Supreme Court of California
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Supreme Court of California
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FILED WITH PERMISSION

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 County 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 REPLY BRIEF ON THE MERITS

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INTRODUCTION

Prior to *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*), sentencing courts made findings of facts about conduct related to prior offenses and then used those facts to impose often severe recidivist sentences. These findings were made in the absence of any trial; rather, courts looked through the prior record of conviction to determine underlying facts. Unanimously[1] recognizing this injustice, this Court in *Gallardo* aligned itself with United States Supreme Court law and ruled such factfinding unconstitutional. *Gallardo* restored the jury trial right – and all of its accompanying constitutional rights and procedural safeguards – to defendants who face significant punishment for conduct that was never litigated. The only remedy now to correct these past injustices is to apply *Gallardo* retroactively.

Respondent's argument for why *Gallardo* should not be made retroactive largely hinges upon two erroneous readings of *Gallardo*: (1) That *Gallardo* merely allocated factfinding between the judge and the jury; and (2) that *Gallardo*'s *exclusive* purpose was to protect the Sixth Amendment jury trial right.

Respondent's argument that *Gallardo* merely reallocated factfinding is a plain misreading of *Gallardo*. *Gallardo* was not concerned about a "court trial" versus a "jury trial"; rather,

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[1] Although Justice Chin concurred and dissented, Justice Chin agreed with the majority ruling that defendants have a right to a jury trial on the nature of their prior convictions. (*Gallardo*, *supra*, 4 Cal.5th at p. 140 (conc. & dis. opn. of Chin, J.).) Justice Chin's disagreement was limited to the remedy. (*Ibid.*)

Gallardo was concerned about determinations of fact made in the absence of any trial at all. Indeed, in rejecting Justice Chin's proposed remedy to simply shift factfinding from the sentencing court in the newer proceeding to a jury in the newer proceeding, this Court stated:

> To 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 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, emphasis added, footnote omitted.)

Accordingly, *Gallardo* was concerned with the *lack* of a trial on prior legally extraneous conduct used to support recidivist sentences. *Gallardo*, therefore, prohibited *any* factfinding – whether performed by a court or a jury – about the legally extraneous conduct underlying the prior conviction. Instead, sentencing courts may only identify those facts necessarily found by the jury in the prior proceeding or admitted by the defendant in the prior proceeding. (*Gallardo*, *supra*, 4 Cal.5th at p. 124.)

Additionally, respondent's argument that *Gallardo*'s only purpose was to protect the Sixth Amendment jury trial right is

also a misreading of *Gallardo*. As quoted above, this Court's rejection of Justice Chin's proposed remedy was founded not only on the Sixth Amendment jury trial right but all of the constitutional and procedural safeguards, such as the right to cross-examination, that typically apply to determinations of facts in criminal proceedings. (*Gallardo*, *supra*, 4 Cal.5th at p. 139.)

Given *Gallardo*'s vindication of fundamental constitutional rights and its impact on those who have been sentenced to lengthy and sometimes life-long terms of imprisonment in violation of these fundamental constitutional rights, *Gallardo* must apply retroactively.

ARGUMENT

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

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

1. *Gallardo* Established a New Rule

Respondent agrees that *Gallardo* established a new rule under state law. (Answer Brief on the Merits ("ABM") 52.)

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 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) …." (*In re Martinez* (2017) 3 Cal.5th 1216, 1222, citing *In re Lopez* (2016) 246 Cal.App.4th 350, 357-359 (*Lopez*).)

Respondent's argument that "the *Gallardo* rule" is not substantive because "it only regulated the manner in which a fact is determined" (ABM 40) is both inconsistent with other portions of its argument and ignores the practical effects of *Gallardo*.

First, it is inconsistent because respondent elsewhere acknowledges that, rather than regulating the manner of factfinding, *Gallardo* actually eliminated factfinding in a

subsequent proceeding. (ABM 40 ["Under *Gallardo*, trial courts are not permitted to do *any* fact-finding"].)

Secondly, because *Gallardo* limited sentencing courts to identifying facts necessary to the prior conviction, it consequently regulated not the manner of determining facts but rather *which* facts could be relied upon.

Accordingly, as set forth below, *Gallardo* is substantive because it altered the punishable range of conduct or, alternatively, because it altered the class of persons subject to punishment.

a. *Gallardo* Altered the Range of Conduct by Directing Courts to Consider Only Conduct *Necessary* to the Prior Conviction As Opposed to Legally Extraneous Conduct Underlying the Prior Conviction

Gallardo produced a substantive rule because it altered the range of conduct that could be relied upon in applying recidivist sentencing schemes.

Before *Gallardo*, sentencing courts were permitted to impose additional punishment based on legally extraneous conduct underlying a prior conviction, but now courts may only impose additional punishment based on conduct *necessary* to the prior conviction itself. Consequently, the range of conduct that may be used to support an increased sentence has been limited such that only conduct corresponding to the elements of the prior offense may be used to increase a sentence.

Respondent argues "*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)." (AMB 38, citing *Gallardo*, *supra*, 4 Cal.5th at pp. 124, 136.) First, it is worth noting that *Gallardo* only uses the phrase "facts underlying" once in the majority opinion, and only in the context that a sentencing court may *not* find "facts underlying a defendant's prior conviction." (*Gallardo*, *supra*, 4 Cal.5th at p. 124.) Moreover, *Gallardo* plainly held a sentencing "court may not rely on its own review of record evidence to determine what conduct 'realistically' led to the defendant's conviction." (*Ibid*.)

Respondent also critiques petitioner's "distinction between the underlying *conduct*, on the one hand, and the *conviction itself*, on the other…." (AMB 37, original italics.) The "conviction itself," however, is merely shorthand for conduct corresponding to the elements of the conviction itself " 'as distinct from amplifying but legally extraneous circumstances.' " (*Gallardo*, *supra*, 4 Cal.5th at p. 133, quoting *Descamps v. United States* (2013) 570 U.S. 254, 269 (*Descamps*).) *Gallardo* additionally noted the distinction between the statutory scheme at issue in *Descamps* – which focused on elements – and the Three Strikes law – which focused on conduct – "makes no difference for purposes of delimiting the constitutional bounds of judicial factfinding." (*Gallardo*, *supra*, 4 Cal.5th at p. 135.)

It may be additionally argued the alteration of punishable "conduct" here is more legal than factual; that is, rather than making previously unlawful conduct lawful – a more "factual"

alteration of punishable conduct – it instead set limits as to how and under what circumstances prior conduct may be used – a more "legal" alteration of punishable conduct.

But even alterations of this nature have been held to qualify as alterations of range of conduct for purposes of determining a law to be substantive. For instance, in *People v. Chiu* (2014) 59 Cal.4th 155, 159 (*Chiu*) this Court held that a defendant could not be convicted of first-degree premeditated murder under a natural and probable consequence theory. This change in law did not make any previously unlawful conduct lawful. The "target crime" remained an unlawful offense. Nonetheless, the new rule was found to have altered the range of punishable conduct and to therefore qualify as a substantive law. (*Lopez*, *supra*, 246 Cal.App.4th at p. 358 ["The *Chiu* decision set forth a new rule of substantive law by altering the range of conduct for which a defendant may be tried and convicted of first degree murder"].)

Accordingly, as set forth below, because *Gallardo* altered the range of punishable conduct by limiting courts to facts necessarily found in the prior proceeding, *Gallardo* announced a substantive rule of law.

i. Reviews of Records in Trials Are Limited to Facts *Necessarily* Found by the Trier of Fact

This Court held that a sentencing court may only "identify those facts that were already *necessarily* found by a prior jury in rendering a guilty verdict…." (*Gallardo*, *supra*, 4 Cal.5th at p. 124, emphasis added.) Respondent, however, argues that "[a] sentencing court is not constrained to solely consider the elements …." (ABM 61.)

It is not clear what facts respondent is suggesting may be considered "necessarily found" in a jury trial besides the facts corresponding to elements of the charged offenses. Indeed, *Gallardo*, quoting *Descamps*, noted the opposite: " '[T]he 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.)

ii. Reviews of Records in Pleas Are Limited to Facts *Necessarily* Admitted at the Plea Hearing

The thornier question is whether *Gallardo* permits reliance on legally extraneous facts admitted during a plea colloquy or stipulated to as the basis for a plea involving prior indivisible

offenses. (See *In re Scott* (2020) 49 Cal.App.5th 1003, 1021 (conc. opn. of Dato, J.) [characterizing this question as "a much more difficult question"].) Although this precise issue is not presently before this Court, resolution of this issue is one of several factors that may be considered by this Court in determining the question of retroactivity; however, while petitioner submits that *Gallardo* prohibited the consideration of extraneous underlying conduct from the prior conviction even if admitted during the plea colloquy, retroactivity is still appropriate for other reasons stated herein even if this Court decides facts admitted during a plea colloquy may still be relied upon.

Respondent takes the position that sentencing courts may, in the instances of pleas, consider extraneous conduct underlying the conviction. (ABM 38.) Respondent notes that *Gallardo* held "that a sentencing court may consult facts 'that the defendant admitted as the factual basis for a guilty plea' " and "that the facts admitted as the basis for a plea can be broader than the minimum elements of an offense." (ABM 38, quoting *Gallardo*, *supra*, 4 Cal.5th at p. 136.)

Respondent's selective quotation of *Gallardo*, however, omits critical language. *Gallardo* held the only facts that could be considered from a plea hearing were those facts *necessary* to the conviction itself. This Court explained that a sentencing court may only "identify those facts that were already *necessarily* found by a prior jury in rendering a guilty verdict or admitted by the defendant in entering a guilty plea." (*Gallardo*, *supra*, 4 Cal.5th at p. 124, emphasis added.) The use of the word "necessarily"

modified both the phrase "found by a prior jury" and the phrase "admitted by the defendant."

Indeed, even the Attorney General's suggestion of remedy in *Gallardo* was for the sentencing court to review the record of the prior plea proceeding and " 'mak[e] a determination about what facts [Gallardo] *necessarily* admitted in entering her plea.' " (*Gallardo*, *supra*, 4 Cal.5th at pp. 137-138, emphasis added; see also *id.* at p. 138 [The Attorney General's "primary contention … is that the trial court on remand should review the record of conviction in order to determine what facts were *necessarily* found or admitted in the prior proceeding" (emphasis added)].) This Court agreed with that remedy. (*Id.* at p. 139; see also *In re Haden* (2020) 49 Cal.App.5th 1091, 1115 (conc. opn. of Brown, J.) (*Haden*) ["the problem with using the preliminary hearing transcript is that it reveals nothing about what a jury necessarily found or the defendant *necessarily* admitted" (emphasis added)].)

Moreover, this understanding of *Gallardo* is at minimum consistent with and arguably compelled by *Descamps*. *Descamps* held that when a defendant pleads guilty to a crime, "he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment." (*Descamps*, *supra*, 570 U.S. at p. 270.) In other words, because a defendant does not waive his or her right to a jury trial on a legally extraneous fact admitted during a plea colloquy, that fact cannot under the Sixth Amendment be used to support additional

punishment in a later proceeding. These facts, even if admitted, are still considered "disputed facts" under *Descamps*.

Descamps did not sanction any reliance on the plea colloquy except when necessary to determine *which* offense a defendant entered a plea to. As described in *Descamps*, under the "modified categorical approach," review of the plea colloquy is appropriate to determine *which* offense a defendant pled to when the offense has "divisible" or "alternative" elements. (*Descamps*, *supra*, 570 U.S. at p. 262 [sentencing courts may refer to a plea colloquy to, for instance, "determine if the defendant had pleaded guilty to entering a building or, alternatively, a car or boat"]; see *Mathis v. United States* (2016) __ U.S. __ [136 S.Ct. 2243, 2253; 195 L.Ed.2d 604] (*Mathis*) ["the modified approach serves – and serves solely – as a tool to identify the elements of the crime of conviction when a statute's disjunctive phrase renders one (or more) of them opaque"].) *Gallardo* followed this approach in remanding for a determination of *which* type of aggravated assault – involving use of force or use of a deadly weapon – the defendant entered a plea to.

Gallardo expressly stated it was following the Sixth Amendment principles described in *Descamps* and *Mathis* for its conclusion that the limitation on proof of prior convictions is mandated by the Sixth Amendment; it gave no indication it was departing from the analysis set forth in these opinions. (*Gallardo*, *supra*, 4 Cal.5th at p. 135.)

Principles of fairness further support a reading that *Gallardo* restricted the use of legally extraneous facts admitted

during a plea colloquy. For instance, it would be unfair to punish a defendant who pled to a lesser offense as if he had pled to the greater offense based on his admissions of the underlying conduct. (See *Descamps*, *supra*, 570 U.S. at p. 271 [" '[I]f a 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' "].)

Further, *Gallardo* protects a defendant from being punished for facts which he or she had no reason to contest at the original hearing. As one California court has noted, "To double a defendant's sentence based on disputed facts that he had no reason or right to contest would be fundamentally unfair." (*People v. Wilson* (2013) 219 Cal.App.5th 500, 516; see *Descamps*, *supra*, 570 U.S. at p. 270 ["A defendant, after all, often 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 the superfluous factual allegations."]; *Wilson v. Knowles* (9th Cir. 2011) 638 F.3d 1213, 1215 [Defendant "did not have any reason to contest these alleged facts when he was convicted in 1993"].)

Additionally, it would be inconsistent to permit extraneous conduct to be relied upon for recidivist sentences in the cases of prior pleas – by allowing reliance on all facts admitted by the defendant – but not in the case of prior trials – by limiting

reliance to those facts necessarily found by the jury.

Lastly, continued reliance on admissions made during a plea colloquy encourages additional haggling on issues not relevant to the conviction itself. For instance, presently, it is not uncommon for defendants to stipulate to "the police report" as a factual basis for a plea. A determination that *Gallardo* permits reliance on "stipulated facts," however, would encourage defendants to challenge details in the police report that may have a negative impact in the future.

iii. Because Only Conduct *Necessary* to the Prior Conviction May Be Considered – As Opposed to Legally Extraneous Conduct Underlying the Prior Conviction – *Gallardo* Altered the Range of Conduct That May Support an Increased Sentence Based on a Prior Offense

Accordingly, whether the defendant was convicted at trial by a jury (or court) in a prior proceeding or whether the defendant entered a plea in the prior proceeding, a sentencing court in a subsequent case is limited only to the conduct *necessary* to the conviction and may not consider legally extraneous conduct in determining whether a prior offense supports an increased sentence. Because formerly a wider range of conduct (conduct beyond the elements) could support an increased sentence and now only a more limited range of conduct

(conduct corresponding to the elements) can support an increased sentence, *Gallardo* altered the range of conduct punishable. (See *Welch v. United States* (2016) 136 S.Ct. 1257, 1264-1265 (*Welch*) [Substantive rules include those " 'that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish' "].)

b. Alternatively, *Gallardo* Altered the Class of Persons Subject to Punishment

Alternatively, if *Gallardo* did not alter the range of punishable conduct, *Gallardo* still produced a substantive rule because it altered the class of persons subject to punishment. Respondent disagrees on the basis that " '[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.' " (ABM 42, quoting *In re Brown* (2020) 45 Cal.App.5th 699, 728-729 (dis. opn. of Menetrez, J.) (*Brown*).)

Respondent fails to adequately distinguish, however, the identification of a class of persons affected by *Breed v. Jones* (1975) 421 U.S. 519 (*Breed*) from an identification of a class of persons affected by *Gallardo*. In *People v. Trujeque* (2015) 61 Cal.4th 227, 251 (*Trujeque*), 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.' " (*Trujeque*, *supra*, 61 Cal.4th at p. 251, quoting *Schriro v. Summerlin* (2004) 542 U.S. 348, 351-352 (*Schriro*).)

Respondent argues, "*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 qualifies the felonies as serious or violent. [Citations.]" (ABM 41.)

Respondent's argument, however, rests on an inaccurate characterization of those still subject to punishment under *Gallardo*. While, previously, the class of defendants subject to punishment included defendants whose extraneous conduct underlying a prior conviction amounted to a serious or violent felony, now, the class of defendants subject to punishment is limited to defendants whose conduct *necessary* to a prior conviction amounted to a serious or violent felony. Accordingly, because it reduced the class of defendants subject to increased sentences based on prior convictions, *Gallardo* effected a substantive change in law.

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 Purpose to Be Served by the Change in Law Is To Vindicate Rights Essential to the Integrity of the Factfinding Process

Respondent's argument that "*Gallardo* was singularly motivated by the Sixth Amendment jury trial right" (ABM 22) oversimplifies *Gallardo*'s reasoning (and the opinions on which *Gallardo* was based). Indeed, the fact that the majority in *Gallardo* specifically rejected Justice Chin's proposed resolution to reallocate the factfinding merely from the sentencing court in the newer proceeding to a jury in the newer proceeding (*Gallardo*, *supra*, 4 Cal.5th at pp. 138-139) demonstrates this Court was considering other concerns besides the Sixth Amendment jury trial right.[2]

The purpose to be served by *Gallardo* is rather to vindicate rights essential to the integrity of the factfinding process. (See *In re Johnson* (1970) 3 Cal.3d 404, 416 ["overwhelming concern of …

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[2] This decision to not adopt Justice Chin's remedy demonstrates that Justice Brown's concurrence argument in *Haden* – that *Gallardo*'s "focus is on the *identity* of the fact finder (or fact admitter)" – is mistaken. (*Haden*, *supra*, 49 Cal.App.5th at p. 1114 (conc. opn. of Brown, J.), original italics.) Rather, under *Gallardo*, *neither* the sentencing court *nor* the jury is permitted to make factual findings about extraneous underlying conduct from prior offenses.

retroactivity … [is the] test of the integrity of the judicial process"]; *In re Joe R.* (1980) 27 Cal.3d 496, 511 ["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*" (emphasis added)].)

There are three aspects to *Gallardo*'s vindication of rights essential to the integrity of the factfinding process: *Gallardo* protects a defendant's constitutional rights, it promotes fairness, and it promotes reliability.

i. *Gallardo* Protects a Defendant's Constitutional Rights

As to the constitutional rights, *Gallardo* protects a defendant's Sixth Amendment right to a jury trial by ensuring that the only facts that could be used from a defendant's prior conviction were those necessarily found by the prior jury (or admitted in a plea).

Gallardo also preserved a defendant's federal due process right to notice of the charges by precluding a sentencing court from increasing a sentence based on conduct that was never even included in the charge itself in the prior proceeding. Even *Apprendi*, the predecessor of *Gallardo*, recognized its ruling was not only based on the Sixth Amendment jury trial right but also on Fifth and Fourteenth Amendment due process rights, including right to notice of the charges. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476 ["[U]nder the Due Process Clause of the

Fifth Amendment *and the notice* and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' [Citation.] The Fourteenth Amendment commands the same answer in this case involving a state statute." (Emphasis added)]; see *Schriro, supra,* 542 U.S. at p. 350 [noting that *Apprendi* was grounded not only on the jury trial right but also on "constitutional due-process" guarantees].)

Indeed, *Gallardo* vindicates *all* of "the procedural safeguards, such as the Sixth Amendment right to cross-examine one's accusers, that normally apply in criminal proceedings." (*Gallardo*, *supra*, 4 Cal.5th at p. 140.)

Thus, this Court noted that even if the determination of what conduct led to the defendant's prior conviction could be made by a jury by reviewing the record of the prior conviction, that "kind of proceeding might involve a jury, but it would not be much of a trial." (*Gallardo*, *supra*, 4 Cal.5th at p. 139, footnote omitted.)

ii. *Gallardo* Promotes Fairness

As to fairness, as discussed previously (see Argument I.A.2.a.ii, *ante*), *Gallardo* protects a defendant who pled guilty to a lesser offense in a prior conviction – i.e., a petty theft – from being treated, based on conduct extraneous to the plea, as if he or she had pled guilty to the greater offense – i.e., a burglary. (See *Descamps*, *supra*, 570 U.S. at p. 271.) *Gallardo* additionally

promotes fairness by not increasing punishment based on facts that a defendant had no reason to contest at the prior hearing. (See Argument I.A.2.a.ii, ante.*)*

iii. *Gallardo* Promotes Reliability

As to reliability, it is not a question of the reliability of a "jury trial" versus the reliability of a "court trial" as respondent suggests. (See ABM 13.) Instead, prior to *Gallardo*, a factfinding process conducted by the sentencing judge was no trial at all; because the sentencing judge merely reviewed the record of conviction from the prior offense.

Now, however, as respondent acknowledged, "[u]nder *Gallardo*, trial courts are not permitted to do *any* factfinding; they may only identify which facts a jury found or the defendant admitted. (ABM 40, original italics, citing *Gallardo*, *supra*, 4 Cal.5th at pp. 134, 136, 138.) It is hard to see how a change in law that completely eliminated factfinding could have no "significant effect on the integrity of the fact finding process …." (*Johnson*, *supra*, 3 Cal.3d at p. 411.)

As Justice Tucher explained, prior to *Gallardo*

> the sentencing court's factfinding was insufficiently reliable – not because a judge is less capable of sorting fact from fiction than would be a jury – but because vital information was missing: Would a jury in the prior case "have credited" the victim's testimony about a knife? Did the defendant "acknowledg[e] the truth" of that particular testimony? Left to "guess at" the answers to these

> questions, the sentencing court could not reliably determine the dispositive fact.

(*Haden*, *supra*, 49 Cal.App.5th at pp. 1104-1105 (conc. opn. of Tucher, J.), quoting *Gallardo*, *supra*, 4 Cal.5th at p. 137.)

In other words, by ensuring that the only facts that can be used to increase a defendant's sentence are those necessarily found through a process with all of the constitutional protections of due process and procedural protections of the rules of evidence – i.e., a jury trial – or those facts admitted by the defendant, *Gallardo* enhanced the reliability of factual determinations underlying recidivist sentencing schemes.

Courts have consistently held that these foundational principles of our jury trial system promote reliability. (See, e.g., *Ramos v. Louisiana* (2020) ___ U.S. ___ [140 S.Ct. 1390; 206 L.Ed.2d 583, 595-596] [requirement of 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"]; *Crawford v. Washington* (2004) 541 U.S. 36, 62 (*Crawford*) [The Confrontation Clause "reflects a judgment … about how reliability can best be determined"]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 402 ["established rules of procedure and evidence," including hearsay rules, "are designed to assure both fairness and reliability in the ascertainment of guilt and innocence"].)

Moreover, other than a couple of brief references (see ABM 35, 57), respondent largely ignored that *Gallardo* reallocated

factfinding from the sentencing court not simply to "the jury" but to the jury *in the prior proceeding*. (See, e.g., ABM 11 ["*Gallardo* established a new rule of criminal procedure intended to transfer the fact-finding responsibility from judge to jury"]; 12 ["transfer the fact-finding responsibility from judge to jury"; "reassigned the role of fact-finding from the current sentencing judge to a jury"], 36 ["rules which reassign decision-making authority from a court to the jury are procedural"], 36-37 ["*Gallardo* … allocated decision-making authority between a judge and a jury"], 44 ["reallocate decision-making between judge and jury"], 53 ["*Gallardo* … reallocated the fact-finding responsibility from the judge to the jury"], 54 ["reassigning the fact-finding responsibility from the judge to the jury"; "reallocate fact-finding from the judge to jury"], 66 ["transferring the fact-finding responsibility from the judge to the jury"].)

But "[i]nstead of transferring responsibility for finding facts from judge to jury, [*Gallardo*] withdraws from the sentencing process entirely any finding of facts beyond 'those facts that were established by virtue of the [prior] conviction itself.' " (*Haden*, *supra*, 49 Cal.App.5th at p. 1103 (conc. opn. of Tucher, J.), quoting *Gallardo*, *supra*, 4 Cal.5th at p. 136.)

Moreover, respondent's argument that this Court rejected Justice Chin's remedy *only* on grounds of the jury trial right plainly mischaracterizes this Court's ruling and omits relevant language. (See AMB 57.) This Court explained 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 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, emphasis added, footnote omitted.) Thus, this Court made absolutely clear that it was considering *not only* the Sixth Amendment jury trial right, but also other applicable constitutional protections and procedural safeguards.[3]

Thus, the present issue is analogous to the question of retroactivity with regards to *People v. Chun* (2009) 45 Cal.4th 1172 (*Chun*), which fully reinstated the "merger" bar for all assaultive felonious crimes. *In re Lucero* (2011) 200 Cal.App.4th 38 (*Lucero*) found *Chun* to be retroactive because "*Chun* directly affects inmates such as [the defendant], who might have been acquitted of murder *but for* application of the felony-murder rule" and, therefore, the rule "impacts the reliability of his murder conviction. [Citation.]" (*Lucero*, *supra*, 200 Cal.App.4th at p. 46, original italics.) Similarly, *Gallardo* directly affects inmates such

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[3] Accordingly, the comment in Justice Brown's concurrence in *Haden* that "Gallardo's laser focus was on vindication of the jury trial right, without a further nod to any underlying motivation relating to reliability" overlooks this portion of the *Gallardo* opinion. (See *Haden*, *supra*, 49 Cal.App.5th at p. 1110 (conc. opn. of Brown, J.); see also ABM 45.) Rather, as Justice Tucher's concurrence correctly notes, this Court's "response to [Justice Chin's] dissent reveals the breadth of interests at stake. (*Id.* at p. 1103 (conc. opn. of Tucher, J.).)

as Milton who would have been acquitted of recidivist sentencing allegations *but for* application of the pre-*Gallardo* rule.

The instant case is also analogous to *Berger v. California* (1969) 393 U.S. 314 (*Berger*). *Berger* addressed retroactivity for a change in law that prohibited states from relying on a preliminary hearing transcript instead of live testimony without proof of a good faith effort to secure the witness's presence at trial. (*Id.* at p. 315.) The United States Supreme Court held the change in law should be made retroactive[4] because "petitioner's inability to cross-examine [the witness] at trial may have had a significant effect on the 'integrity of the fact-finding process.' [Citations.]" (*Ibid.*; see *Johnson*, *supra*, 3 Cal.3d at p. 411.) Here, as in *Berger*, the change in law precluded the use of the preliminary hearing for purposes of determining a fact necessary to the finding of guilt.

Johnson also noted that in *Roberts v. Russell* (1968) 392 U.S. 293 (*Roberts*), the United States Supreme Court retroactively applied *Bruton v. United States* (1968) 391 U.S. 123 to the defendant's case "because a codefendant's admission might lead to an unreliable determination of guilt or innocence when untested by cross-examination." (*Johnson*, *supra*, 3 Cal.3d at p. 411, citing *Roberts*, *supra*, 392 U.S. at p. 293.) Similarly, before

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[4] It appears that in *Berger* the defendant's case may not have been considered final on appeal at the time the change in law went into effect because the change in law occurred 19 days after the defendant's petition for review was denied in this Court. (*Berger*, *supra*, 393 U.S. at p. 315.) Nonetheless, this Court found *Berger*'s reasoning applicable in *Johnson*. (*Johnson*, *supra*, 3 Cal.3d at p. 411.)

Gallardo, the sentencing court was authorized to make findings of fact in the absence of cross-examination. (See *Gallardo*, *supra*, 4 Cal.5th at p. 139 ["To 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 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" (emphasis added)].)

Justice Brown, concurring in *Haden*, responded to *Berger* and *Roberts* by noting that the confrontation clause rule announced in *Crawford, supra,* 541 U.S. 36 was found to not be retroactive. (*Haden*, *supra*, 49 Cal.App.5th at p. 1112 (conc. opn. of Brown, J.), citing *Whorton v. Bocktin* (2007) 549 U.S. 406.)

Crawford, however, only addressed one aspect of the confrontation clause: The use of testimonial hearsay. (See *Crawford*, *supra*, 541 U.S. at p. 53.) Similarly, *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), which only addressed one aspect of the confrontation clause – an expert's use of testimonial hearsay about case-specific facts – was also held to not be retroactive. (*In re Thomas* (2018) 30 Cal.App.5th 744, 765.)

By contrast, factfinding determinations made prior to *Gallardo* occurred in the absence of the right to cross-examination since the sentencing court relied upon the record of conviction to ascertain facts. In other words, there was no opportunity for defendant or defense counsel in the newer offense

to cross-examine witnesses from the prior offense. While a prior opportunity had existed to cross-examine during the preliminary examination on the prior offense, defendant and prior defense counsel at that time had no incentive to cross-examine on facts not relevant to the elements of those charged offenses.

Thus, while *Crawford* and *Sanchez* only addressed one aspect of the confrontation clause in the form of one type of evidence, *Gallardo*, like *Berger*, addressed the *lack* of any right to cross-examination in the context of determinations made by a sentencing court about underlying conduct from a prior offense. Indeed, even Justice Brown, concurring in *Haden*, noted that "[t]he rules in *Roberts* and *Berger* thus remedied a situation where a defendant clearly lacked any ability to confront a witness at trial." (*Haden*, *supra*, 49 Cal.App.5th at p. 1113 (conc. opn. of Brown, J.).) Justice Brown only erred in failing to recognize that *Gallardo* confronted the same issue.

Accordingly, "[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.) "Because 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.)

b. *Gallardo*, Like the Change of Law Addressed in *Johnson*, Is Outcome Determinative

In *Johnson*, this Court found a change in law that operated as a complete *legal* defense to a prior conviction to be fully retroactive. (*Johnson*, *supra*, 3 Cal.3d at p. 414.)

First and foremost, it bears special emphasis that the change in law in *Johnson* functioned as a *legal* defense and *not* as a *factual* defense. *Johnson* addressed a prior conviction for which subsequent changes in Fifth Amendment law operated such "that the Fifth Amendment [was] a complete defense to the prosecutions in question …." (*Johnson*, *supra*, 3 Cal.3d at p. 414 [addressing the retroactivity of *Leary v. United States* (1969) 395 U.S. 6].) It was *not* a question of whether the defendant had *factually* violated the law – acquiring marijuana without paying the applicable tax. (See *Johnson*, *supra*, 3 Cal.3d at p. 409.) Indeed, *Johnson* noted that for purposes of retroactive application, it is immaterial whether the change in law operates as a legal defense or a factual defense: "Since, under our system of justice, *the significance of innocence does not vary with its legal cause*, the present petitioner is as entitled to a retroactive application of [the change in law] as others are entitled to a retrospective right to counsel - - counsel whose job it is to search for *legal as well as factual defenses* for those accused of crime." (*Id.* at p. 417, emphasis added.)

Johnson directly tied the question of retroactivity to the question of the impact of the change of law on the determination

of guilt or innocence. (*Johnson*, *supra*, 3 Cal.3d at pp. 411 ["Fully retroactive decisions are seen as vindicating a right which is essential to a reliable determination of whether an accused should suffer a penal sanction"], 413 ["review of federal retroactivity law reveals that the more directly the new rule in question serves to preclude the conviction of innocent persons, the more likely it is that this rule will be afforded retrospective application"], 416 ["the question before us -- whether [the change in law] should be retroactive -- involves the question of guilt and innocence …"]; see also *In re Thomas, supra,* 30 Cal.App.5th at p. 765 [decisions that " 'implicate[ ] questions of guilt and innocence' " are generally made retroactive].) *Johnson* discussed a number of cases that have been held retroactive in part due to their impact on reliable determinations of guilt or innocence. (*Johnson*, *supra*, 3 Cal.3d at p. 411.)

Here, the change in law effected by *Gallardo* operates as a complete defense – whether construed as factual or legal – for all cases in which the sentencing court needed to resort to factfinding in order to impose a recidivist sentence (rather than identifying those facts necessarily found by the jury or admitted by the defendant). Thus, the question of guilt or innocence – including legal innocence in addition to factual innocence – is not hypothetical. Because Milton and those similarly situated are legally innocent under the law of having suffered a prior conviction for purposes of a recidivist sentence, the prior determinations of "guilt" of having suffered a qualifying prior conviction are no longer reliable. And where a change in law

"vindicate[s] a right which is essential to a reliable determination of whether an accused should suffer a penal sanction," that change in law must be made "[f]ully retroactive." (*Johnson*, *supra*, 3 Cal.3d at p. 411.)

c. The Reliance on the Old Standards by Law Enforcement and the Effect of Retroactive Application on the Administration of Justice Are Outweighed by the Purpose of *Gallardo*

In assessing the reliance on the old standards and the effect on the administration of justice, it is first important to keep in mind the stakes: This is *not* a question of holding a brand new sentencing hearing to determine whether a ten-dollar fine was erroneously imposed. Rather, this is a question of holding a new sentencing hearing to determine whether a multi-year or life sentence was unconstitutionally imposed. Any burden on the justice system pales in comparison to the benefit retroactivity would have for those unconstitutionally sentenced.

It is not disputed that prior to *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." (ABM 58.) This reliance, however, was limited to sentencing hearings – and not every sentencing hearing, but only those involving the specific circumstance where a determination needed to be made whether a prior conviction qualified to support

an increased sentence.

Moreover, while respondent warns of "a costly and disruptive effect on the administration of justice," respondent fails to account for the limited documentation necessary to retroactively apply *Gallardo*. Indeed, except in those instances in which the prior offense was a divisible offense, a court would only need to compare the elements of the out-of-state offense with the elements of its California equivalent. (See *Descamps*, *supra*, 570 U.S. at p. 270 [the elements-centric approach prevents 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"].) Thus, unlike retroactive application of *Sanchez*, which would have required an entirely new trial – and still likely produced the same result – the effect on the administration of justice by retroactively applying *Gallardo* would be quite limited.

In *Johnson*, the purpose of the change in law "strongly militate[d] in favor of retroactivity, and this factor often is conclusive even if there is a considerable burden on the administration of justice. [Citations.]" (*Johnson*, *supra*, 3 Cal.3d at p. 416.) Further, since the change in law in *Johnson* established "a complete defense to the prosecutions in question, there [was] no substantial burden upon the administration of justice in the usual sense of costly retrials with stale evidence and forgetful witnesses." (*Id.* at p. 414.) Similarly, here, *Gallardo*

– which operates as a complete defense where the sentencing court relied on extraneous underlying conduct from the prior offense – will not burden the administration of justice "in the usual sense" but will require only a very limited resentencing hearing.

In *People v. Tenorio* (1970) 3 Cal.3d 89, which invalidated a statute that had precluded courts from striking prior convictions unless the prosecution had filed a motion to strike, this Court stated the change in law should be retroactive because it "relates only to sentencing and will not require any retrials." (*Id.* at p. 95, fn. 2; see *Haden*, *supra*, 49 Cal.App.5th at p. 1105 (conc. opn. of Tucher, J.).)

Respondent also argues, with respect to both state and federal tests, that this Court should reach its decision "in a way that recognizes the fundamental importance of preserving the finality of judgments…." (ABM 26; see ABM 31.) While finality may have its benefits to a criminal justice system,[5] notions of finality should not interfere with the correction of lengthy and life-long sentences that were imposed pursuant to unconstitutional procedures.

Thus, "the prosecutors' reliance on the former law and the burden retroactivity will place upon the judicial system" is not outweighed by "the purpose of the *Gallardo* rule, which ensures

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[5] The idea that current notions of finality benefit society and the criminal justice system is not without its challengers. (See, e.g., Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences* (2014) 4 Wake Forest J. L. & Pol'y 151; Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality"* (2013) 2013 Utah L. Rev. 561.)

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; see *Johnson*, *supra*, 3 Cal.3d at p. 410.)

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

Respondent argues that the unauthorized sentence exception may not be used to retroactively apply *Gallardo* because the sentence would only be considered unauthorized upon a determination first that *Gallardo* is fully retroactive. (ABM 60-61.) Respondent is mistaken.

The change in law at issue here was not simply a statutory change in the law, such as recent legislation that has eliminated certain enhancements or made them discretionary. Rather, the change in law here recognized that the prior applicable rule of law was inconsistent with Sixth Amendment principles. (See *Gallardo*, *supra*, 4 Cal.5th at p. 124.)

Accordingly, the factual findings previously made to support imposition of punishment under recidivist sentencing schemes were in violation of the Sixth Amendment. Consequently, those sentences were unauthorized under the Sixth Amendment and may now be retroactively remedied. (*Brown*, *supra*, 45 Cal.App.5th at p. 714.)

Separately and additionally, the previously imposed sentences were unauthorized under *Apprendi* (Opening Brief on the Merits ("OBM") 39-40); respondent, however, neglected to address this argument.

Apprendi explicitly stated the boundaries of its ruling:

> The judge's role in sentencing is constrained *at its outer limits* by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than otherwise legally proscribed were by definition "elements" of a separate legal offense.

(*Apprendi*, *supra*, 530 U.S. at p. 483, fn. 10, emphasis added.)

Thus, even under *Apprendi*, there was no room for judicial factfinding that extended beyond identifying "the facts alleged in the indictment and found by the jury." (*Apprendi*, *supra*, 530 U.S. at p. 483, fn. 10.)

In *Wilson v. Knowles*, *supra*, 638 F.3d 1213, the Ninth Circuit, while acknowledging some reasonable disagreement about the boundaries of *Apprendi*, nevertheless found that "[i]t would be unreasonable to read *Apprendi* as allowing a sentencing judge to find the kinds of disputed facts at issue [in the case before it] – such as the extent of the victim's injuries and how the accident occurred." (*Id.* at p. 1215, footnote omitted.) The Ninth Circuit explained, "The judge's fact-finding seven years after the 1993 conviction extended beyond any reasonable interpretation of the prior conviction exception." (*Ibid.*) The court further elaborated, "It is utterly unreasonable to hold that what a judge

in 2000 imagines might have happened in 1993 is the same as a conviction in 1993." (*Id.* at p. 1216.) To emphasize the point even further, the court explained, "No reasonable judge could hold that the *Apprendi* exception was satisfied by a California court, 7 years after the criminal proceedings were completed, making a guess as to what could have been proved if the 1993 prosecution of [the defendant] had been different." (*Ibid.*)

Moreover, this Court, in previously discussing *Apprendi*, noted that " 'the relevant inquiry' " under *Apprendi* is whether " 'the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict[.]' If so, regardless of whether a state labels the fact a sentencing factor or an element of an offense, the Sixth Amendment requires that it be proven to a jury beyond a reasonable doubt." (*People v. Anderson* (2009) 47 Cal.4th 92, 106 (*Anderson*), quoting *Apprendi*, *supra*, 530 U.S. at p. 495.)

Given this understanding of *Apprendi*, it is plain that factfinding by the sentencing court (as opposed to identification of facts necessarily found by the jury or admitted by the defendant) violated the Sixth Amendment jury trial right *under Apprendi*. Thus, any sentence imposed after *Apprendi* based on factfinding by the sentencing court was unauthorized under Sixth Amendment jury trial right as set forth in *Apprendi*.

C. 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

Because *Gallardo* and *Descamps* were derivative of *Taylor* and *Apprendi*, the test set forth in *In re Gomez* (2009) 45 Cal.4th 650 (*Gomez*) supports retroactive application of *Gallardo* to those cases not yet final at the time *Taylor*, or alternatively *Apprendi*, was decided. (OBM 40.)

Respondent argues *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." (ABM 34, citing *Taylor*, *supra*, 495 U.S. at pp. 578, 601-602.) *Taylor*'s explanation, however, that the categorical approach avoids findings by trial court which a defendant potentially "could . . . challenge . . . as abridging his right to a jury trial" (*Taylor*, *supra*, 495 U.S. at p. 601) plainly illustrates that Sixth Amendment concerns were considered in the United States Supreme Court's decision to adopt a categorical approach.

Indeed, even *Descamps* stated one of the grounds for its decision in *Taylor* was 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.) Accordingly, respondent's argument as to the reasoning underlying *Taylor* is undercut by the United States Supreme Court's own explanation of its

reasoning underlying *Taylor*.

Similarly, regarding *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.)

Indeed, as noted previously, *Apprendi* explicitly stated the boundaries of its ruling: "The judge's role in sentencing is constrained *at its outer limits* by the facts alleged in the indictment and found by the jury." (*Apprendi*, *supra*, 530 U.S. at p. 483, fn. 10, emphasis added.) Thus, any factfinding beyond identifying "the facts alleged in the indictment and found by a jury" was unconstitutional under *Apprendi*.

Further, as discussed previously (see Argument I.C, *ante*), the Ninth Circuit has previously found that an interpretation of *Apprendi* as allowing for factfinding is "unreasonable." (*Wilson v. Knowles*, *supra*, 638 F.3d at p. 1215.)

For these reasons, even *Descamps* acknowledged 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.) For the same reasons, *Gallardo* was dictated by prior case law and must be found retroactively applicable to cases that became final after *Taylor* or, alternatively, after *Apprendi*.

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

Gallardo is alternatively retroactive to final judgments under the federal *Teague* test because *Gallardo* is a substantive rule of criminal law or, alternatively, because it is a watershed rule of criminal procedure. (OBM 46.)

1. *Gallardo* Is a Substantive Rule Because It Alters the Range of Conduct, Prohibits Punishment for a Class of Defendants, and Controls the Outcome of the Case

For the same reasons argued as to why *Gallardo* is substantive under the state test, *Gallardo* is also substantive under the federal test.

Respondent argues *Gallardo* cannot be considered substantive because "this Court has recognized that *Apprendi* – which *Gallardo* extended – announced a procedural rule." (ABM 37, citing *Anderson*, *supra*, 47 Cal.4th at p. 118; see also *Jones v. Smith* (9th Cir. 2000) 231 F.3d 1227, 1237.) *Anderson*'s assertion that *Apprendi* was procedural relied upon a holding by the United States Supreme Court that the rule announced in *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*) – which held any aggravating circumstances necessary for the imposition of the death penalty needed to be found by a jury – was procedural. (*Anderson*, *supra*, 47 Cal.4th at p. 118, citing *Schriro*, *supra*, 542 U.S. 348.)

But *Gallardo* specifically rejected the idea that its holding merely amounted to the allocation of decision-making authority;

rather, it explained that the prohibition on factfinding applies to *both* judges *and* juries. (*Gallardo*, *supra*, 4 Cal.5th at pp. 138-139.)

Additionally, respondent's attempt to distinguish this case from *Montgomery v. Louisiana* (2016) 577 U.S. ___ [136 S.Ct. 718; 193 L.Ed. 2d 599] (*Montgomery*) – which addressed retroactive application of *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*) – fails because the class created by *Montgomery* is analogous to the class created by *Gallardo*. Respondent argues that, unlike *Montgomery,* a class cannot be defined as having been created under *Gallardo* "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." (ABM 42.) Respondent's distinction is incorrect.

Miller held "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. [Citation.]" (*Miller*, *supra*, 567 U.S. at p. 479.) *Montgomery*, in finding *Miller* substantive, characterized the class of persons affected by *Miller* as "juvenile offenders whose crimes reflect the transient immaturity of youth. [Citation.]" (*Montgomery*, *supra*, 136 S.Ct. at p. 734.) *Miller* had used that phrase – " 'transient immaturity' " – to distinguish some juvenile offenders from the " 'rare juvenile offender whose crime reflects irreparable corruption.' " (*Miller*, *supra*, 467 U.S. at pp. 479-480, citations omitted.)

Accordingly, in defining the class of persons affected by *Miller*, *Montgomery* employed reasoning analogous to the

reasoning employed herein to define the class of persons affected by *Gallardo*. *Miller* created a class of persons because the life-without-parole sentence was only constitutional when imposed for some crimes – those reflecting "irreparable corruption" – and was unconstitutional when imposed for other crimes – those reflecting "the transient immaturity of youth." (*Montgomery*, *supra*, 136 S.Ct. at p. 734.) Similarly, *Gallardo* created a class of persons because the recidivist sentence was only constitutional when imposed for some crimes – those crimes necessarily involving conduct corresponding to the elements of qualifying California offenses – and was unconstitutional when imposed for other crimes – those that do not necessarily involve conduct corresponding to the elements of qualifying California offenses.

Respondent's criticism of the Ninth Circuit's decision in *Allen v. Ives* (9th Cir. 2020) 950 F.3d 1184 (*Allen*) also fails. (See ABM 42-44.) *Allen* found *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.) Respondent directed this Court to the dissenting opinion in *Allen* that asserted "*Descamps* and *Mathis* 'regulate[d] only the manner of determining a defendant's qualification for a sentencing enhancement.' " (ABM 43, quoting *Allen*, *supra*, 950 F.3d at p. 1192 (dis. opn. of Callahan, J.), quotation marks omitted by respondent.) As discussed previously, however, by changing what conduct could be considered – from extraneous conduct underlying the prior offense to conduct

necessary to the prior offense – *Gallardo* changed and altered the range of punishable conduct.

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

Alternatively, even if this Court concludes *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.)

Respondent argues *Gallardo* did not announce a watershed rule of criminal procedure because "it is not a rule that is necessary to prevent an impermissibly large risk of inaccurate conviction or unmerited punishment." (ABM 44.) Respondent is mistaken.

As this Court has previously noted, retroactivity under the federal test depends upon the "practical result" of the change in law. (*Trujeque*, *supra*, 61 Cal.3th at p. 251.) Here, retroactive application of the rule announced in *Gallardo* – the prohibition of reliance on conduct underlying but extraneous to the prior offense – has the practical effect of eliminating recidivist sentences for defendants whose past conduct was not constitutionally proven to qualify for those recidivist sentences. Because there are a number of defendants, such as Milton, who are serving a sentence based on extraneous prior conduct that sentencing courts can no longer rely upon, retroactive application is necessary to prevent further incarceration premised on unconstitutional grounds. In other words, Milton and others

similarly situated have been "improperly deprived of [their] liberty" such that retroactive application is the only appropriate remedy. (*Brown*, *supra*, 45 Cal.App.5th at p. 712.)

II. The Remedy

Respondent argues that, upon a determination that *Gallardo* applies retroactively, the matter should be remanded " '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." (AMB 61, quoting *Gallardo*, *supra*, 4 Cal.5th at pp. 136, 138.)

As set forth below, because – even under a narrow reading of *Gallardo* – neither of Milton's prior Illinois convictions qualifies as a violent or serious felony, remand is unnecessary to allow the sentencing court to hunt for "stipulated facts [that] will demonstrate firearm use or some other fact that qualifies his conviction as serious or violent." (ABM 62.)

A. The Armed Robbery

Milton was convicted by a jury of armed robbery. (*People v. Milton* (2019) 42 Cal.App.5th 977, 982 (*Milton*).) Because robbery in Illinois does not require a specific intent to permanently deprive the owner of the property, an Illinois robbery conviction by itself does not qualify as a serious or violent felony in California. (*Id.* at p. 983; see OBM 15, fn. 4.) The robbery could, however, qualify as a serious or violent felony if a gun was

personally used. (Pen. Code, § 1192.7, subd. (c)(1).) At the time of Milton's Illinois armed robbery conviction, however, armed robbery could be committed by merely *possessing* a gun during the robbery. (Former Ill. Rev. Stats., ch. 38, § 18-2(a).)

Accordingly, the sentencing court in the instant matter found that "it could look 'beyond the record … to determine what really happened.' " (*Milton*, *supra*, 42 Cal.App.5th at p. 984.) Upon retroactive application of *Gallardo*, however, the sentencing court would be restricted to identifying what the jury *necessarily* found in rendering its verdict.

As *Descamps* noted, and as this Court quoted, " 'the only facts the court can be sure the jury so found are those constituting elements of the offense.' " (*Gallardo*, *supra*, 4 Cal.5th at p. 2017, quoting *Descamps*, *supra*, 540 U.S. at pp. 269-270.) Thus, because the elements of an Illinois armed robbery do not satisfy the elements of a serious or violent felony, any remand for further factfinding on this conviction is unnecessary.

B. The Simple Robbery

Milton entered a plea of guilty to the simple robbery. (*Milton*, *supra*, 42 Cal.App.5th at p. 982.) Again, because robbery in Illinois does not require a specific intent to permanently deprive the owner of the property, an Illinois robbery conviction by itself does not qualify as a serious or violent felony in California. (*Id.* at p. 983; see OBM 15, fn. 4.) Thus, again, the robbery only qualifies as a serious or violent felony if a gun was personally used. (Pen. Code, § 1192.7, subd. (c)(1).)

The prosecutor at the Illinois sentencing hearing "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*.) The Illinois sentencing court said "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 … .' " (*Id.* at pp. 982-983, brackets and ellipses added by *Milton*.) In addressing Milton directly, however, the sentencing court asserted that Milton "held a gun – a loaded gun – upon an individual." (*Id.* at p. 983.)

Even under a narrow reading of *Gallardo*, however, the sentencing court in the instant case would be limited to the stipulated facts. Because the stipulated facts only reflected possession of a firearm as opposed to personal use of a firearm, the prior conviction does not in any manner qualify as a prior serious or violent felony.

If the stipulations may not be considered under *Gallardo*, remand is also unnecessary because Illinois robbery does not qualify as a serious or violent felony in California.

C. Remand Was Only Necessary Under *Gallardo* To Determine *Which* Offense the Defendant Had Committed

In *Gallardo*, remand was appropriate so that the court could determine *which* offense 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.)

The prior convictions here do not present the same issue. Rather, because the facts necessarily established by the jury conviction and the facts necessarily established by the guilty plea (even if the stipulated facts are included) do not qualify either prior offense as a serious or violent felony, remand is unnecessary here.

III. Respondent's Forfeiture Argument – Raised for the First Time – Is Forfeited and Without Merit

Respondent argues that "[a]s 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." (AMB 63, footnote omitted.) Respondent asserted, therefore, that Milton "waived any argument that the evidence did not establish the armed robbery was a strike." (AMB 63.)

First, respondent's claim of forfeiture is itself forfeited due to respondent's failure to raise this issue before the Court of Appeal or in the answer to the petition for review. (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 559, fn. 11 [finding issue

waived where party failed to raise the issue "in the Court of Appeal or in its answer to the petition for review"]; see Cal. Rules of Court, rules 8.500(c)(1), 8.516(b)(1).) Respondent failed to raise this issue even though *both* priors were referenced in Milton's original habeas petition filed in this Court on December 29, 2017. (Petition for Writ of Habeas Corpus, p. 4 ["Due to the recent decision by this Court in *People v. Gallardo*, and by the United States Supreme Court in *Descamps v. United States*, Petitioner's Illinois priors cannot be used as 'strikes' under California law" (italics added)].) Indeed, in respondent's previous briefings, respondent conceded remand was appropriate on *both* prior strike allegations upon a determination that *Gallardo* is retroactive. (See Return, pp. 40-45; Informal Response to original habeas filing in this Court (S246213), pp. 31-34.)

Second, the issue was preserved because, as respondent acknowledged, Milton's sentencing brief "alleged both convictions were not strikes." (ABM 64, citing 1CT 82-83.) While admittedly the arguments centered on the simple robbery, the sentencing court made a *finding* that *both* prior convictions qualified as strikes. (2RT 358.) Milton did answer affirmatively when asked to admit that the armed robbery was a serious felony for purposes of Penal Code section 667, subdivision (a)(1) (RT 337), but he did not make the same admission for purposes of it qualifying as a strike.

Third, there was no forfeiture by Milton because California law at the time permitted a finding that the armed robbery qualified as a strike. (See *In re Madrid* (1971) 19 Cal.App.3d 996,

998 [defendants entitled to withdraw guilty plea on habeas after a change in kidnapping law was determined to apply retroactively to final cases].) Thus, any argument would have been futile, just as Milton's arguments regarding the simple robbery conviction proved futile. (See *People v. Welch* (1993) 5 Cal.4th 228, 237 ["Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence"].)

People v. Black (2007) 41 Cal.4th 799 (*Black*) is illustrative. In *Black*, the court considered whether the Sixth Amendment required a jury to find facts necessary to sentence a defendant to the aggravated term under the determinate sentencing law. (*Id.* at p. 805.) This function had been previously undertaken by a judge, not the jury. (*Ibid.*) Even though *Apprendi* had been decided at the time of Black's sentencing, the court found competent counsel could not have reasonably anticipated the United States Supreme Court's decision in *Cunningham v. California* (2007) 549 U.S. 270, which held California's determinate sentencing law was unconstitutional by allocating to a judge instead of a jury the factfinding necessary to support an upper term sentence. (*Black*, *supra*, 41 Cal.4th at p. 805.) This was because at the time of the defendant's trial, no California case supported the proposition that *Apprendi* required a jury trial on aggravating circumstances, which, under the determinate sentencing law, were to be decided by the judge. (*Id.* at p. 811.) Therefore, the court found the issue had not been forfeited. (*Id.* at

pp. 811-812.)

Additionally, upon a determination that the original sentence was unauthorized, no objection was required to preserve the issue because a claim of an unauthorized sentence cannot be forfeited. (*People v. Scott* (2015) 9 Cal.4th 331, 354.)

Lastly, "[a]n appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. [Citations.]" (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

CONCLUSION

With *Gallardo*, this Court preserved a defendant's right to a jury trial with all of its accompanying constitutional protections and procedural safeguards when legally extraneous conduct that was not previously charged, let alone litigated, is alleged as the basis for a recidivist sentence. Yet incarcerated individuals such as Milton are still suffering the consequences of sentences – lengthy and in some cases life-long – previously imposed on unconstitutional grounds. This Court has the opportunity to correct that injustice. It is respectfully requested that this Court take that opportunity.

Respectfully submitted,

Date: October 16, 2020

/S/ BRAD KAISERMAN
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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 10,677 words, including footnotes, which is more 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: October 16, 2020

/S/ BRAD KAISERMAN
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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 REPLY BRIEF ON THE MERITS**.

On October 16, 2020, following ordinary business practice, the above document was placed in a sealed envelope for collection and mailing via United States Mail, addressed as follows:

Sherri R. Carter, Clerk of the Court
Los Angeles County Superior Court
(For Retired Judge Ronald J. Slick)
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Los Angeles, CA 90012

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This proof of service is executed in Los Angeles, California, on October 16, 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