

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

WILLIAM MILTON

Defendant and Appellant.

Cal. Supreme Court

Case No. S259954

Second District Court of

Appeal Case No. B297354

Los Angeles County Superior

Court Case No. TA039953

**BRIEF AMICUS CURIAE BY THE OFFICE OF THE STATE PUBLIC
DEFENDER IN SUPPORT OF PETITIONER WILLIAM MILTON**

Second District Court of Appeal, Case No. B297354
Los Angeles County Superior Court, Case No. TA039953
The Honorable Ronald J. Slick, Judge

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS.....	9
INTRODUCTION	10
ARGUMENT	12
I. BROAD PROSECUTORIAL AND JUDICIAL DISCRETION HAS CONTRIBUTED TO DISPROPORTIONATE THREE STRIKES SENTENCES FOR AFRICAN AMERICAN MEN.....	12
A. Implicit Bias and Inequality in the Criminal Justice System	14
B. Prosecutorial and Judicial Discretion and Racial Disparity Under the Three Strikes Law.....	17
II. <i>GALLARDO</i> IS RETROACTIVE UNDER <i>JOHNSON</i> BECAUSE IT REINS IN SENTENCING DISCRETION AND VINDICATES THE RIGHT TO A RELIABLE SENTENCING.....	22
III. <i>TEAGUE</i> IS AN INAPPROPRIATE POST-CONVICTION RETROACTIVITY STANDARD IN CALIFORNIA COURTS.....	31
CONCLUSION.....	38
CERTIFICATE OF COUNSEL.....	39

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>Batson v. Kentucky</i> (1986) 476 U.S. 79.....	32
<i>Berger v. California</i> (1969) 393 U.S. 314.....	25
<i>Brady v. Maryland</i> (1963) 373 U.S. 83.....	35
<i>Brown v. Allen</i> (1953) 344 U.S. 443.....	32, 33
<i>Bruton v. United States</i> (1968) 391 U.S. 123.....	26
<i>Chaidez v. United States</i> (2013) 568 U.S. 342.....	33
<i>Chambers v. Mississippi</i> (1973) 410 U.S. 284.....	26
<i>Crawford v. Washington</i> (2004) 541 U.S. 36	26, 34
<i>Danforth v. Minnesota</i> (2008) 552 U.S. 264	33, 34
<i>Leary v. United States</i> (1969) 395 U.S. 6.....	23
<i>Mathis v. United States</i> (2016) __ U.S. __, 136 S.Ct. 2243	29
<i>Padilla v. Kentucky</i> (2009) 559 U.S. 356.....	33
<i>Ramos v. Louisiana</i> (2020) __ U.S. __, 140 S.Ct. 1390	26, 33, 35

<i>Ring v. Arizona</i> (2002) 536 U.S. 584.....	33
<i>Roberts v. Russell</i> (1968) 392 U.S. 293	26
<i>Schriro v. Summerlin</i> (2004) 542 U.S. 348.....	33
<i>Solem v. Stumes</i> (1984) 465 U.S. 638	35
<i>Teague v. Lane</i> (1989) 489 U.S. 288	31, 32, 35
<i>Whorton v. Bockting</i> (2007) 549 U.S. 406.....	33

State Cases

<i>B.B. v. County of Los Angeles</i> (2020) 10 Cal.5th 1.....	11
<i>Ex parte Lee</i> (1918) 177 Cal. 690	27
<i>In re Harris</i> (1993) 5 Cal.4th 813.....	27
<i>In re Joe R.</i> (1980) 27 Cal.3d 496	23, 26
<i>In re Johnson</i> (1970) 3 Cal.3d 404	passim
<i>In re Milton</i> (2019) 42 Cal.App.5th 977	18, 19, 25
<i>In re Thomas</i> (2018) 30 Cal.App.5th 744.....	28
<i>People v. Gallardo</i> (2017) 4 Cal.5th 120.....	passim

<i>People v. Guillen</i> (1994) 25 Cal.App.4th 756.....	27
<i>People v. Sanchez</i> (2016) 63 Cal.4th 665.....	28
<i>People v. Scott</i> (1994) 9 Cal.4th 331.....	27
<i>People v. Tenorio</i> (1970) 3 Cal.3d 89	29
<i>People v. Trujillo</i> (2006) 40 Cal.4th 165.....	19

State Statutes

Govt. Code § 15420 (b)	9
Pen. Code § 667 (g)	14
§ 2933.5 (a)(1).....	14

Constitutional Provisions

U.S. Const. 6th Amend.	passim
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Other Authorities

Assem. Bill No. 242 (2019-2020 Reg. Sess.)	17
No. 242 (2019-2020 Reg. Sess.), § 1 (a)(3).....	15, 17
No. 242 (2019-2020 Reg. Sess.), § 1 (a)(5).....	16, 17
No. 2542 (2019-2020 Reg. Sess.), § 2 (a)	15
Balko, <i>There’s overwhelming evidence that the criminal justice system is racist. Here’s the proof,</i> The Washington Post (June 10, 2020) < https://www.washingtonpost.com/graphics/2020/ opinions/systemic-racism-police-evidence-criminal- justice-system/ >.....	15

Bennett & Plaut, <i>Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice</i> (2018) 51 UC Davis L. Rev. 745.....	17
Brown & Jolivet, <i>A Primer: Three Strikes - The Impact After More Than a Decade</i> (Oct. 2005) Legislative Analyst's Office < https://lao.ca.gov/2005/3_strikes/3_strikes_102005.htm >	13, 18
California Department of Corrections and Rehabilitation, <i>Offender Data Points</i> (Oct. 2020) < https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2020/10/201906-DataPoints.pdf >	13
Chen, <i>The Liberation Hypothesis and Racial and Ethnic Disparities in the Application of California's Three Strike Law</i> (2008) 6 J. of Ethnicity in Crim. Justice 83	passim
Chen et al., <i>General Effects of Proposition 36 on Racial and Ethnic Disparities in Three Strikes Sentencing</i> (Nov. 11, 2020) < https://ssrn.com/abstract=3729034 >	22
Chen, <i>In the Furtherance of Justice, Injustice, or Both? A Multilevel Analysis of Courtroom Context and the Implementation of Three Strikes</i> , (April 2014) vol. 31	14, 27
Chen, <i>Three Strikes Legislation in African Americans and the Criminal Justice System: An Encyclopedia</i> . (Jones-Brown, Frazier & Brooks edits., 2014)	12, 14
Dagenais et al., <i>Sentencing Enhancements and Incarceration: San Francisco, 2005-2017</i> (Oct. 17, 2019) Stanford Computational Policy Lab < https://policylab.stanford.edu/media/enhancements_2019-10-17.pdf >	13, 20

Davis, et al., In Understanding the Public Health Implications of Prisoner Reentry in California: State-of-the-State Report (2011)	36
Deutsch, <i>Federalizing Retroactivity Rules: The Unrealized Promise of Danforth v. Minnesota and the Unmet Obligation of State Courts to Vindicate Federal Constitutional Rights</i> (2016) 44 Fla. St. U. L. Rev. 53.....	31, 34
Entzeroth, <i>Reflections on Fifteen Years of the Teague v. Lane Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine</i> (2005) 35 N.M. L. Rev. 161.....	31
Jin & Wohlleben, <i>Three Strikes Analysis: Demographic Characteristics of Strike Offenders</i> , Claremont McKenna College: Rose Institute of State and Local Government (Apr. 26, 2016) < http://s10294.pcdn.co/wp-content/uploads/2016/07/Three-Strikes-Racial-and-Ethnic-Analysis.pdf >	22
Kang et al., <i>Implicit Bias in the Courtroom</i> (2012) 59 UCLA L. Rev. 1124	14, 15, 16
Lasch, <i>The Future of Teague Retroactivity, or "Redressability," After Danforth v. Minnesota: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings</i> (2009) 46 Am. Crim. L. Rev. 1	32, 35
Levinson, Bennett, & Hioki, <i>Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes</i> (2017) 69 Fla. L. Rev. 63.....	16

McLaughlin et al., *The Economic Burden of Incarceration in the U.S.* (July 2016) Concordance Institute for Advancing Social Justice: George Warren Brown School of Social Work <<https://joinnia.com/wp-content/uploads/2017/02/The-Economic-Burden-of-Incarceration-in-the-US-2016.pdf>>..... 36

The Pew Charitable Trusts, *Collateral Costs: Incarceration’s Effect on Economic Mobility* (2010) <https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf>..... 36

Rabinowitz et al., *The California Criminal Justice Data Gap* (Apr. 1, 2019) Stanford Law School: Stanford Criminal Justice Center <https://www-cdn.law.stanford.edu/wp-content/uploads/2019/04/SCJC-DatagapReport_v07.pdf> 19, 20

Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?* (2009) 84 Notre Dame L. Rev. 1195..... 16

Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases* (1985) 19 Law & Soc’y Rev. 587 15

Schmitt, *Plea Bargaining Favors Whites as Blacks, Hispanics Pay Price*, San Jose Mercury News (Dec. 8, 1991) 16

INTEREST OF AMICUS

The Office of the State Public Defender (OSPD) represents indigent persons in their appeals from criminal convictions in both capital and non-capital cases and has been instructed by the Legislature to “engage in efforts for the purpose of improving indigent defense.” (Govt. Code, §15420, subd. (b).) The OSPD has a longstanding interest in the fair and uniform administration of California criminal law and in the protection of the constitutional and statutory rights of those who have been convicted of crime.

The OSPD is particularly concerned with the retroactive application of *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*) because of the racially discriminatory impact of the Three Strikes law. Black men make up an extraordinarily disproportionate number of those sentenced under the Three Strikes law. The unreliable judicial factfinding that *Gallardo* prohibited helped perpetuate the racially discriminatory outcomes that have resulted from decades of sentencing under the Three Strikes law. Proper resolution of this issue is thus critical to OSPD’s concern with the fair and orderly administration of the criminal justice system in California.

INTRODUCTION

Gallardo recognized that the Sixth Amendment right to a jury trial bars a sentencing court from making its own findings regarding whether the defendant's prior conduct would be a serious felony under the Three Strikes law. (*Gallardo, supra*, 4 Cal.5th at p. 138.) *Gallardo* also rejected the idea that a sentencing jury could instead make the requisite factfindings about prior convictions without the constitutional due process protections of a criminal trial. Such a proposal "might involve a jury, but it would not be much of a trial. [Fn. omitted]." (*Id.* at p. 139.) Following *Gallardo*, a sentencing court may only recognize the fact of the prior conviction and "the facts that were necessarily found in the course of entering the [prior] conviction." (*Id.* at p. 134.) At issue in this case is the retroactivity of *Gallardo*.

Petitioner presents several compelling arguments why *Gallardo* should apply retroactively. This brief focuses on one: *Gallardo* is retroactive under the California retroactivity standard articulated in *In re Johnson* (1970) 3 Cal.3d 404 (*Johnson*) because it promotes reliable sentencing. This Court has long recognized that new standards vindicating the right to a reliable determination of whether an accused should suffer a penal sanction are fully retroactive. (*Id.* at p. 410.) *Gallardo* is such a rule, not only for the compelling reasons articulated by this Court in *Gallardo* itself, and by the petitioner in his briefing, but also for another critical reason: the prior rule allowed implicit racial bias to infect sentencing decisions. By prohibiting

unreliable judicial factfinding, *Gallardo* curtails the wide sentencing discretion under the Three Strikes law – discretion which has contributed to the disparate and unreliable sentencing of Black men.

A 2006 study revealed that Black men comprised more than a third of those sentenced under the Three Strikes law and nearly half of all people sentenced for third-strike offenses. Even more troubling, a Black man charged under the Three Strikes law was 40% more likely to receive a third-strike sentence than a similarly-situated White man, even when controlling for legally relevant factors such as the offense of conviction, prior criminal history, and parole status. One reason for this jarring disparity is the broad discretion prosecutors and courts have under the Three Strikes law. By limiting sentencing discretion and requiring that sentencing facts be proven at trial or through a knowing and voluntary plea, *Gallardo* enhances the reliability of Three Strikes sentencing and the integrity of the factfinding process while offering some relief from the historical disparate impact of the Three Strikes law. *Gallardo* is no panacea for the inequities of the criminal justice system, but it is a start and a partial response to the question, “How are we to ensure that ‘the promise of equal justice under law is, for all our people, a living truth’? [citation.]” (*B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 20.)

ARGUMENT

I. BROAD PROSECUTORIAL AND JUDICIAL DISCRETION HAS CONTRIBUTED TO DISPROPORTIONATE THREE STRIKES SENTENCES FOR AFRICAN AMERICAN MEN

The Three Strikes law has had a disparate impact on African American men, who comprised only 3 percent of California's adult population in 2006, but nearly half of those serving third-strike sentences,¹ and over a third of those serving second-strike sentences.² This overrepresentation was significantly higher than their overrepresentation among all California state prisoners.³ Moreover, since over a quarter of California prisoners were serving second- or third-strike sentences, overrepresentation in this cohort contributed significantly to overrepresentation among all state prisoners.

¹ Chen, *Three Strikes Legislation in African Americans and the Criminal Justice System: An Encyclopedia*. (Jones-Brown, Frazier & Brooks eds., 2014) p. 553 (*Three Strikes Legislation*) (Black men were 44 percent of people serving third-strike sentences in 2006).

² Chen, *The Liberation Hypothesis and Racial and Ethnic Disparities in the Application of California's Three Strike Law* (2008) 6 J. of Ethnicity in Crim. Justice 83, 89. (*Liberation Hypothesis*) (in 2006, Black people made up 34 percent of prisoners serving second-strike sentences). While there is no data tracking the gender of those serving second- and third-strike sentences, women constitute a small minority of California prisoners, in general. (*Id.* at p. 91 [6.7% of all California prisoners in 2006].)

³ In 2006, 28.7% of California prisoners were African American. (*Liberation Hypothesis, supra*, 6 J. of Ethnicity in Crim. Justice at p. 91.)

(*Liberation Hypothesis, supra*, 6 J. of Ethnicity in Crim. Justice at p. 91.)⁴

A 2019 study of 8,000 felony sentencing in San Francisco from 2005 to 2017, concluded that sentencing enhancements (principally under the Three Strikes law) accounted for 1 out of every 4 years served in jail and prison. (Dagenais et al., *Sentencing Enhancements and Incarceration: San Francisco, 2005-2017* (Oct. 17, 2019) Stanford Computational Policy Lab <https://policylab.stanford.edu/media/enhancements_2019-10-17.pdf> [as of Oct. 27, 2020] at p. 1 (*Sentencing Enhancements and Incarceration*)).) The study also examined race disparities in the imposition of sentencing enhancements between 2011 and 2017 and found that Black people accounted for 65% of total base time served and 80% of total enhancement time served – vastly disproportionate figures considering that only 6% of San Francisco is Black. (*Id.* at p. 10.) The study concluded that sentencing enhancements “pronounce the already large [racial] disparities in sentencing.” (*Ibid.*)

⁴ The ratio of all California state prisoners serving Three Strikes sentences has grown over time. In 2004, one study found that just over 25% of California state prisoners were serving Three Strike law sentences. (Brown & Jolivette, *A Primer: Three Strikes - The Impact After More Than a Decade* (Oct. 2005) Legislative Analyst’s Office <https://lao.ca.gov/2005/3_strikes/3_strikes_102005.htm> [as of Nov. 12, 2020] (*Three Strikes Primer*)).) By 2016, that number had grown to 31.5%. (California Department of Corrections and Rehabilitation, *Offender Data Points* (Oct. 2020) at p. 10. <<https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2020/10/201906-DataPoints.pdf>> [as of Nov. 6, 2020].)

As noted above, the disparate treatment of Black men is even more extreme among those receiving the most severe sentences under the Three Strikes law. In 2006, for example, nearly *half* of all men serving third-strike sentences were Black.⁵ Even when controlled for seriousness of the offense of conviction, prior criminal history, and parole status, a Black man convicted of a third-strike eligible offense had a 40 percent higher odds of receiving a third-strike sentence than a similarly-situated White man.⁶ That is, by virtue of his race, a Black man was substantially more likely than a White man to have his sentence increased to 25 years to life for a third strike and to have his custody credits reduced by 30%. (Pen. Code, §§ 667, subd. (g), 2933.5, subd. (a)(1).)

A. Implicit Bias and Inequality in the Criminal Justice System

Empirical research has exposed the role implicit bias⁷ plays in the racial disparities of the criminal justice system as scholars,

⁵ *Three Strikes Legislation, supra*, at p. 553.

⁶ Chen, *In the Furtherance of Justice, Injustice, or Both? A Multilevel Analysis of Courtroom Context and the Implementation of Three Strikes*, (April 2014) vol. 31, no. 2, Justice Q. 274 (*In the Furtherance of Justice*).

⁷ In contrast to explicit biases, which are consciously accessible and endorsed as appropriate, implicit biases are not consciously accessible and may even be offensive to the holder. (Kang et al., *Implicit Bias in the Courtroom* (2012) 59 UCLA L. Rev. 1124, 1132 (*Implicit Bias in the Courtroom*).)

advocates, and courts begin to understand the pernicious threat it poses to the promise of equal justice for all. The California legislature acknowledged the deleterious effects of implicit bias on the fairness of our criminal justice system when it enacted the California Racial Justice Act of 2020. Among its legislative findings was that “[d]iscrimination undermines public confidence in the fairness of the state’s system of justice and deprives Californians of equal justice under law.” (Assem. Bill No. 2542, (2019-2020 Reg. Sess.) § 2, subd. (a).)

For Black men, implicit bias makes the criminal justice system less fair and more punitive at virtually every stage. (See Assem. Bill No. 242 (2019-2020 Reg. Sess.), § 1, subd. (a)(3), [“most people have an implicit bias that disfavors African Americans and favors Caucasian Americans, resulting from a long history of subjugation and exploitation of people of African descent.”].) Implicit bias that associates Blackness with criminality can influence the decision to stop, search, and detain. (*Implicit Bias in the Courtroom*, *supra*, 59 UCLA L. Rev. at pp. 1135-1139; see also Balko, *There’s overwhelming evidence that the criminal justice system is racist. Here’s the proof*, The Washington Post (June 10, 2020) [collecting studies of bias in policing] <<https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/>> [as of Nov. 6, 2020].)

Implicit bias has also long affected charging and plea bargain decisions. (See, e.g., *Implicit Bias in the Courtroom*, *supra*, 59 UCLA L. Rev. at p. 1140; Radelet & Pierce, *Race and*

Prosecutorial Discretion in Homicide Cases (1985) 19 Law & Soc'y Rev. 587, 615-619 [prosecutors more likely to press charges against Black than White people and charging disparities could not be accounted for by race-neutral factors, such as prior record, seriousness of charge, or use of a weapon].) A newspaper investigation into 700,000 criminal cases in San Jose found that “at virtually every stage of pre-trial negotiation, whites are more successful than non-whites.” (Schmitt, *Plea Bargaining Favors Whites as Blacks, Hispanics Pay Price*, San Jose Mercury News (Dec. 8, 1991) p. 1A.)

Judges are not immune to implicit bias. (See Assem. Bill 242 § 1, subd. (a)(5) [“Judges and lawyers harbor the same kinds of implicit biases as others.”].) One study of judges from different judicial districts found that, “[c]onsistent with the general population, White judges show strong implicit attitudes favoring Whites over Blacks.” (*Implicit Bias in the Courtroom, supra*, 59 UCLA L. Rev. at p. 1146, citing Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?* (2009) 84 Notre Dame L. Rev. 1195, 1210.) Retired federal district court judge Mark W. Bennett has written extensively on unconscious bias in sentencing. (See, e.g., Levinson, Bennett, & Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes* (2017) 69 Fla. L. Rev. 63.) In a recent article, Judge Bennett wrote that “[r]epeated studies indicate Blacks with darker skin tones and stronger Afrocentric facial features ‘activate automatic associations with negative behavioral stereotypes of Black men, such as aggression, violence, and criminality.’ [citations]”

(Bennett & Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice* (2018) 51 UC Davis L. Rev. 745, 785.)

The California legislature recognized the problem of implicit bias in the judiciary when it enacted Assembly Bill 242, which required judges, judicial officers, and attorneys to receive training on how implicit and systemic bias lead to unacceptable disparities in the legal system. (Assem. Bill No. 242 (2019-2020 Reg. Sess.)) The legislature found that biases result in inequities in our criminal justice system where “Black defendants are held in pretrial custody 62 percent longer than White defendants” and “receive 28 percent longer sentences than White defendants convicted of the same crimes.” (*Id.* at § 1, subd. (a)(5).) Assembly Bill 242 is an extremely important step in addressing the pernicious effects of implicit bias in the courtroom going forward. But it is the institutional responsibility of this Court to ensure that rules that implicate reliability, particularly those that limit the harmful impacts of implicit bias, are applied to all.

B. Prosecutorial and Judicial Discretion and Racial Disparity Under the Three Strikes Law

Given the pervasiveness of implicit bias in every stage of the criminal justice system, it is not surprising that the wide discretion prosecutors and courts exercise under the Three Strikes law is a potent source of racial disparity. Prosecutors elect how to charge “wobblers,” or offenses which may be charged

as felonies or misdemeanors.⁸ Prosecutors can elect not to charge prior convictions as strikes, or may move to dismiss them in the interest of justice. And before *Gallardo*, prosecutors could charge as a strike any prior felony conviction if they believed the underlying conduct amounted to a strike. Prosecutors can also retroactively reduce prior convictions for “wobblers” from felonies to misdemeanors, or charge single or multiple counts, one or more of which may be strikes, arising out of a single incident. The California Legislative Analyst’s Office noted there was no official tracking of how often such discretion was used, but that some surveys of district attorneys suggest that prior strikes might be dismissed in 25 percent to 45 percent of Three Strikes law prosecutions.⁹

Unreliable judicial fact-finding is another source of the broad discretion which permits racial bias to infect the Three Strikes law. Before *Gallardo*, courts had discretion to rely on a wide range of sources to find that the defendant’s prior conduct would be a serious felony under the Three Strikes law, including stray comments at a sentencing hearing as in this case,¹⁰ the

⁸ Proposition 36 and 47 cabined prosecutorial discretion with respect to wobblers, but did not eliminate it. Propositions 47 reclassified some wobblers as misdemeanors (except for defendants with prior convictions for murder, rape, certain sex offenses or certain gun crimes) and Proposition 36 required that the new felony conviction be “serious or violent” (again, with some exceptions) to trigger the Three Strikes law.

⁹ (*Three Strikes Primer, supra.*)

¹⁰ See *In re Milton* (2019) 42 Cal.App.5th 977, 982-983 (*Milton*).

preliminary hearing testimony of a single witness, (*Gallardo, supra*, 4 Cal.5th at p. 123), an appellate court decision, (*People v. Trujillo* (2006) 40 Cal.4th 165, 180-181), or a judge’s handwritten note in the underlying criminal case file, (*Milton, supra*, 42 Cal.App.5th at p. 995.) By their nature, these sources are often incomplete, ambiguous, or never rigorously tested on the crucial factual point at issue. Therefore, pre-*Gallardo* determinations transformed what is nominally a factfinding process into a procedure encompassing wide judicial and prosecutorial discretion. Indeed, the decision to look beneath the surface of a non-qualifying crime of conviction for evidence that it qualified as a strike was completely discretionary.

While it would be ideal to measure the racial disparity of Three Strikes sentencings that *Gallardo* made illegal, that would require trial court data that California courts do not collect or make publically available. (See Rabinowitz et al., *The California Criminal Justice Data Gap* (Apr. 1, 2019) Stanford Law School: Stanford Criminal Justice Center <https://www-cdn.law.stanford.edu/wp-content/uploads/2019/04/SCJC-DatagapReport_v07.pdf> [as of Oct. 27, 2020] at pp. 14-16) Statewide criminal justice data collected by the California Department of Justice is incomplete, with “more than half of arrest records . . . missing disposition information[.]” (*Id.* at p. 8.) Many local criminal justice agencies “have no electronic case management systems . . . leaving them reliant on paper case files, excel spreadsheets, and other homegrown processes that do not

lend themselves to research, evaluation, or data-driven decision-making.” (*Id.* at p. 14.)¹¹

The most comprehensive study of racial disparity in Three Strikes sentencing relied on California Department of Corrections statistics to show that racial disparity was highest when sentencing discretion was at its apex. (*Liberation Hypothesis, supra*, 6 J. of Ethnicity in Crim. Justice at p. 89.) The study of the 171,000 people serving felony sentences in the California Department of Corrections on August 31, 2006, found that Black men had 1.85 times greater odds of receiving third-strike sentences than White men. (*Id.* at p. 92.) While some of the

¹¹ The failure of state and local agencies to track criminal justice statistics has even stymied this Court’s attempt to understand California’s inmate population. In 2019, at the request of Chief Justice Cantil-Sakauye, the Stanford Criminal Justice Center (SCJC) analyzed the role of sentencing enhancements in California prison overcrowding. (*Sentencing Enhancements and Incarceration, supra*, at p. 6.) Unfortunately, the SCJC was unable to obtain empirical information about the frequency of enhanced sentences from the California Department of Justice or the California Department of Corrections and Rehabilitation since those agencies did not believe their information was reliable and what they did have was not digitized. (*Ibid.*) Nor was the SCJC able to obtain this information from the Superior Court, as the Chief Justice had suggested, since their data was also unreliable, they lacked the resources to organize the data they did have, and they were unwilling to open their files to researchers. (*Ibid.*) As a result, the SCJC reached out to District Attorneys in several counties. Only then San Francisco District Attorney George Gascon was willing to provide data for the research. (*Ibid.*) As noted above, that study concluded that sentencing enhancements “pronounce the already large disparities in sentencing.” (*Id.* at p. 10.)

disparity was due to differences in the seriousness and number of prior felony convictions, parole status, and offense type, even when those factors were considered, the disparity remained significant. Even when controlling for these legally-relevant factors, Black men had 1.47 times greater odds of being sentenced to a third-strike offense, higher than any other demographic. (*Ibid.*)

The study concluded that sentencing disparities increased when sentencing discretion was highest and associated penalties were less clearly defined. (*Liberation Hypothesis, supra*, 6 J. of Ethnicity in Crim. Justice at pp. 94-95.) For example, the study found that the disparity between African Americans and Whites was greater for “wobbler” offenses (which can be charged either as a felony or misdemeanor) than for non-wobbler offenses (1.56 versus 1.44 odds ratio). (*Id.* at p. 94.) Sentencing disparities were also greater for less serious offenses (i.e., property and drug crimes) than for violent offenses (1.76 and 1.52 odds ratio respectively for property and drug offenses versus 1.35 for violent offenses). (*Id.* at p. 97.)

In 2012, Proposition 36 removed some prosecutorial discretion from the Three Strikes law by requiring that third-strike convictions be for serious or violent felonies (with limited exceptions), and authorizing re-sentencing for people serving life sentences not comporting with this limitation. Multiple empirical analyses have shown that reducing prosecutorial and judicial discretion helped ameliorate racial disparities. One study found that while in 2001, 38% of all prisoners serving sentences for

strike offenses were Black, by 2015, following the enactment of Proposition 36, only 35% of all strike offenders were Black.¹² Another (forthcoming) study concludes that Proposition 36 reduced some of the racial disparities caused by the Three Strikes law.¹³

In sum, narrowing discretion under the Three Strikes law leads to more reliable sentencing and limits the role implicit bias can play in sentencing. Applying *Gallardo* retroactively will serve this important goal by requiring that anyone sentenced under the law was unquestionably convicted of a prior serious felony.

II. GALLARDO IS RETROACTIVE UNDER JOHNSON BECAUSE IT REINS IN SENTENCING DISCRETION AND VINDICATES THE RIGHT TO A RELIABLE SENTENCING

The California retroactivity standard places primary importance on “the purpose to be served by the new standards[.]” (*Johnson, supra*, 3 Cal.3d at p. 410.) Under *Johnson*, new

¹² Jin & Wohlleben, *Three Strikes Analysis: Demographic Characteristics of Strike Offenders*, Claremont McKenna College: Rose Institute of State and Local Government (Apr. 26, 2016) <<http://s10294.pcdn.co/wp-content/uploads/2016/07/Three-Strikes-Racial-and-Ethnic-Analysis.pdf>> [as of Oct. 27, 2020].

¹³ Chen et al., *General Effects of Proposition 36 on Racial and Ethnic Disparities in Three Strikes Sentencing* (Nov. 11, 2020) (The day before Proposition 36 was implemented, Black people were 35.2% of eligible drug crime offenders and 42.1% of eligible property crime offenders. By November 2016, this overrepresentation was reduced to 32.7% of eligible drug offenders (-2.5%) and 39.9% of eligible property offenders (-2.2%.) <<https://ssrn.com/abstract=3729034>> [as of Nov. 11, 2020].

standards “vindicating a right which is essential to a reliable determination of whether an accused should suffer a penal sanction” are fully retroactive. (*Ibid*; see *In re Joe R.* (1980) 27 Cal.3d 496, 511 (*Joe R.*.) When the right vindicated is merely collateral to a fair factfinding process, retroactivity is not required. (*Id.* at p. 512.) If the retroactivity question is close, after considering the purpose of the new rule, the remaining *Johnson* factors are weighed, including the extent to which law enforcement relied on the old standards, and the new standard’s effect on the administration of justice. (*Johnson, supra*, 3 Cal.3d at p. 410.)

Like the matter now before the Court, *Johnson* addressed the retroactivity of a rule that would have provided a complete defense to the use of a prior conviction as a sentencing enhancement. *Johnson* considered the retroactivity of *Leary v. United States* (1969) 395 U.S. 6, which held the timely invocation of Fifth Amendment privilege against self-incrimination was a complete defense against a prosecution for failure to pay marijuana tax, one of Johnson’s prior convictions. (*Johnson, supra*, 3 Cal.3d at p. 413.) The *Johnson* Court observed that “the more directly the new rule in question serves to preclude the conviction of innocent persons, the more likely it is that the rule will be afforded retrospective application.” (*Ibid.*) The Court held *Leary* retroactively applicable, concluding that those who availed themselves of the legal defense established in *Leary* are “just as innocent — under our system of justice — as a person convicted

by evidence which is insufficient as a matter of law.” (*Id.* at p. 416.)

In the same way *Leary* established “a complete defense to prosecutions under the relevant statutes,” *Gallardo* established a complete defense to the use of certain prior convictions as a strike; defendants sentenced on non-qualifying priors in violation of *Gallardo* are “innocent as a matter of law.” (*Johnson, supra*, 3 Cal.3d at p. 416; see Milton Opening Brief at p. 30.) And, as in *Johnson*, the rule articulated in *Gallardo* is “essential to a reliable determination of whether an accused should suffer a penal sanction[.]” (*Johnson, supra*, 3 Cal.3d at p. 410.)

Gallardo recognized the right to a reliable sentence under the Three Strikes law when it required that all necessary facts be found by a jury (or admitted by the defendant) in the original trial, and not by a judge, or even a jury, at a subsequent sentencing hearing. *Gallardo* withdrew from the sentencing process entirely any finding of facts beyond “those facts that were established by virtue of the [prior] conviction itself.” (*Gallardo, supra*, 4 Cal.5th at p. 136.) And it further limited those facts to ones the prior “jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea[.]” (*Ibid.*) The *Gallardo* Court limited consideration to the findings underlying the prior felony conviction because any other proceeding would lack the due process protections attached to a criminal trial. In other words, *Gallardo* rejected the proposal to have a sentencing jury make findings based on the records of prior convictions because it

would “not be much of a trial” – i.e., it lacked the “procedural safeguards” that ensure reliability in the original proceedings, including the right to cross-examine one’s accusers. (*Id.* at p. 139.)

The opinion below erroneously concluded that Sixth Amendment concerns, and not the reliability of judicial factfinding, compelled this Court to bar judicial factfinding at sentencing. (*Milton, supra*, 42 Cal.App.5th at p. 988). But if this Court believed the only issue was the Sixth Amendment limit on judicial factfinding, it would have embraced the dissent’s proposed remedy and shifted factfinding to a sentencing jury. (*Gallardo, supra*, 4 Cal.5th at p. 140 [conc. & dis. opn. of Chin, J.]). Instead, this Court rejected the proposal because it “would raise significant constitutional concerns” and specifically because it lacked protections which ensure reliability. (*Id.* at pp. 138-139.)

Gallardo’s focus on reliability mirrors the concerns that compelled this Court to adopt the *Johnson* standard in the first place. *Berger v. California*, cited in *Johnson*, retroactively applied a rule prohibiting states from relying on a preliminary hearing transcript, except in limited circumstances, because it may have “a significant effect on the ‘integrity of the fact-finding process.’” (*Berger v. California* (1969) 393 U.S. 314, cited in *Johnson, supra*, 3 Cal.3d at p. 411.) This was precisely the concern in *Gallardo*: that the unrestricted use of preliminary hearing transcripts undermined the reliability of the fact-finding process. (See *Gallardo, supra*, 4 Cal.5th at p. 137 [“A sentencing court reviewing that preliminary transcript has no way of knowing

whether a jury would have credited the victim’s testimony had the case gone to trial.”].) The *Johnson* Court also cited *Roberts v. Russell* (1968) 392 U.S. 293 (*Roberts*), where the U.S. Supreme Court found retroactive the rule in *Bruton v. United States* (1968) 391 U.S. 123, because “a codefendant’s admission might lead to an unreliable determination of guilt . . . when untested by cross examination.” (*Johnson, supra*, 3 Cal.3d. at p. 411, citing *Roberts, supra*, 392 U.S. at p. 293.) Again, *Gallardo* addressed similar concerns when it prohibited consideration of statements that were never tested by cross-examination or any other definitive adversarial process. (*Gallardo, supra*, 4 Cal.5th at pp. 138-139.)

Gallardo did more than vindicate the Sixth Amendment right to a jury trial, it vindicated the right to all the procedural safeguards of a trial required to protect the “integrity of the factfinding process.” (*Joe R., supra*, 27 Cal.3d. at p. 511.) The U.S. Supreme Court has recognized the integral role many of these trial rights play in promoting reliability, including the right to a unanimous jury verdict, (*Ramos v. Louisiana* (2020) __ U.S. __, 140 S. Ct. 1390, 1401 (*Ramos*)), the right to confront witnesses, (*Crawford v. Washington* (2004) 541 U.S. 36, 62 (*Crawford*)), and the right to present a defense, (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) *Gallardo* barred sentences based on extraneous facts or anything less than facts necessarily found by a prior jury in rendering a guilty verdict or admitted by the defendant in entering a guilty plea.¹⁴ This was “the purpose

¹⁴ Under *Gallardo*, a Three Strikes sentence based on anything less is an unauthorized sentence. A fundamental rule of

to be served by the new standards.” (*Johnson, supra*, 3 Cal.3d at pp. 410-411.)

These procedural safeguards will make sentencing under the Three Strikes law more reliable for all defendants, but especially for Black men, who have 40% higher odds of being sentenced to a third-strike sentence than a similarly-situated White man. (*In the Furtherance of Justice, supra*, at p. 274.) By limiting sentencing discretion, *Gallardo* removes one cause of their disparate treatment. (*Liberation Hypothesis, supra*, at pp. 94-95 [sentencing disparities are greater when discretion is at its apex].) *Gallardo* did not just limit what a sentencing judge could do, it limited what a prosecutor could choose to ask a court to do, and it prevented stray comments in a probation report, a single witness in a preliminary hearing, or a handwritten notation on file from resulting in a life sentence. By requiring that sentencing factors be the product of a trial process with all procedural safeguards, *Gallardo* eliminated the potential for ambiguous, unreliable, and untested comments in a prior case – like the ones that led the court to impose a life sentence on Mr. Milton – to drive massive and racially-disparate sentencing outcomes.

California criminal law jurisprudence is that an unauthorized sentence can be corrected at any time. (See, e.g., *People v. Scott* (1994) 9 Cal.4th 331, 354-355; *People v. Guillen* (1994) 25 Cal.App.4th 756, 764.) A longstanding application of this rule permits the granting of habeas relief as to final convictions upon a showing that a defendant is serving an unauthorized sentence. (See *In re Harris* (1993) 5 Cal.4th 813, 838-839, citing *Ex parte Lee* (1918) 177 Cal. 690.)

The above notwithstanding, were the Court to consider the question of retroactive application “close” under *Johnson*, the remaining two considerations – the extent to which law enforcement relied on the old standards, and the new standard’s effect on the administration of justice – also militate in favor of *Gallardo*’s retroactive application. (*Johnson, supra*, 3 Cal.3d at p. 410.) The Attorney General contends prosecutors “reasonably relied on” pre-*Gallardo* caselaw to “justify having the trial court determine whether a prior conviction qualified for increased punishment.” (Respondent’s Brief at p. 58.) But this “reliance” is not the sort contemplated by *Johnson*. Pre-*Gallardo* prosecutors *applied* the old caselaw, but they did not rely on it to their detriment. There is nothing prosecutors would or could have done differently had the law of *Gallardo* controlled at the time of sentencing. (Compare *In re Thomas* (2018) 30 Cal.App.5th 744, 766 [concluding the hearsay rule established in *People v. Sanchez* (2016) 63 Cal.4th 665, did not apply retroactively in part because the prosecution detrimentally relied on pre-*Sanchez* law to “use[] a shortcut even though it could have obtained a conviction using other evidence.”].) That prosecutors would not have been able to obtain a lengthier sentence is not “reliance” in the sense that *Johnson* intended. After all, undoing a sentence that prosecutors had previously been able to obtain was precisely the result in *Johnson*.

The Attorney General further argues *Gallardo*’s retroactive application would have a “costly and disruptive effect” on the administration of justice simply because some new hearings

would be required and records of conviction would have to be located. (Respondent’s Brief at p. 59.) But under *Johnson*, the pertinent inquiry is not whether retroactive application necessarily imposes some burden on the justice system, but the extent of that burden. Here, the burden is comparatively light. No new trial is required. No jury need be empaneled. No witnesses need be called. In cases where a defendant was sentenced under the Three Strikes law based on a non-qualifying prior California conviction, the court need only look at defendant’s criminal record. And, where a defendant was sentenced based on an out-of-state prior conviction, except in those limited instances where the prior offense involved a divisible criminal statute¹⁵, the court would only need to compare the elements of the out-of-state offense with its California analogue. (See *People v. Tenorio* (1970) 3 Cal.3d 89, 95, fn 2. [finding retroactive application of invalidated statute that precluded courts from striking prior convictions unless the prosecution moved to strike was appropriate because “it relates only to sentencing and will not require any retrials.”]; *Johnson, supra*, 3 Cal.3d at p. 414 [“there is no substantial burden upon the administration of justice in the usual sense of costly retrials with stale evidence and forgetful witnesses.”].)

¹⁵ In which case, the court would determine which alternative elements the jury found or the defendant admitted. (See *Mathis v. United States* (2016) __ U.S. __ 136 S.Ct. 2243, 2249; *Gallardo, supra*, 4 Cal.5th at pp. 137-138.)

Furthermore, the Attorney General's characterization of the effect on the administration of justice fails to account for the burden on the justice system of people serving lengthy sentences meted out under pre-*Gallardo* law, and the collateral burden on the state due to the deleterious impact of incarceration on the families and communities of those incarcerated. (See, *infra*, footnote 20.) The time and cost of new sentencing hearings pales in comparison to this staggering drain on the finances and other resources of the justice system resulting from the lengthy confinement of defendants sentenced in violation of *Gallardo*.

Nor does the Attorney General's accounting of "cost" consider the impact of discrimination. Before *Gallardo*, broad discretion, including the ability to rely on evidence outside the record of conviction to increase punishment, yielded unreliable results. The disproportionately higher rate of Black men subjected to second- and third-strike sentences is powerful evidence of this unreliability. Prosecutors had discretion to seek out and rely upon conduct (not just convictions) to establish qualifying prior serious felonies, and trial courts had the discretion to cull stray and untested remarks from the record of prior proceedings to find conduct amounted to a serious felony conviction.

This wide latitude is vulnerable to the subjectivity and implicit bias that experience has taught undermines the integrity of the factfinding process. Prospectively applied new constitutional rules can reduce the number of people who suffer unjust sentences, but they leave behind those already

languishing there for the same reasons. (Deutsch, *Federalizing Retroactivity Rules: The Unrealized Promise of Danforth v. Minnesota and the Unmet Obligation of State Courts to Vindicate Federal Constitutional Rights* (2016) 44 Fla. St. U. L. Rev. 53, 56-57 (*Federalizing Retroactivity Rules*.) On the other hand, granting relief to those whose sentences resulted from unconstitutional, unreliable procedures, presents a means to mitigate the legacy of systemic racial bias.

III. **TEAGUE IS AN INAPPROPRIATE POST-CONVICTION RETROACTIVITY STANDARD IN CALIFORNIA COURTS**

The Attorney General argues that this Court should “harmonize” the *Teague*¹⁶ standard with the *Johnson* standard to recognize “the fundamental importance of preserving the finality of judgments under a rule that ensures consistent and predictable application[.]” (Respondent’s Brief at p. 26.) However, *Johnson* never emphasized finality. It focused on reliability and, only in close cases, the extent to which law enforcement relied on the old standards, and the new standard’s effect on the administration of justice. (*Johnson, supra*, 3 Cal.3d at p. 410.)

Teague’s elevation of finality and comity above all else undermines the recognized functions of habeas review: protection of the rule of law in criminal proceedings. (Entzeroth, *Reflections on Fifteen Years of the Teague v. Lane Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of*

¹⁶ *Teague v. Lane* (1989) 489 U.S. 288 (*Teague*).

the Court's Doctrine (2005) 35 N.M. L. Rev. 161, 204.) *Teague* also does not allow consideration of the purpose of the “new” rule in question, and thus takes no account of the injustice of unconstitutional sentences and an increasing awareness of the racial bias that pervades our criminal justice system. Indeed, *Teague* itself blocked any remedy for the rampant racial discrimination which had infected jury selection in the years prior to *Batson v. Kentucky* (1986) 476 U.S. 79.¹⁷ Because California law under *Johnson* provides a retroactivity analysis with the flexibility to address concerns about reliability and to remedy past injustice, this Court should reject *Teague* altogether.

The *Teague* rule that only “watershed” constitutional rules of criminal procedure may be applied retroactively was issued in the aftermath of an expanded federal habeas regime, and a parallel expansion of substantive bases for habeas relief. (See Lasch, *The Future of Teague Retroactivity, or “Redressability,” After Danforth v. Minnesota: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings* (2009) 46 Am. Crim. L. Rev. 1, 11 (*The Future of Teague Retroactivity*) [discussing *Brown*

¹⁷ The petitioner in *Teague*, a Black man, challenged his conviction by an all-White jury, where the prosecutor used all 10 of his peremptory challenges to strike Black jurors. (*Teague, supra*, 489 U.S. at p. 293.) The Court held that under its newly announced procedural bar, the harm of *Batson* could not be remedied by federal courts under any new constitutional theories recognized after his case became final on direct appeal. (See *id.* at pp. 299-311.)

v. Allen (1953) 344 U.S. 443, which “authorized federal courts to engage in complete relitigation of federal claims previously adjudicated in state court criminal proceedings”]; *Danforth v. Minnesota* (2008) 552 U.S. 264, 272 (*Danforth*) [recognizing that “[t]he serial incorporation of the Amendments in the Bill of Rights during the 1950's and 1960's imposed more constitutional obligations on the States and created more opportunity for claims that individuals were being convicted without due process and held in violation of the Constitution.”].)

Prior to *Teague*, federal courts “routinely applied” new constitutional rules of criminal procedure to cases on habeas review. (*Danforth, supra*, 552 U.S. at p. 272.) *Teague* thus represented a dramatic shift by establishing a general, nearly insurmountable rule of non-retroactivity. (*Id.* at p. 279.) “*Teague’s* test is a demanding one, so much so that this Court has yet to announce a new rule of criminal procedure capable of meeting it.” (*Ramos, supra*, 140 S. Ct. at p. 1407.) In the 30 years since *Teague* was decided, not one new criminal procedural rule has met its apparently impossibly high “watershed” standard.¹⁸

¹⁸ See, e.g., *Chaidez v. United States* (2013) 568 U.S. 342, 357 (holding rule in *Padilla v. Kentucky* (2009) 559 U.S. 356, requiring defense counsel to advise defendant about risk of deportation arising from a guilty plea, is a new rule of criminal procedure that does not apply retroactively); *Schriro v. Summerlin* (2004) 542 U.S. 348, 358 (holding Sixth Amendment jury right for capital sentencing announced in *Ring v. Arizona* (2002) 536 U.S. 584, is a new rule of criminal procedure that does not apply retroactively); *Whorton v. Bockting* (2007) 549 U.S. 406, 409 (holding the Confrontation Clause rule articulated

Application of the exceedingly demanding *Teague* standard to a rule like the one *Gallardo* recognized, which implicates the reliability of convictions or sentences, would effectively deny any forum to those seeking redress for what may amount to wrongful imprisonment.

Moreover, *Teague*'s application in state post-conviction proceedings is at odds with, and cannot be justified by, the principles underlying its adoption on the federal stage. *Teague*'s rule of non-retroactivity is justified by "reference to comity and respect for the finality of *state convictions*." (*Danforth, supra*, 552 U.S. at p. 279, emphasis added.) However, comity and federalism are concerns exclusive to federal review of state convictions and are not implicated in state court proceedings like the instant case. Federal court deference to state criminal proceedings presumes that state proceedings will adequately safeguard state prisoner's rights in the first instance. (*Federalizing Retroactivity Rules, supra*, 44 Fla. St. U. L. Rev. at pp. 75-76.) California's application of this same deferential standard to its own proceedings thus upends *Teague*'s rationale entirely.

Comity and federalism aside, finality alone is a wholly inadequate rationale upon which to deny relief to people serving unconstitutional sentences in overcrowded prisons. First, finality weighs less heavily in the retroactivity calculus at the state, as opposed to the federal, level. Where federal post-conviction

in *Crawford, supra*, 541 U.S. 36, is a new rule of criminal procedure that does not apply retroactively).

proceedings typically represent a third round of litigation, state habeas proceedings represent a second round of litigation for some claims, closer in time to the trial or plea, and the first forum for many post-conviction claims, e.g., *Brady*¹⁹ claims, newly discovered DNA evidence, flawed forensic evidence, and other issues that implicate core reliability concerns. (*The Future of Teague Retroactivity, supra*, 46 Am. Crim. L. Rev. at p. 44.) State interests in finality, while real, are also sufficiently addressed by other procedural mechanisms such as timeliness requirements, procedural default, and restrictions on successive habeas petitions. (*Id.* at p. 61.)

Second, the finality interest as embodied by the *Teague* retroactivity standard is both overstated and incomplete. *Teague*'s concern with finality is based in part on an aversion to imposing additional costs on states by disturbing already settled judgments. (*Teague, supra*, 489 U.S. at p. 310 ["The 'costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application'", quoting *Solem v. Stumes* (1984) 465 U.S. 638, 654 (conc. opn. of Powell, J.)]; *Ramos, supra*, 140 S.Ct. at p. 1407 ["the test is demanding by design, expressly calibrated to address the reliance interests States have in the finality of their criminal judgments"].) But, again, where the rule implicates the reliability of the conviction or sentence, the concern is myopic. Merely highlighting the cost of retrials and

¹⁹ *Brady v. Maryland* (1963) 373 U.S. 83.

new sentencing hearings fails to account for the much more substantial cost to the state of decades or even lifetimes of incarceration (including food, housing, and healthcare) as well as its economic ripple effect on the families and communities of those incarcerated, which in turn also burdens the state.²⁰ And it

²⁰ One national study found that “[f]or every dollar in corrections costs, incarceration generates an additional ten dollars in social costs,” with much of those costs borne by families, children, and community members. (McLaughlin et al., *The Economic Burden of Incarceration in the U.S.* (July 2016) Concordance Institute for Advancing Social Justice: George Warren Brown School of Social Work < <https://joinnia.com/wp-content/uploads/2017/02/The-Economic-Burden-of-Incarceration-in-the-US-2016.pdf>> [as of Oct. 27, 2020] at p. 2.) Black men are disproportionately incarcerated under the Three Strikes law and they and their families bear an outsized social and economic burden. For example, family income is reduced by 22 percent during a father’s incarceration as compared to the year before incarceration. Children with an incarcerated parent are at an increased risk for delinquency, are more likely to be suspended or expelled from school and less likely to complete high school or attend college, negatively impacting their economic mobility. Consequently, incarceration tends to place new burdens on governmental resources that are important for meeting the needs of children and families of those incarcerated, including schools, foster care, adoption agencies, the juvenile and dependency court systems, and other services. (The Pew Charitable Trusts, *Collateral Costs: Incarceration’s Effect on Economic Mobility* (2010) <https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf> [as of Oct. 27, 2020]; Davis, et al., *In Understanding the Public Health Implications of Prisoner Reentry in California: State-of-the-State Report* (2011) pp. 117-142.)

does so in the name of rules which, under *Johnson's* prime focus, have resulted in unreliable judgments.

As *Gallardo* makes clear, some of those sentenced to a third-strike term of 25 years to life in prison were punished based on unconstitutional and dubious findings. Were they sentenced today, people like Mr. Milton would not be spending the rest of their lives in prison based on an idle comment in a sentencing hearing which they had no meaningful incentive to contest. Yet, under *Teague*, the federal rights of these incarcerated people, again among them a disproportionate number of Black men, are far less likely to be vindicated. This is true even where the state and the courts *acknowledge* that they have been convicted and sentenced to decades or a lifetime in prison based on unconstitutional and unreliable procedures. The interests of justice and the guiding principles of habeas review itself are better served by the standard set forth in *Johnson*, which allows the court to consider the purpose of the law in question and its effect on the integrity of the fact-finding process, along with the state's other interests in reliance and cost.

CONCLUSION

For the foregoing reasons, this Court should hold that *Gallardo* is retroactive under *Johnson* to apply to all those whose Three Strikes law sentence violates the Sixth Amendment.

DATED: November 13, 2020

Respectfully submitted,

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Cal. Rules of Court, rule 8.520(c)

I, Erik Levin, have conducted a word count of this brief using our office's computer software. On the basis of the computer generated word count, I certify that this brief is 7,190 words in length excluding the tables and this certificate.

DATED: November 13, 2020

Respectfully submitted,

/s/ Erik Levin

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DECLARATION OF SERVICE

Case Name: *People v. William Milton*
Case Number: **Supreme Court Case No. S259954**

I, **Lauren Emerson**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county of Oakland. My business address is 1111 Broadway, Suite 1000, Oakland, CA 94607. I served a true copy of the following document:

BRIEF AMICUS CURIAE BY THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF PETITIONER WILLIAM MILTON

by enclosing it in envelopes and placing the envelopes for collection and mailing with the United States Postal Service with postage fully prepaid on the date and at the place shown below following our ordinary business practices.

The envelopes were addressed and mailed on **November 13, 2020**, as follows:

Sherri R. Carter, Clerk of the Court Los Angeles County Superior Court (For Retired Judge Ronald J. Slick 111 North Hill St. Los Angeles, CA 90012

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Brad Kaiserman Attorney at Law 5870 Melrose Avenue, Suite 3396 Los Angeles, CA 90038	Nicholas J. Webster Office of the Attorney General 300 South Spring Street, Suite 1702 Los Angeles, CA 90012
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **November 13, 2020**, at San Joaquin County, CA.

/s/ Lauren Emerson
Lauren Emerson

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **MILTON (WILLIAM) ON H.C.**

Case Number: **S259954**

Lower Court Case Number: **B297354**

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