IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re WILLIAM MILTON, Petitioner, on Habeas Corpus.	Supreme Court Case No. S259954 Second District Court of Appeal Case No. B297354 Los Angeles Superior Court Case No. TA039953

On Review from the Decision of the Court of Appeal
Second Appellate District, Division Seven

From a Judgment of the Superior Court
of the State of California for the County of Los Angeles,
the Honorable Ronald Slick, Judge Presiding

PETITIONER'S OPENING BRIEF ON THE MERITS

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INTRODUCTION

This Court has granted review on the following question: Do the limitations of *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*) on judicial factfinding about the basis for a prior conviction apply retroactively to final judgments? (Compare *In re Milton* (2019) 42 Cal.App.5th 977 (*Milton*) [finding no retroactive application] with *In re Brown* (2020) 45 Cal.App.5th 699 (*Brown*) [finding retroactive application].)

Based on six separate but related grounds, the answer must be that *Gallardo* applies retroactively. In *Gallardo*, this Court, by applying Sixth Amendment principles discussed in *Descamps v. United States* (2013) 570 U.S. 254 (*Descamps*), overruled precedent to hold that, when determining whether a prior conviction qualifies as a strike under the "Three Strikes" law, "[t]he trial court's role is limited to determining the facts that were necessarily found in the course of entering the conviction." (*Gallardo*, *supra*, 4 Cal.5th at p. 134.) *Gallardo* also effectively altered what the elements of prior conviction allegations are because the prosecution must now prove that a defendant suffered a prior conviction which *itself* qualifies as a strike, rather than proving a defendant suffered a prior conviction whose *underlying conduct* qualifies as a strike. Thus, by ensuring, on constitutional grounds, the reliability of determinations of prior convictions and by altering the range of conduct and class of people who may be subject to increased punishment based on prior convictions, *Gallardo* controls the outcome of these cases.

As set forth herein, application of any of the following six tests for retroactivity supports retroactive application of *Gallardo*:

(1) Under *In re Martinez* (2017) 3 Cal.5th 1216 (*Martinez*), it is retroactive because it is a substantive change in law that alters the range of conduct or class of persons the law punishes;

(2) Under *In re Johnson* (1970) 3 Cal.3d 404 (*Johnson*), it is retroactive because it directly impacts the integrity of the judicial process;

(3) Under both state and federal law, original sentences imposed in violation of *Gallardo* must now be deemed unauthorized under the Sixth Amendment and an unauthorized sentence may be corrected at any time;

(4) Under both state and federal law, because *Gallardo* was dictated by *Taylor v. United States* (1990) 495 U.S. 575 (*Taylor*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Gallardo* is retroactive to those cases that were not final at the time that precedent was decided;

(5) Under *Teague v. Lane* (1989) 489 U.S. 288 (*Teague*), it is retroactive because it is a substantive change in law; or

(6) Under *Teague*, it is retroactive as it is a watershed rule of criminal procedure.

Although *Milton* found *Gallardo* to not be retroactive, *Brown* found *Gallardo* to be retroactive both on the basis that the original sentence imposed was unauthorized and that *Gallardo* satisfied the *Johnson* test. (*Brown*, *supra*, 45 Cal.App.5th at pp. 714, 717-720.) Additionally, the Ninth Circuit has found *Descamps* to be retroactive because it is a substantive rule of law. (*Allen v. Ives* (2020) 950 F.3d 1184, 1192 (*Allen*).)

The constitutional stakes at issue here are substantial. *Gallardo*'s ruling protects a defendant's Sixth Amendment right to have a jury determine the necessary facts of a conviction in a proceeding with all the guarantees of federal due process; it does so by requiring that the use of a prior conviction be limited to the use of the necessary facts found by the prior jury at trial or admitted by the defendant at the prior plea proceeding. (*Gallardo*, *supra*, 4 Cal.5th at p. 124.) It further protects a defendant's right to notice of the charges – in accordance with Fourteenth Amendment due process principles and the Sixth Amendment – by preventing a sentencing court from increasing punishment in reliance on prior underlying conduct that was not included in the charges themselves in the prior proceeding. As *Gallardo* vindicates these fundamental rights in the context of using prior convictions to increase sentences, *Gallardo* must apply retroactively.

STATEMENT OF THE CASE

In 1999, a California jury convicted petitioner of committing a second-degree robbery on September 6, 1998. (*Milton*, *supra*, 42 Cal.App.5th at pp. 981, 983; Exh. 1, p. 5. [1]) At a bifurcated hearing, petitioner admitted two prior Illinois felony convictions: A simple robbery from February 2, 1987 and an armed robbery from February 9, 1987. (*Id.* at p. 982; Exh. 1, p. 3.)

For the simple robbery, the Illinois charging document alleged petitioner took "a wallet and $338.00 United States currency ... by threatening the imminent use of force." (Exh. 4, p. 24; see *Milton*, *supra*, 42 Cal.App.5th at p. 982.) A handwritten note underneath the allegation stated, " 'Class II. [The victim] left [the market] after cashing this check. Stopped. Money demanded. [Defendant] had a gun. $338. [Defendant] admitted to Wkgn PD he took the money.' " (*Milton*, *supra*, 42 Cal.App.5th at p. 982, brackets added by *Milton*; Exh. 4, p. 24.)

For the armed robbery, the Illinois charging document alleged petitioner took "$40 from his victim, 'while ar[med] with a dangerous weapon, a gun ... by threatening the imminent use of force.' " (*Milton*, *supra*, 42 Cal.App.5th at p. 982; Exh. 5, p. 29.)

Petitioner pled guilty to the simple robbery charge and was convicted by a jury of the armed robbery charge. (*Milton*, *supra*, 42 Cal.App.5th at p. 982; Exh. 4, p. 22; Exh. 5, p. 26.)

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[1] Exhibit references refer to exhibits attached to Petitioner's Traverse to Return to Order to Show Cause. The page number referred to is the page number set forth at the bottom of each page in the format "In re Milton, B297354, Traverse Exhibits, page ___."

At the Illinois sentencing hearing, regarding the armed robbery, "the Illinois prosecutor recounted the testimony of the victim as follows: 'Mr. Milton got out of the car, pointed a gun at [the victim], and threatened him, forced him into the car where he was robbed of his goods.' " (*Milton*, *supra*, 42 Cal.App.5th at p. 982, brackets added by *Milton*; see CT[2] 130.) The Illinois sentencing court told Milton regarding the armed robbery, " 'You used a gun ... . You stopped the victim ... . You forced this individual into the automobile.' " (*Milton*, *supra*, 42 Cal.App.5th at p. 982, ellipses added by *Milton*; see CT 147)

Also at the Illinois sentencing hearing, regarding the simple robbery, "the Illinois prosecutor stated Milton approached the victim 'with a weapon, threaten[ed] him, and ... [the victim] lost his entire paycheck to Mr. Milton.' " (*Milton*, *supra*, 42 Cal.App.5th at p. 982, brackets and ellipses added by *Milton*; see CT 131) The Illinois sentencing court, in discussing the simple robbery, noted "it had received 'stipulated facts' for the case, which 'indicated that the victim ... left the ... [market] after cashing his check. He was stopped. Money was demanded from the victim by ... Milton ... who possessed a handgun. And the sum of three hundred thirty-eight dollars was taken from the victim ... .' " (*Milton*, *supra*, 42 Cal.App.5th at pp. 982-983, brackets and ellipses added by *Milton*; see CT 143.)

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[2] Citations to the Clerk's Transcript ("CT") refer to the Clerk's Transcript in *People v. Milton* (May 30, 2000, B131757) [nonpub. opn.]. A motion for judicial notice of the record from the appeal was filed on May 13, 2020.

The sentencing court then told Milton, " 'In each of the two respective offenses you deliberately held a gun – a loaded gun – upon an individual. ... I'm going to tell you that he who participates in an offense of violence against another with a gun is going to be punished. And the sentence I am going to give is for the purpose of punishment.' " (*Id.* at p. 983; see CT 148.)

At the California hearing in the instant action on the prior conviction allegations, petitioner acknowledged his Illinois armed robbery conviction was a serious felony (Pen. Code,[3] § 667, subd. (a)), but denied his Illinois simple robbery was a serious or violent felony or a strike (§§ 667, subds. (b)-(j), 1170.12). (*Milton*, *supra*, 42 Cal.App.5th at p. 983.) "The California prosecutor acknowledged that the Illinois simple robbery conviction was not a serious or violent felony under the three strikes law because robbery under Illinois law, unlike robbery under California law, did not require the specific intent to permanently deprive the person of the property. The California prosecutor argued, however, that certified documents from the Illinois court 'indicate that [Milton] used a gun during the [simple] robbery' and that '[t]his information, therefore, provides this Court with the ability to determine that this particular conviction is a strike.[4]' " (*Ibid.*; Exh. 6, pp. 36-37)

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[3] Subsequent statutory references are to the Penal Code unless otherwise indicated.

[4] In California, robbery requires the specific intent to permanently deprive the victim of their property. (§ 211; *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 489.) In Illinois, robbery does not require any specific intent. (*People v. Banks* (Ill. 1979)

Petitioner "argued the Illinois court documents, at best, showed Milton 'possessed' a gun, and nothing in the record showed he 'actually personally used' a gun." (*Milton*, *supra*, 42 Cal.App.5th at p. 983; Exh. 7, p. 49.) Armed robbery can be committed in Illinois by merely possessing a gun during the course of the robbery. (Former Ill. Rev. Stats., ch. 38, § 18-2(a).[5]) The prosecutor responded by arguing "California law allowed the trial court 'to look behind the record' to determine whether Milton used a gun in the simple robbery." (*Milton*, *supra*, 42 Cal.App.5th at p. 983; Exh. 7, p. 48.) The trial court agreed it could look " 'beyond the court record ... to determine what really happened.' " (*Milton*, *supra*, 42 Cal.App.5th at pp. 983-984; Exh. 7, p. 49.) The trial court did so and determined petitioner used a gun in both Illinois robberies such that the prior convictions qualified as strikes. (*Milton*, *supra*, 42 Cal.App.5th at p. 984; Exh. 7, p. 49.) Petitioner received a sentence of 25 years to life, plus five years for a prior serious felony conviction (§ 667, subd. (a)(1)). (*Milton*, *supra*, 42 Cal.App.5th at p. 984.)

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388 N.E.2d 1244 [75 Ill.2d 383, 392]; see Exh. 2 at p. 16.) Thus, although California robbery qualifies as a strike under California law (§§ 667.5, subd. (c)(9)), 1192.7, subd. (c)(1)), the Illinois robbery by itself does not satisfy the definition of California robbery and therefore does not qualify as a strike or serious or violent felony. Since the robbery by itself did not qualify as a strike, the prosecutor's argument was based on subdivision (c)(1) of section 1192.7, which qualifies as a strike or serious felony "any felony in which the defendant personally uses a firearm."

[5] The Illinois Revised Statutes are no longer the current law in Illinois. A copy of the former relevant statutes was provided in Exhibit 2.

On direct review, the Court of Appeal affirmed the judgment in an unpublished decision. (Exh. 1 [*People v. Milton* (May 30, 2000, B131757)].) It determined the sentencing "court properly found two 'California' serious felony convictions. The court was entitled to look at the entire record of conviction to determine the substance of the foreign convictions. [Citations.] The abstract of judgment, the stipulated facts of the offense in question and the Illinois court's sentencing comments show [Milton] obtained the proceeds of both robberies by pointing and threatening the victims with a handgun." (Exh. 1 at p. 10.) A petition for review was denied on July 19, 2000. (Exh. 10.)

On December 29, 2017, petitioner filed a petition for writ of habeas corpus in this Court. On May 1, 2019, this Court issued an order to show cause, returnable before the Court of Appeal, "why petitioner is not entitled to relief pursuant to [*Gallardo*], and why *Gallardo* should not apply retroactively on habeas corpus to final judgments of conviction."

Respondent, while arguing that *Gallardo* does not apply retroactively, conceded that, if *Gallardo* were to apply retroactively, petitioner would be entitled to relief because the trial court erroneously considered the record of the proceedings from the prior convictions in determining the prior convictions qualified as strikes. (*Milton*, *supra*, 42 Cal.App.5th at p. 987.) The Court of Appeal denied the petition upon determining *Gallardo* does not apply retroactively. (*Id.* at p. 982.) On March 11, 2020, this Court granted review.

STATEMENT OF FACTS

The instant petition does not raise any issues concerning the facts of the offense for which petitioner was convicted in the instant proceeding. Therefore, a statement of facts is omitted. (See *People v. White* (1997) 55 Cal.App.4th 914, 916, fn. 2.) The relevant facts as to the prior convictions have been set forth in the Statement of the Case, *ante*.

ARGUMENT

I. *Gallardo* Must Be Applied Retroactively to Final Convictions Under Both State and Federal Tests

A. Applicable Law

The Three Strikes law provides for increased sentences where a person convicted of a felony has a prior conviction that qualifies as a serious or violent felony. (§§ 667, subds. (b)-(i), 1170.12.) An out-of-jurisdiction prior conviction may be used as a strike when "the prior conviction in the other jurisdiction is for an offense that includes all of the elements of a particular violent felony as defined in subdivision (c) of Section 667.5 or serious felony as defined in subdivision (c) of Section 1192.7." (§ 667, subd. (d)(2).) The prosecution has the burden of proving elements of a prior conviction beyond a reasonable doubt. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065.)

At the time of petitioner's sentencing, California courts were permitted to review the entire record of conviction to determine whether an out-of-state conviction qualified as a prior strike. (*People v. Guerrero* (1988) 44 Cal.3d 343, 345.) In *People v. McGee* (2006) 38 Cal.4th 682 (*McGee*), this Court held a sentencing court, rather than a jury, could make that determination. (*McGee*, *supra*, 38 Cal.4th at p. 686.)

In *Descamps*, the United States Supreme Court considered Sixth Amendment principles and held, under the "categorical approach," a sentencing court may not consider conduct underlying the prior conviction, but may only consider the

elements of the prior conviction to determine whether the prior conviction may be used to increase a defendant's sentence. (*Descamps*, *supra*, 570 U.S. at pp. 261, 269-270.) The prior conviction may only be used to increase a sentence if the offense elements of the prior conviction are the equivalent of or more restricted than the elements of the qualifying offense. (*Id.* at p. 276.)

A narrow exception, termed the "modified categorical approach," applies when the prior conviction has "divisible" or "alternative" elements, in which case the court may consider a limited set of documents to determine which version of the prior offense the defendant was convicted of committing. (*Descamps*, *supra*, 570 U.S. at p. 257.)

In *Descamps*, the court considered whether a guilty plea to burglary in California (§ 459) qualified as a prior violent felony under the Armed Career Criminal Act ("ACCA") (18 U.S.C. § 924, subd. (e)). Because the California statute for burglary, which does *not* require an unlawful entry, is broader than the generic crime under the ACCA, a conviction under the California statute "cannot count as an ACCA predicate, *even if* the defendant actually committed the offense in its generic form." (*Descamps*, *supra*, 570 U.S. at p. 260, emphasis added.) **"The key … is elements, not facts."** (*Ibid.*, emphasis added.) Thus, in the case before it, "review of the plea colloquy or other approved extra-statutory documents" was not authorized because the California statute for burglary was broader than the generic offense of burglary under the ACCA. (*Id.* at p. 265.)

Subsequently, in *Mathis v. United States* (2016) __ U.S. __ [136 S.Ct. 2243, 2248] (*Mathis*), the United States Supreme Court reaffirmed *Descamps*'s holding "that the prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense." (*Id.* at p. 2247.) A sentencing court "can do no more, consistent with the Sixth Amendment, then determine what crime with what elements, the defendant was convicted of." (*Id.* at p. 2252, citing *Apprendi*, *supra*, 530 U.S. at p. 490.)

In its watershed 2017 opinion in *Gallardo*, this Court aligned itself with the United States Supreme Court's application of Sixth Amendment principles to prior convictions. *Gallardo* explained, " 'The Sixth Amendment contemplates that a jury – not a sentencing court – will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense – as distinct from amplifying but legally extraneous circumstances.' " (*Gallardo*, *supra*, 4 Cal.5th at p. 133, quoting *Descamps*, *supra*, 570 U.S. at pp. 269-270.) Thus, "the court may *not* rely on its own independent review of record evidence to determine what conduct 'realistically' led to the defendant's conviction." (*Gallardo*, *supra*, 4 Cal.5th at p. 124, emphasis added.) *Gallardo* also held *even if* a jury, rather than a judge, were deciding the "truth" of prior conviction allegations, such a jury, like a judge, would be limited to the prior conviction itself in determining if it qualifies as a strike and would be prohibited from determining underlying conduct. (*Id.* at pp. 138-139.)

Thus, *Gallardo* overruled the prior precedent set forth in *Guerrero* and *McGee*. (*Gallardo*, *supra*, 4 Cal.5th at p. 129.) Although *Gallardo* did not explicitly address *People v. Myers* (1993) 5 Cal.4th 1193 (*Myers*), *Gallardo* also effectively overruled *Myers*, which had held, primarily on the basis of statutory interpretation, that the same set of *Guerrero* rules applied to out-of-state priors where the crime of conviction lacked elements required for a serious felony under California law.

In the instant case, the Court of Appeal determined that *Gallardo* does not satisfy any of the tests for retroactive application to final judgments.[6] After *Milton* was decided, the Court of Appeal in *Brown*, *supra*, 45 Cal.App.5th 699 found otherwise and held that *Gallardo* does apply retroactively on two separate grounds: (1) The sentence imposed was unauthorized and unauthorized sentences may be corrected at any time; and (2) the *Gallardo* rule passes the test for retroactivity under *Johnson*.

Whether *Gallardo* applies retroactively is reviewed de novo. (*In re Serrano* (1995) 10 Cal.4th 447, 457.)

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[6] A judgment is considered final for retroactivity purposes when all direct appeals have been exhausted and a petition for writ of certiorari in the United States Supreme Court has been denied or the time for filing such a petition has expired. (*People v. Vieira* (2005) 35 Cal.4th 265, 305-306.) An appellant has 90 days after the state court of last resort denies discretionary review to file a petition for writ of certiorari with the United States Supreme Court. (United States Supreme Court Rules, rule 13.)

B. *Gallardo* Is Retroactive to Final Judgments Under the State Tests for Retroactivity

1. *Gallardo* Established a New Rule

The first question for purposes of state retroactivity is whether "the decision establish[es] a new rule of law." (*People v. Guerra* (1984) 37 Cal.3d 385, 399.) *Gallardo* satisfies this threshold inquiry as it disapproved prior California Supreme Court law. (*Gallardo*, *supra*, 4 Cal.5th at p. 125; see *Brown*, *supra*, 45 Cal.App.5th at p. 716; *Milton*, *supra*, 42 Cal.App.5th at p. 997.)

2. *Gallardo* Is Retroactive Because It Is a Substantive Change in Law That Altered the Range of Conduct or the Class of Persons That the Law Punishes

California law regarding the retroactivity of state court decisions grants "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) or when a judicial decision undertakes to vindicate the meaning of the statute." (*Martinez*, *supra*, 3 Cal.5th at p. 1222, citing *In re Lopez* (2016) 246 Cal.App.4th 350, 357-359.) Applying this principle, the rule established by *Gallardo* is substantive.

By limiting the imposition of an increased sentence to circumstances where the prior conviction itself, as distinct from the underlying conduct, supports the increased sentence,

Gallardo is substantive because it "alter[ed] the range of conduct or the class of persons that the law punishes." (*Martinez*, *supra*, 3 Cal.5th at p. 1216.) In other words, while, prior to *Gallardo*, courts could increase sentences based on conduct *underlying* a prior conviction, now courts are limited to increasing sentences based on conduct *necessary* to the prior conviction itself. Thus, the "range of conduct" has been limited.

Consequently, the class of persons who may be subject to the punishment has been limited as well. *Gallardo* narrows the universe of the defendants for whom a sentence can be enhanced based on a prior conviction as courts may no longer rely on conduct that was neither charged nor proven in the prior proceeding.

Stated yet another way, *Gallardo* effectively "modifie[d] the elements" (*Martinez*, *supra*, 3 Cal.5th at p. 1222) of the prior conviction allegation: Whereas previously, the prosecution had to prove that defendant's conduct underlying a prior conviction qualified as a strike, now the prosecution has to prove that defendant's conviction *itself* qualifies as a strike.

Using analogous reasoning, the Ninth Circuit has found *Mathis* and *Descamps*, "[t]o the extent that [they] may be thought to have announced a new rule," to be retroactive because "the rule is one of substance rather than procedure." (*Allen*, *supra*, 950 F.3d at p. 1192.) *Allen* explained that "the rule from *Mathis* and *Descamps* alters 'the range of conduct ... that the law punishes'

and not 'only the procedures used to obtain the conviction.' "[7] (*Id.* at p. 1192, citing *Welch v. United States* (2016) __ U.S. __ [136 S.Ct. 1257, 1266] (*Welch*); see *Holt v. United States* (7th Cir. 2016) 843 F.3d 720, 722 ["substantive decisions such as *Mathis* presumptively apply retroactively on collateral review"]; *Hill v. Masters* (6th Cir. 2016) 836 F.3d 591, 596 ["The Government further concedes that *Descamps* ... appl[ies] retroactively"].)

Accordingly, as *Gallardo* altered the range of conduct and class of persons that the law punishes, it is a substantive rule of law that applies retroactively.

3. Alternatively, If *Gallardo* Is Procedural, *Gallardo* Is Retroactive Because It Affects the Integrity of the Judicial Process and Controls the Outcome of the Case Under the *Johnson* Standard

a. The *Johnson* Standard

Alternatively, if the *Gallardo* rule is procedural and not substantive, it applies retroactively under the standard set forth in *Johnson*, *supra*, 3 Cal.3d 404. (*Brown*, *supra*, 45 Cal.App.5th

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[7] The finding of retroactivity applied within the context of a petition filed under 28 U.S.C. § 2241. (*Allen*, *supra*, 950 F.3d at p. 1192.) Other courts have found *Descamps* to not be retroactive within the context of a second or successive petition filed under 28 U.S.C. § 2255 because, for federal purposes, *Descamps* did not announce a new rule of constitutional law, as required under 28 U.S.C. § 2255(h)(2). (See, e.g., *Holt v. United States*, *supra*, 843 F.3d at p. 722; *In re Thomas* (11th Cir. 2016) 823 F.3d 1345, 1349.)

at p. 717.)

In *Johnson*, this Court described the parameters of the California test used to determine retroactive application, which requires consideration of three factors: " ' "(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." ' "[8] (*Johnson*, *supra*, 3 Cal.3d. at p. 410, quoting *Desist v. United States* (1969) 394 U.S. 244, 249 (*Desist*).) In adopting this test, *Johnson* noted that "states are free to give greater retroactive impact to a decision than the federal courts choose to give." (*Johnson*, *supra*, 3 Cal.3d at p. 415, citing *Jenkins v. Delaware* (1969) 395 U.S. 213, 222, fn. 10; *Johnson v. New Jersey* (1966) 384 U.S. 719, 733.)

Johnson held that, where subsequent changes in the law offer a complete constitutional defense to a prior conviction used to increase a sentence, that prior conviction could be attacked in a habeas petition. (*Johnson*, *supra*, 3 Cal.3d 404 at p. 418.) The defendant in *Johnson* had been convicted of the federal crime of acquiring marijuana without paying the applicable tax. (*Id.* at p. 407.) Subsequent United States Supreme Court decisions established the Fifth Amendment's privilege against self-incrimination would have been a complete defense to the crime. (*Id.* at pp. 409-410.) After the defendant's conviction was used to increase his sentence in a subsequent state case, this Court found

[8] The United States Supreme Court has since rejected this three-factor test for federal purposes. (*Teague*, *supra*, 489 U.S. at pp. 302-305.)

that "[i]f … a conviction may be collaterally attacked because it is based on an unconstitutional statute, there is no reason to forbid such attacks when convictions are based upon statutes as to which the Constitution affords a complete defense." (*Id.* at p. 417.) Thus, the defendant was entitled on habeas review to the retroactive benefit of the subsequent United States Supreme Court decisions where those subsequent decisions offered a constitutional defense to the prior conviction. (*Id.* at p. 418.)

As *Johnson* explained, "[t]he overwhelming concern of … retroactivity … [is the] test of the integrity of the judicial process." (*Johnson*, *supra*, 3 Cal.3d at p. 416.)

Applying this standard, *Brown* determined that *Gallardo* is retroactive. (*Brown*, *supra*, 45 Cal.App.5th at pp. 717-720.)

b. The Purpose to Be Served by the Change in Law

The fundamental purpose of *Gallardo* is to promote fair and reliable determinations of the defendant's guilt or innocence on the allegation that he suffered a prior conviction qualifying as a strike under California law. (*Brown*, *supra*, 45 Cal.App.5th at p. 718.) Our state and federal Constitutions provide that the fairest and most reliable method of obtaining a conviction entails notice of the charges and a jury trial. (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 24; see *Ramos v. Louisiana* (2020) ___ U.S. ___ [206 L.Ed.2d 583, 595-596] [finding a unanimous jury promotes reliability in convictions]; *United States v. Booker* (2004) 543 U.S. 220, 244 ["the interest in

fairness and reliability protected by the right to a jury trial ... has always outweighed the interest in concluding trials swiftly"]; *People v. Seaton* (2001) 26 Cal.4th 598, 640 (*Seaton*) ["Both the Sixth Amendment of the federal Constitution and the due process guarantees of the state and federal Constitutions require that a criminal receive notice of the charges adequate to give a meaningful opportunity to defend against them"].)

Thus, where a factual allegation was *not* charged in a prior proceeding and *not* adjudicated – by a jury or a plea – in a prior proceeding, that fact, under *Gallardo* and *Descamps*, may not be used to increase a sentence in a subsequent offense. The only thing that can be determined with reliability is the fact of the conviction itself. Even where a defendant enters a plea, the only things that can be determined with reliability are the elements of the crime, not the underlying facts that were never contested. (*Descamps, supra*, 570 U.S. at pp. 269-270.)

Part of the rationale for this elements-centric approach is that "[a] defendant ... has little incentive to contest facts that are not elements of the charged offense – and may have good reason not to. At trial, extraneous facts and arguments may confuse the jury …. And during plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations." (*Descamps*, *supra*, 570 U.S. at p. 271.)

Moreover, it is fundamentally unfair to defendants to look beyond the elements of the prior conviction because when a defendant pleads guilty to a lesser offense in a prior conviction, the prosecution should not be able to rely on underlying conduct

as if the defendant had pled guilty to a greater offense. (*Taylor*, *supra*, 495 U.S. at pp. 601-602.) *Taylor*, the bedrock United States Supreme Court case on the limits of sentence increases based on prior convictions, explained that where a defendant entered a guilty plea, "if [the] guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." (*Id.* at pp. 601-602.)

Analogous reasoning for retroactive application has been applied to long final convictions involving second-degree felony murder following this Court's decision in *People v. Chun* (2009) 45 Cal.4th 1172 (*Chun*), which fully reinstated the "merger" bar for all assaultive felonious crimes. Since *Chun* "impact[ed] the reliability" of those murder convictions, it was retroactively applied. (*In re Lucero* (2011) 200 Cal.App.4th 38, 46 (*Lucero*); *In re Hansen* (2014) 227 Cal.App.4th 906, 917 (*Hansen*).)

People v. Mutch (1971) 4 Cal.3d 389, 395 is also illustrative. In *Mutch*, this Court found a change in the kidnapping law – now requiring substantial movement of the victim as opposed to *any* movement (*People v. Daniels* (1969) 71 Cal.2d 1119) – required retroactive application to final convictions because "when the statute is properly construed the evidence there introduced was insufficient to support the judgments." (*Mutch*, *supra*, 4 Cal.3d at p. 395.) Thus, " '*what defendant did was never proscribed under section 209*.' [Citation.]" (*Id.* at p. 396, original italics.) Noting the absence of "material dispute as to the facts," *Mutch* concluded that "[i]n such circumstances, it is settled that finality for

purposes of appeal is no bar to relief, and that habeas corpus or other appropriate extraordinary remedy will lie to rectify the error ….” (*Ibid*.)

The same principles must be applied here. Under a proper, constitutional interpretation of the recidivism statutes at issue, the Illinois robbery convictions, for which no use of a gun was alleged and found true, cannot be strikes. Just as in *Johnson*, where a collateral attack was permitted when a new interpretation of the federal Constitution provided a complete defense to a prior conviction, here, a collateral attack on the use of petitioner’s prior convictions must be permitted as the new interpretation of the federal Constitution under *Gallardo* provides a complete defense to the use of the prior convictions as strikes. Like the petitioner in *Mutch*, who was factually innocent of kidnapping under a proper interpretation of section 209, petitioner is factually innocent of the charged strikes. And like the petitioners in *Lucero* and *Hansen*, the new rule announced in *Gallardo* “impacts the reliability” of the fact-finding procedure used to find that petitioner’s prior convictions were strikes.

Brown reached the same conclusion by finding that “[t]he *Gallardo* rule thus goes to the integrity of the factfinding process when the court determines whether a prior conviction qualifies as a strike.” (*Brown*, *supra*, 45 Cal.App.5th at p. 718.) *Brown* elaborated that “[b]ecause the purpose of *Gallardo* ‘relates to characteristics of the judicial system which are essential to minimizing convictions of the innocent’ used to increase a defendant’s sentence (*In re Johnson*, *supra*, 3 Cal.3d at p. 413),

the purpose of the *Gallardo* rule weighs heavily in favor of retroactive application." (*Brown*, *supra*, 45 Cal.App.5th at p. 719, citing *Johnson*, *supra*, 3 Cal.3d at p. 413; see *Lucero*, *supra*, 200 Cal.App.4th at p. 45.)

Here, the Court of Appeal's reliance on *In re Thomas* (2018) 30 Cal.App.5th 744 (*Milton*, *supra*, 42 Cal.App.5th at p. 998) was misplaced, as *Thomas* is actually illustrative in its distinction from the present case. In *Thomas*, the Court of Appeal assessed retroactive application of *People v. Sanchez* (2016) 63 Cal.4th 665, 686, which limited an expert's use of testimonial hearsay about case-specific facts to cases final on appeal. (*Thomas*, *supra*, 30 Cal.App.5th at pp. 748-749.) Although *Thomas* concluded *Sanchez* "articulated a new rule related to the integrity of the fact-finding process which implicates questions of guilt and innocence," it ultimately determined "the connection between the *Sanchez* rule and avoiding wrongful convictions is significant, but not strong." (*Id.* at p. 765, fn. omitted.) *Sanchez* only involved one piece of evidence presented in a case. Thus, the facts provided by the excluded evidence in most instances could be established by alternative evidence. (*Id.* at pp. 765-766.) *Gallardo* and *Descamps*, however, directly control the findings of guilt on prior conviction allegations by shifting the determination from whether the underlying conduct qualifies as a strike to whether the conviction *itself* qualifies as a strike.

Brown similarly found *Thomas* distinguishable. (*Brown*, *supra*, 45 Cal.App.5th at pp. 719-720.) It explained that the connection between the *Sanchez* rule and avoiding wrongful

convictions is not strong "because the effect of the *Sanchez* rule would not have prevented prosecutors from introducing expert testimony. Expert testimony was merely weakened by excluding the expert's hearsay statements supporting the expert opinion's testimony. Furthermore, the impact of excluding hearsay statements was not strong because the facts provided by the excluded evidence in most instances could be established by alternative evidence." (*Brown*, *supra*, 45 Cal.App.5th 699, 719, citing *Thomas*, *supra*, 30 Cal.App.5th at pp. 765-766.) *Brown* further explained that, unlike the *Sanchez* rule, "[t]he *Gallardo* rule strongly relates to characteristics of the judicial system which are essential to minimizing convictions of the innocent and avoiding oversentencing." (*Brown*, *supra*, 45 Cal.App.5th at p. 720.)

Accordingly, because the fundamental purpose of *Gallardo* is to promote reliable determinations of the defendant's guilt or innocence in committing a prior strike and to protect a defendant's right to notice of the charges and to a jury under the federal Constitution, the purpose of the change in law supports retroactive application.

c. The Extent of the Reliance on the Old Standards by Law Enforcement

While the old rule was relied upon by prosecutorial agencies, that reliance was limited to sentencing hearings where a question arose as to whether a prior conviction qualified as a strike, such as with out-of-state convictions – as was the case

here – or divisible convictions – as was the case in *Gallardo*.

Moreover, this factor is counter-balanced by a more important factor, namely that the *Gallardo* rule directly controls findings of guilt or innocence on prior conviction allegations. (*Hansen*, *supra*, 227 Cal.App.5th at p. 919 [because *Chun* narrows the scope of liability for murder and thus goes to the guilt issue, its purpose outweighs consideration of impact on law enforcement or judicial resources].) The "reliance" factor is further counterbalanced by the constitutional issues at stake which operate as procedural safeguards to ensure the reliability of determinations of prior conviction allegations. (See *Descamps*, *supra*, 570 U.S. at pp. 269-270 ["the only facts the court can be sure the jury so found are those constituting elements of the offense – as distinct from amplifying but legally extraneous circumstances"].)

d. The Effect on the Administration of Justice of a Retroactive Application of the New Standards

The Court of Appeal here found applying *Gallardo* retroactively "would cause significant disruption by requiring courts to reopen countless cases, conduct new sentencing hearings, and locate records of proceedings conducted long ago to ascertain 'what facts were necessarily found or admitted in the prior proceeding.' [Citations.]" (*Milton*, *supra*, 42 Cal.App.5th at p. 999.)

While certainly some judicial resources would be utilized in retroactively applying *Gallardo*, the Court of Appeal overstates the extent of this "disruption."

First, the Court of Appeal's reasoning overlooks the fact that where the prior conviction did not consist of divisible offenses, a court would *not* need to review any extraneous documents from the prior conviction, but only the conviction itself. Such a proceeding would be straightforward.

Indeed, part of the rationale of the elements-centric approach is to *prevent* sentencing courts from "hav[ing] to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense." (*Descamps*, *supra*, 570 U.S. at p. 270.)

Further, compared to retroactive application of *Sanchez*, which would result in an entirely new trial, retroactive application of *Gallardo* would only require a new sentencing hearing in limited circumstances. Thus, "[a]pplying the *Gallardo* rule retroactively to final cases may be disruptive and costly but not to the same extent as anticipated in applying the *Sanchez* rule retroactively." (*Brown*, *supra*, 45 Cal.App.5th at p. 720.)

Finally, as this Court explained in *Johnson*, "the factors of reliance and burden on the administration of justice are of significant relevance only when the question of retroactivity is a close one after the purpose of the new rule is considered." (*Johnson*, *supra*, 3 Cal.3d at p. 410, citing *Desist*, *supra*, 394 U.S.

at p. 521.) Thus, *Brown* concluded that "the prosecutors' reliance on the former law and the burden retroactivity will place upon the judicial system" was not outweighed by "the purpose of the *Gallardo* rule, which ensures that a defendant is sentenced fairly, in adherence to constitutional factfinding procedures, consistent with a defendant's Sixth [A]mendment and due process rights." (*Brown*, *supra*, 45 Cal.App.5th at p. 718.)

Accordingly, like with the factor of reliance on old authorities, the fact that retroactive application would utilize some judicial resources is counterbalanced by *Gallardo*'s controlling impact on findings of guilt or innocence on prior conviction allegations and its recognition of the relevant constitutional rights that act as procedural safeguards to ensure reliability in determining prior conviction allegations.

e. The Right Vindicated Is One Which Is Essential to the Integrity of the Fact-Finding Process

"The overwhelming concern of … retroactivity … [is the] test of the integrity of the judicial process." (*Johnson*, *supra*, 3 Cal.3d at p. 416.) "Decisions have generally been made fully retroactive only where the right vindicated is one which is *essential to the integrity of the fact-finding process*. On the other hand, retroactivity is not customarily required when the interest to be vindicated is one which is merely collateral to a fair determination of guilt or innocence. [Citation.]" (*In re Joe R.* (1980) 27 Cal.3d 496, 511; see *Thomas*, *supra*, 30 Cal.App.5th at

p. 763 ["if a decision goes to the integrity of the factfinding process [citation], or 'implicates questions of guilt and innocence' [citation], retroactivity is the norm"].)

Gallardo held "that defendant's constitutional right to a jury trial sweeps more broadly than our case law previously recognized." (*Gallardo*, *supra*, 4 Cal.5th at p. 138.) By holding that constitutional principles require that only the prior conviction itself – and not the underlying conduct – is relied upon to determine if a prior conviction may be used to increase a sentence, *Descamps* and *Gallardo* directly address the integrity of the factfinding process: " 'The Sixth Amendment contemplates that a jury – not a sentencing court – will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense – as distinct from amplifying but legally extraneous circumstances.' " (*Gallardo*, *supra*, 4 Cal.5th at p. 133, quoting *Descamps*, *supra*, 570 U.S. at pp. 269-270.)

Under the Sixth and Fourteenth Amendments, therefore, petitioner cannot be punished for the Illinois robberies where no *use* of a gun was alleged and found true.

Stated another way, under *Gallardo*, petitioner is *innocent* of the allegation that his prior convictions in Illinois are serious felonies and strikes in California. Accordingly, the Court of Appeal erred here in finding that *Gallardo* did not implicate petitioner's guilt or innocence (*Milton*, *supra*, 42 Cal.App.5th at p. 999, fn. 11) and that *Gallardo* had only a " 'speculative connection to innocence.' [Citation.]" (*Id.* at p. 992.)

The Ninth Circuit reached an analogous conclusion in *Allen*. There, the defendant argued that his prior conviction, which had been relied upon by the district court to deem the defendant a career offender and increase his sentence (U.S.S.G. §§ 4B1.1, 4B1.2), no longer qualified to increase his sentence under *Descamps* and *Mathis*, "and that he was therefore innocent of being a career offender." (*Allen*, *supra*, 950 F.3d at p. 1187.) The Ninth Circuit agreed that the defendant's argument amounted to "a claim of actual innocence" and found that *Descamps* and *Mathis* applied retroactively. (*Id.* at pp. 1189, 1192.)

The wrong here – permitting judicial factfinding of nonelemental facts – is one which fundamentally concerns the "integrity of the factfinding process" and is *not* "merely collateral to a fair determination of guilt or innocence." (*In re Joe R.*, *supra*, 27 Cal.3d at p. 511.) Thus, under the *Johnson* test, with particular consideration to the "overwhelming concern" of this test – i.e., the "integrity of the factfinding process" – *Gallardo* must be applied retroactively.

C. Alternatively, Under State and Federal Tests, the Increase in Petitioner's Maximum Sentence Was Unauthorized and Is Therefore Subject to Retroactive Correction on Habeas[9]

Under both state and federal law, an unauthorized sentence can be corrected at any time. (*United States v. Johnson* (1982) 457 U.S. 537, 550; *People v. Scott* (1994) 9 Cal.4th 331, 354-355.) A longstanding application of this rule permits granting habeas relief as to final convictions upon a showing a defendant is serving an unauthorized sentence. (*In re Harris* (1993) 5 Cal.4th 813, 838-839.) Thus, a writ of habeas corpus is appropriate "to review a claim that the sentencing court acted in excess of its jurisdiction by imposing a sentence on the petitioner longer than that permitted by law. [Citation.]" (*Id.* at p. 839.)

As *Brown* held, sentences imposed in violation of the Sixth Amendment principles discussed in *Gallardo* are unauthorized and thus subject to correction at any time. (*Brown*, *supra*, 45 Cal.App.5th at p. 714.)

This Court has also applied the settled rule that an unauthorized sentence may be corrected at any time to situations akin to the present one, involving defects in the proof of prior conviction allegations, to permit challenges via habeas corpus. In an earlier *Harris* case, *In re Harris* (1989) 49 Cal.3d 131, this Court held "the requirement in section 667 that the predicate

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[9] The Court of Appeal neglected to address this argument in its opinion, although the failure to address it was noted in Milton's petition for rehearing. (Reh. Pet., pp. 4-5.)

charges must have been 'brought and tried separately' " was not satisfied where two prior convictions had originally been commenced in a single felony complaint. (*Id.* at p. 136.) This Court held habeas corpus was a proper vehicle to challenge this error, notwithstanding the fact this issue had already been presented and rejected on direct appeal, by construing the imposed sentence as in excess of the court's jurisdiction or a misinterpretation of the law resulting in confinement beyond the maximum time allowed by law. (*Id.* at p. 134, fn. 2; see also *In re Preston* (2009) 176 Cal.App.4th 1109, 1114 [defendant has right to argue on habeas after his conviction was final that the trial court exceeded its jurisdiction at sentencing].)

The present case plainly fits within the unauthorized sentence exception to the rule precluding habeas relief on final judgments. By determining conduct underlying petitioner's prior convictions in order to find the prior convictions qualified as strikes, the sentencing court acted in excess of its jurisdiction as limited by the Sixth Amendment.

Separately, petitioner's sentence was unauthorized pursuant to *Apprendi*, *supra*, 530 U.S. 466, which held the only fact not found true by a jury or admitted by a defendant that a judge could rely on to increase a sentence was "the *fact* of a prior conviction." (*Id.* at p. 490, emphasis added; see *Brown*, *supra*, 45 Cal.5th at p. 714; see also *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 226.) *Apprendi* had been decided before

petitioner's case was final. [10] Because, here, the sentencing court relied on the underlying conduct, the sentence was unauthorized under *Apprendi* at the time it issued.

Further, habeas relief is particularly appropriate where there is no " 'material dispute as to the facts' [citation], or [where] the judgment may be corrected 'without the redetermination of any facts.' [Citation.]" (*In re Harris*, *supra*, 5 Cal.4th at p. 840.)

Accordingly, the unauthorized sentence imposed in petitioner's case may be retroactively corrected on habeas.

D. Alternatively, Under State and Federal Tests, *Gallardo* Is Retroactive to Judgments That Became Final After *Taylor* or *Apprendi* Because *Gallardo* Was Dictated by Those Prior Cases

Additionally, a separate retroactivity analysis may be applied where the holding in a case was dictated by a prior case, as set forth *In re Gomez* (2009) 45 Cal.4th 650 (*Gomez*) and *Stringer v. Black* (1992) 503 U.S. 222 (*Stringer*). This test provides a *limited* expansion to the normal rule of finality: If an original decision dictated a subsequent decision, and if the original decision was decided before petitioner's case was final, then petitioner is entitled to the retroactive benefit of the subsequent decision. (*Gomez*, *supra*, 45 Cal.4th at p. 660; *Stringer*, *supra*, 503 U.S. at p. 227.)

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[10] *Apprendi* was decided on June 26, 2000. (530 U.S. 466.) Milton's direct appeal was final in October of 2000, 90 days after the denial of review in his case, on July 19, 2000. (Exh. 9 at p. 63; see fn. 5, *ante*.)

Here, because *Descamps* and *Gallardo* were derivative of *Apprendi*, *supra*, 530 U.S. 466 and *Taylor*, *supra*, 495 U.S. 575 and because *Apprendi* and *Taylor* were decided prior to petitioner's case becoming final, *Descamps* and *Gallardo* apply retroactively to petitioner.

In *Gomez*, the defendant was sentenced shortly after the United States Supreme Court decided *Blakely v. Washington* (2004) 542 U.S. 296, which held that, under the Sixth Amendment, a judge could not rely on a fact not found true by a jury or admitted by the defendant to impose a sentence above the standard range. (*Gomez*, *supra*, 45 Cal.4th at p. 653.) After sentencing and after the defendant's case was final, the United States Supreme Court decided *Cunningham v. California* (2006) 546 U.S. 1169, in which the court held that "the Sixth Amendment rights to a jury trial and proof beyond a reasonable doubt apply to aggravating factors that make a defendant eligible for an upper term sentence under [California's determinate sentencing law]. [Citation.]" (*Gomez*, *supra*, 45 Cal.4th at p. 654.) *Gomez* then held that because the United States Supreme Court "would view the result in *Cunningham* not as new law, but as one dictated by *Blakely* …. [¶] … *Cunningham* applied retroactively to any case in which the judgment was not final at the time the decision in *Blakely* was issued." (*Id.* at p. 660.)

The same reasoning applies here. *Descamps* recognized it was not breaking new ground; rather, it found prior "caselaw explaining the categorical approach and its 'modified' counterpart all but resolves this case." (*Descamps*, *supra*, 570 U.S. at p. 260.)

Because the constitutional holdings in *Descamps* and *Mathis*, which are plainly the bases for *Gallardo*, did not themselves "break new ground," but were dictated by the combined impact of *Taylor* and *Apprendi* – which were decided prior to the finality of petitioner's case – *Descamps* and *Gallardo* apply retroactively to petitioner.

1. *Descamps* Was Derivative of *Taylor*

The beginning point of analysis in *Descamps* was *Taylor*: "*Taylor* adopted a 'formal categorical approach': Sentencing courts may 'look only to the statutory definitions' – *i.e.*, the elements – of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.' " (*Descamps*, *supra*, 570 U.S. at p. 261, quoting *Taylor*, *supra*, 495 U.S. at p. 600, italics in original.) As *Descamps* acknowledged, one of the grounds for the decision in *Taylor* was that the elements-centric approach "avoids the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries." (*Descamps*, *supra*, 570 U.S. at p. 267; see *Taylor*, *supra*, 495 U.S. at p. 601 [categorical approach avoids findings by trial court which a defendant potentially "could . . . challenge . . . as abridging his right to a jury trial"].)

Thus, *Descamps* merely applied *Taylor* to find the sentencing court could not look beyond the elements of California burglary to determine if it qualified under the ACCA.

2. *Descamps* Was Derivative of *Apprendi*

In addition to *Taylor*, the second basis of the holding in *Descamps* was *Apprendi*. *Descamps* noted *Apprendi* had already 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 must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Descamps*, *supra*, 570 U.S. at p. 269, quoting *Apprendi*, *supra*, 530 U. S. at p. 490.) Again, *Descamps* merely applied *Apprendi* to find the sentencing court could not look beyond the fact of the California burglary conviction to determine if it qualified under the ACCA.

The Court of Appeal here rejected this argument on the basis that *McGee*, *supra*, 38 Cal.4th 682 – which held a sentencing court could review the record of conviction to determine if a prior conviction qualified as a strike – illustrated that jurists could interpret *Apprendi* as permitting *McGee*'s approach. (*Milton*, *supra*, 42 Cal.App.5th at p. 991.) But while disagreement among jurists may be a factor in this analysis, it is not dispositive. (*Gomez*, *supra*, 45 Cal.4th at p. 658 [rejecting the Attorney General's argument that *Cunningham* was not dictated by *Blakely* because of the dissenting justices in *Cunningham* and contrary decisions in other cases].) The ultimate test is this Court's objective reading of *Apprendi* and whether it dictates the result in *Gallardo*. (See *Stringer*, *supra*, 503 U.S. at p. 237 ["Reasonableness, in this as in many other contexts, is an objective standard, and the ultimate decision whether [a case] was dictated by precedent is based on an objective reading of the

relevant cases"]; accord, *Gomez*, *supra*, 45 Cal.4th at p. 658.)

3. *Gallardo* Was Derivative of *Taylor* and *Apprendi*

Gallardo too makes it clear the bases for its holding are *Taylor* and *Apprendi*. It cited *Taylor* as the origin of the holding that proof of a prior conviction is limited to " 'the fact of the prior conviction and the statutory definition of the prior offense.' " (*Gallardo*, *supra*, 4 Cal.5th at p. 130, quoting *Taylor*, *supra*, 495 U.S. at p. 602.) It cited *Apprendi* as an origin of the Sixth Amendment jury trial principle precluding courts from determining underlying conduct of a prior conviction. (*Gallardo*, *supra*, 4 Cal.5th at p. 135, citing *Apprendi, supra*, 530 U.S. at p. 490.)

Although *Apprendi*'s landmark holding included an express exception for prior convictions, that exception was limited to "the *fact* of a prior conviction." (*Apprendi*, *supra*, 530 U.S. at p. 490, emphasis added.) It elaborated that any fact beyond the fact of the prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U. S. at p. 490.) Because, as *Taylor* found, the fact of the prior conviction is limited to the statutory definition (*Taylor*, *supra*, 495 U.S. at p. 602), extraneous conduct underlying the conviction may not be considered. Thus, *Gallardo* merely applied the limitation developed by *Taylor* and *Apprendi*.

The Court of Appeal rejected petitioner's contention that *Gallardo* was dictated by *Taylor*, stating, "*Taylor* involved statutory interpretation; it did not 'dictate' the result in *Gallardo*, which is based on Sixth Amendment principles." (*Milton*, *supra*, 42 Cal.App.5th at p. 990.)

However, as *Descamps* explained, one of the grounds for the decision in *Taylor* was that the elements-centric approach "avoids the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belonged to juries." (*Descamps*, *supra*, 570 U.S. at p. 267; see *Gallardo*, *supra*, 4 Cal.5th at p. 133.) Indeed, *Taylor* noted the categorical approach avoids findings by the trial court which a defendant potentially "could … challenge … as abridging his right to a jury trial." (*Taylor*, *supra*, 495 U.S. at p. 601.)

Thus, the Court of Appeal's analysis that *Gallardo* was not dictated by *Taylor* because *Taylor* was based on statutory interpretation while *Gallardo* was based on Sixth Amendment principles overlooks *Taylor*'s consideration of Sixth Amendment principles.

Similarly, the Court of Appeal stated, "*Apprendi*, while providing the foundation for *Gallardo*, did not dictate the result in *Gallardo*, because *Gallardo* concerned the right to have a jury conduct factfinding under a sentencing statute aimed at recidivism."[11] (*Milton*, *supra*, 42 Cal.App.5th at pp. 990-991.)

This distinction, however, overlooks the Sixth Amendment principles that informed *Apprendi* – the same principles that

[11] Further critique of why this statement also mischaracterizes *Gallardo* is set forth below in Argument I.D.2, *post*.

informed *Gallardo*. As *Apprendi* noted, "Other than the fact of a prior conviction, 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." (*Apprendi*, *supra*, 530 U.S. at p. 490.) *Gallardo* effectively applied this holding in finding that only the prior conviction itself, and not the underlying conduct, may be considered.

Thus, the retroactivity analysis set forth in *Gomez* and *Stringer* compels a conclusion that *Descamps* and *Gallardo* were "dictated" by *Apprendi* and *Taylor* in the same manner *Cunningham* was dictated by *Blakely*. Under *Gomez*, therefore, *Descamps* and *Gallardo* apply retroactively to any case in which judgment was not final at the time *Apprendi* and *Taylor* were issued.

E. Alternatively, *Gallardo* Is Retroactive to Final Judgments Under the Federal Test for Retroactivity

1. The Test Under *Teague*

This Court does not need to reach retroactivity under the federal constitutional *Teague* standard because, as this Court's cases make clear, retroactivity under the California tests outlined above is sufficient. Nevertheless, the federal test provides separate and sufficient grounds for retroactivity.

Under *Teague*'s federal standard for retroactivity, new substantive rules of criminal law are fully retroactive, whereas procedural rules are not fully retroactive, unless the procedural

rule was a watershed rule of criminal procedure. (*Montgomery v. Louisiana* (2016) __ U.S. __ [136 S.Ct 718, 728] (*Montgomery*); *Teague, supra*, 489 U.S. at p. 311.)

Like in the analogous state test, a "substantive constitutional rule" is one that "alter[s] 'the range of conduct or the class of persons that the law punishes.' ... Procedural rules, by contrast, 'regulate only the *manner of determining* the defendant's culpability.' " (*Welch, supra,* 136 S.Ct. at pp. 1264-1265, original italics, quoting *Schriro v. Summerlin* (2004) 542 U.S. 348, 353 (*Schriro*).)

A procedural rule may still be retroactive if it qualifies as a watershed rule of criminal procedure by being necessary to prevent an impermissibly large risk of an inaccurate conviction and "alter[ing] our understanding of the bedrock procedural elements essential to the fairness of a proceeding." (*Whorton v. Bockting* (2007) 549 U.S. 406, 418.)

The Court of Appeal here found *Gallardo*'s change in law was procedural, and not a watershed rule of criminal procedure, such that it was not entitled to retroactive effect. (*Milton*, *supra*, 42 Cal.App.5th at pp. 994-996.) Respectfully, the Court of Appeal was incorrect.

2. *Gallardo* Is a Substantive Rule Because It Prohibits Punishment for a Class of Defendants and Controls the Outcome of the Case

For the same reasons that the *Gallardo* rule is substantive under the state test, it is also substantive under the federal test.

(See Argument I.B.2, *ante*.) By limiting the imposition of an increased sentence to circumstances where the prior conviction itself, rather than the underlying conduct, supports the increased sentence, *Gallardo* is substantive because it "alter[ed] 'the range of conduct or the class of persons that the law punishes.' [Citation.]" (*Welch*, *supra*, 136 S.Ct. at p. 1260.)

"[W]hen a new substantive constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." (*Montgomery*, *supra*, 136 S.Ct. at p. 729.) *Montgomery* held the rule announced in *Miller v. Alabama* (2012) 567 U.S. 460 – mandatory life-without-parole sentences for juveniles are unconstitutional – was a substantive rule of law requiring retroactive application to cases on collateral review. (*Id.* at p. 736.)

As noted previously, the Ninth Circuit, applying this test, has already held *Descamps* and *Mathis* to be retroactive because they "alter[ ] 'the range of conduct ... that the law punishes' and not 'only the procedures used to obtain the conviction.' " (*Allen*, *supra*, 950 F.3d at p. 1192, quoting *Welch*, *supra*, 136 S.Ct. at p. 1266.)

This Court has explained retroactivity under the federal test depends upon the "practical result" of the change in law. (*People v. Trujeque* (2015) 61 Cal.4th 227, 251 (*Trujeque*).) If the rule prevents someone in the position of the defendant from being subject to a particular punishment, it is substantive and must be applied retroactively regardless of whether the defendant's conviction is final or not. (*Ibid*.)

In *Trujeque*, the defendant was convicted of capital murder. (*Trujeque*, *supra*, 61 Cal.4th at p. 235.) A prior conviction of second-degree murder was charged as a special circumstance. (*Ibid.*) After defendant's prior second-degree murder conviction became final, the United States Supreme Court in *Breed v. Jones* (1975) 421 U.S. 519 (*Breed*) "held that an adult prosecution after a juvenile adjudication for the same offense violates double jeopardy." (*Trujeque*, *supra*, 61 Cal.4th at p. 245.) This Court determined that, under *Teague*, "*Breed*'s double jeopardy rule [was] more substantive than procedural because without the rule's retroactive application, a defendant would otherwise 'face[ ] a punishment that the law cannot impose upon him.' " (*Id.* at p. 251, quoting *Schriro*, *supra*, 542 U.S. at pp. 351-352.) Accordingly, the defendant's prior second-degree murder conviction was retroactively challengeable under *Breed*. (*Trujeque*, *supra*, 61 Cal.4th at pp. 252-253.)

Here, *Gallardo* and *Descamps* prohibit the use of a prior conviction to increase punishment in a new proceeding unless the prior conviction *itself* supports the increased punishment. The change in law is determinative of the lawfulness of the incarceration, as the practical result is that petitioner's strikes and serious felony enhancement must be struck in light of the trial court's reliance on the record of conviction in order to find the underlying conduct in the prior convictions qualified to increase petitioner's sentence. Like in *Trujeque*, petitioner now " 'face[s] a punishment that the law cannot impose upon him.' " (*Trujeque*, *supra*, 61 Cal.4th at p. 251, citation omitted.)

The Court of Appeal erred in finding *Trujeque* distinguishable. It found "[i]n contrast [to *Trujeque*], *Gallardo* did not alter the scope or applicability of section 1192.7, subdivision (c)(8) or the three strikes law." (*Milton*, *supra*, 42 Cal.App.5th at p. 994.) Respectfully, this is erroneous. *Gallardo*, by recasting the controlling issue from whether the underlying conduct of the prior conviction qualifies as a strike to whether the prior conviction *itself* qualifies as a strike, altered both the scope and applicability of the Three Strikes law.

Montgomery also explained that while "[t]here are instances in which a substantive change in law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish," "[t]hose procedural requirements do not, of course, transform substantive rules into procedural ones." (*Montgomery*, *supra*, 136 S.Ct. at p. 735.) Analogously, while *Gallardo* certainly has a procedural component, the crux of *Gallardo* is that prior convictions may not be used to increase a sentence where the conviction *itself* does not support increasing the sentence. (*Gallardo*, *supra*, 4 Cal.5th at pp. 132-133.)

3. Alternatively, *Gallardo* Announced a New Watershed Rule of Criminal Procedure

Alternatively, even if this Court concludes that *Gallardo* is primarily a procedural rule, it must be applied retroactively because it is a watershed rule of criminal procedure. (See *Teague*, *supra*, 489 U.S. at p. 311.) To qualify as watershed, a new rule

(1) must 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.)

The rule of *Gallardo* meets both requirements. For the first requirement, *Gallardo* promotes reliability in determinations of prior convictions by precluding sentencing courts (and juries) from determining facts without procedural safeguards. (*Gallardo*, *supra*, 4 Cal.5th at pp. 138-139.) The *Gallardo* rule thus prevents an impermissibly large risk of such inaccurate convictions. (*Whorton*, *supra*, 549 U.S. at p. 418.)

For the second requirement, *Gallardo* "alter[s] our understanding of the bedrock procedural elements essential to the fairness of the proceeding." (*Whorton*, *supra*, 549 U.S. at p. 418.) *Gallardo* acknowledges the Sixth Amendment prohibits judicial factfinding that goes beyond recognizing a prior conviction. (*Gallardo*, *supra*, 4 Cal.5th at p. 134.) Moreover, the *Gallardo* rule prevents a court from increasing a defendant's sentence based on facts that a defendant never received notice he would need to contest in the prior proceeding, and thereby preserves a defendant's federal due process right to notice of the charges. (U.S. Const., 5th, 6th & 14th Amends.; see *Gray v. Netherland* (1996) 518 U.S. 152, 167 ["A defendant's right to notice of the charges against which he must defend is well established"]; *Seaton*, *supra*, 26 Cal.4th at p. 640 ["Both the Sixth Amendment of the federal Constitution and the due process guarantees of the state and federal Constitutions require that a

criminal receive notice of the charges adequate to give a meaningful opportunity to defend against them"].)

By prohibiting enhancement of a sentence based on non-elemental facts that a defendant has no notice of or incentive to contest in the prior proceeding, the rule of *Gallardo* creates a bedrock procedural protection essential to the fairness of the sentencing proceeding. The previous existing procedures under *Guerrero* were fundamentally unfair because they required a defendant to belatedly contest facts about a prior conviction in a subsequent proceeding in a manner that is (1) unfair in most cases because the prior case took place years before and (2) raises significant constitutional problems.

Thus, even if this Court is inclined to characterize this substantive limitation as procedural, the rule plays such a key role in ensuring fairness of the sentencing proceedings and protecting the constitutional rights of a large number of defendants that it is a watershed procedural rule under *Teague* which merits retroactive application.

F. Respectfully, The Court of Appeal's Finding That *Gallardo* Is Not Retroactive Relied on Misunderstandings About the Ruling in *Gallardo*

1. The Court of Appeal Seemed to Erroneously Suggest That Conduct Underlying the Conviction Could Still Be Used to Support a Finding of a Strike

Underlying the Court of Appeal's conclusion that *Gallardo* was merely procedural was the court's puzzling assertion that a sentencing court could still find petitioner used a gun in the prior offenses (*Milton*, *supra*, 42 Cal.App.5th at p. 994), *even though petitioner was never charged with or convicted of use of a gun in the prior offenses*. The court stated that "if the sentencing court, after examining the facts the Illinois jury necessarily found in convicting Milton of armed robbery and any admissions Milton made in pleading guilty to simple robbery, determined Milton used a gun, the sentencing court could still" rely on the prior conviction to increase petitioner's sentence. (*Ibid*.)

While the Court of Appeal's language largely mimics the language of *Gallardo* (see *Gallardo*, *supra*, 4 Cal.5th at p. 136), the Court of Appeal ignores that petitioner was never charged with or convicted of use of a gun in the prior offenses. Thus, the Court of Appeal's language suggests that a trial court could still make a factual determination that petitioner used a gun, despite the absence of any charge or conviction on that element.[12]

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[12] Alternatively, the court was hypothesizing about an alternate reality – one in which use of the gun *was* an element of

The suggestion that a sentencing court could still conduct factfinding is patently erroneous under *Gallardo* and *Descamps*. As *Gallardo* explained, a "court may not rely on its own independent review of record evidence to determine what conduct 'realistically' led to the defendant's conviction." (*Gallardo*, *supra*, 4 Cal.5th at p. 124.) " '[T]he only facts the court can be sure the jury … found are those constituting elements of the offense – as distinct from amplifying but legally extraneous circumstances.' " (*Id.* at p. 133, quoting *Descamps*, *supra*, 570 U.S. at p. 269.)

Descamps also specifically *rejected* the idea a court could review a plea colloquy or record to determine what other

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both prior offenses (or allegations attached to those prior offenses), which would render the use of the gun a fact necessarily found by the jury or admitted at a plea hearing. Under this hypothetical based on an alternate reality, the rule of *Gallardo* would have no bearing on the case, as *Gallardo*'s limitation applies only to the record of conviction outside of the offenses themselves. Yet the Court of Appeal relies on this hypothetical to conclude that *Gallardo* must be procedural and not substantive precisely because it would have no bearing on such a case. Analogous reasoning would be if, in *Trujeque*, *Breed* were determined to be procedural, not substantive, because the *Breed* rule has no bearing on cases in which it is determined from reviewing the record that a defendant did *not* face an adjudicatory proceeding in juvenile court for the same offense. Plainly, however, the fact that neither *Breed* nor *Gallardo* has a bearing on the outcome of every case is irrelevant in determining whether it is procedural or substantive. The question is, in those cases in which the rule articulated in *Breed* or *Gallardo* is implicated, does the rule control the outcome of those cases, and the answer must be it does.

extraneous facts were admitted or found. (*Descamps*, *supra*, 570 U.S. at p. 270.) Rather, a court may only "compare the *elements* of the crime of conviction … with the elements of the generic crime." (*Id.* at p. 254, emphasis added; see *Mathis*, *supra*, 136 S.Ct. 2243 [A sentencing court "focus[es] solely on … the elements of the crime of conviction"].)

As described previously, there are several rationales for this elements-centric approach. First, "[a] defendant, after all, has little incentive to contest facts that are not elements of the charged offense – and may have good reason not to." (*Descamps*, *supra*, 570 U.S. at p. 271.) Second, it would be fundamentally unfair to allow a sentencing court to rely on facts underlying a prior conviction when the defendant pled to a lesser offense, such as relying on the facts of a burglary when the defendant pled to a lesser, nonburglary offense as part of a plea agreement. (*Taylor*, *supra*, 495 U.S. at pp. 601-602.) Third, an elements-centric approach *prevents* courts from "hav[ing] to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense." (*Descamps*, *supra*, 570 U.S. at p. 270.)

While *Gallardo* allowed for a limited remand, the remand was only to determine which of the *divisible* offenses of aggravated assault – use of force or use of a deadly weapon – the defendant's conviction encompassed. (*Gallardo*, *supra*, 4 Cal.5th at pp. 136-138.)

Accordingly, under *Gallardo* and *Descamps*, if petitioner was not charged with and convicted of use of a gun, the conviction in itself does not support a finding it was a strike. Allowing the sentencing court to make a finding about petitioner's underlying conduct violated petitioner's Sixth Amendment right to a jury trial and his right to notice of the charges under the Sixth Amendment and Fourteenth Amendment due process principles.

2. The Court of Appeal Erroneously Concluded That *Gallardo* Concerned the Right to Have a Jury Conduct Factfinding Under a Sentencing Statute Aimed at Recidivism

At one point in its opinion, the Court of Appeal stated that "*Gallardo* concerned the right to have a jury conduct factfinding under a sentencing statute aimed at recidivism." (*Milton*, *supra*, 42 Cal.App.5th at pp. 990-991.) The Court of Appeal later stated that in *Gallardo*, "the California Supreme Court drew heavily on *Descamps* and *Mathis* in holding a jury must find the facts that support increased punishment based on recidivism." (*Id.* at p. 991, citing *Gallardo*, *supra*, 4 Cal.5th at p. 134.)

With these descriptions about *Gallardo*, the Court of Appeal mistakenly conflated the right to have the facts determined by a jury *in the prior proceeding* – that is, the proceeding in the prior case that resulted in the prior conviction – and the right to have the facts determined by a jury *in the present proceeding* with regards to the prior conviction.

Gallardo specifically *rejected* the idea that a jury could conduct factfinding on the underlying conduct any more than a court. Although Justice Chin, in his concurrence and dissent, advocated for such a ruling – that "the jury *may* engage in factfinding" about the prior conviction (*Gallardo*, *supra*, 4 Cal.5th at p. 140, conc. & dis. opn. of Chin, J., original italics) – the majority rejected this position. The majority noted that Justice Chin's position involved an attempt to "reconcile *Guerrero* with the Sixth Amendment right to a jury trial by simply reassigning the task of reviewing the record of conviction to a jury, as opposed to a judge. [Citation.]" (*Id.* at p. 138.) But the majority found that "[t]o permit a jury to make factual findings based solely on its review of hearsay statements made in a preliminary hearing would be to permit facts about the defendant's prior conviction to be proved in a way that no other elemental fact is proved – that is, without the procedural safeguards, such as the Sixth Amendment right to cross-examine one's accusers, that normally apply in criminal proceedings. This kind of proceeding might involve a jury, but it would not be much of a trial." (*Gallardo*, *supra*, 4 Cal.5th at p. 139.)

Thus, *Gallardo* did not merely reallocate factfinding between the court in the present proceeding and the jury in the present proceeding. Rather, *Gallardo*'s preservation of Sixth Amendment principles requires that the only facts that can be relied upon in determining if a prior conviction qualifies to increase a sentence are those facts necessarily found by the jury (or pled to) *in the prior proceeding*.

CONCLUSION

The *Gallardo* decision protects a defendant's federal constitutional right to notice of the charges – as a defendant's sentence can no longer be enhanced based on conduct for which he was not charged with in the prior proceeding – and a defendant's federal constitutional right to a jury – as a defendant's sentence can no longer be enhanced based on conduct not adjudicated by a jury or pled to in the prior proceeding. The *Gallardo* decision also aligned California with United States Supreme Court jurisprudence on the use of prior convictions to increase a defendant's sentence. Additionally, *Gallardo* altered what the prosecution needs to prove on the prior conviction allegation, as the prosecution must now prove that the defendant suffered a prior conviction which itself qualifies as a strike rather than proving that the defendant suffered a prior conviction whose underlying conduct qualifies as a strike.

This change in law directly controls, on constitutional grounds, determinations of guilt and innocence on allegations that a defendant suffered a qualifying prior conviction. Accordingly, for the reasons set forth herein, petitioner submits that *Gallardo* must apply retroactively to final judgments.

Respectfully submitted,

Date: June 1, 2020

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies petitioner's opening brief on the merits uses 13-point sized text in Century Schoolbook font and contains approximately 11,779 words, including footnotes, which is less than the number of words permitted. (Cal. Rules of Court, rule 8.520(c)(1).) Counsel relied on the word count of the computer program used to prepare this brief.

Date: June 1, 2020

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PROOF OF SERVICE

I, the undersigned, declare that I am a resident or employed in Los Angeles County, California; that I am an active member of the State Bar (SBN No. 266220); that I am over the age of eighteen years; that my business address is Brad K. Kaiserman, Esq., 5870 Melrose Ave., # 3396, Los Angeles, CA 90038, bradkaiserman@gmail.com; that I served the document entitled **PETITIONER'S OPENING BRIEF ON THE MERITS**.

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This proof of service is executed in Los Angeles, California, on June 1, 2020.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/S/ BRAD KAISERMAN
BRAD KAISERMAN

STATE OF CALIFORNIA
Supreme Court of California

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