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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re DERWIN JULES JACKSON,
on Habeas Corpus.

E072464

(Super.Ct.Nos. WHCJS1800321 &
FSB11452)

OPINION

APPEAL from the Superior Court of San Bernardino County. Gregory S. Tavill
and Ronald M. Christianson, Judges. Reversed.

Jason Anderson, District Attorney, and Philip P. Stemler, Deputy District
Attorney, for Appellant.

Sally Patrone, under appointment by the Court of Appeal, for Respondent.

I

INTRODUCTION

The People appeal from the trial court's¹ orders granting respondent Derwin Jules Jackson's (defendant) petition for writ of habeas corpus, vacating his sentence, and remanding for resentencing without a strike.² The habeas court granted the writ petition after it found the San Bernardino County Superior Court (SBSC or trial court) in case No. FSB11452 incorrectly concluded defendant's prior strike conviction for shooting at an occupied motor vehicle (Pen. Code,³ § 246), Riverside County Superior Court (RCSC) case No. CR44158, qualified as a strike in violation of defendant's Sixth Amendment right to have a jury decide, beyond a reasonable doubt, whether he personally used a firearm in that prior case. The habeas court also determined that *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*) applied retroactively and the trial court's consideration of the preliminary hearing transcript violated the holding in *Gallardo*.

The People contend the habeas court erred in granting defendant's writ petition because (1) the SBSC court found defendant's prior strike to be true and defendant

¹ For the sake of clarity, the trial court that ruled on defendant's habeas petition will be referred to as the "habeas court."

² Defendant was eventually resentenced to 32 years to life (30 years shorter than his original sentence). We take judicial notice of the record on appeal from defendant's pending appeal in case No. E072766. We also take judicial notice of relevant portions of SBSC case Nos. FSB11452, and prior appeals E021188 and E022053 as referenced herein. (See Evid. Code, § 452, subd. (d).)

³ All future statutory references are to the Penal Code unless otherwise stated.

admitted this in his petition and traverse; (2) the habeas court was limited to issues and allegations in the petition; (3) the *Dixon*⁴ doctrine prevents this issue from being raised on habeas; (4) the preliminary hearing transcript establishes that defendant was personally armed with a firearm; (5) the law of the case doctrine, collateral estoppel, and the *Waltreus*⁵ doctrine bar relitigation of this issue; (6) the habeas court erred in applying *Gallardo* retroactively; (7) even if *Gallardo* is applied retroactively, defendant's preliminary hearing transcript is admissible to establish the strike conduct; and (8) the habeas court erred in dismissing the strike without remanding for a new sentencing hearing.

In our original opinion, we concluded the habeas court did not err in applying *Gallardo* retroactively and granting defendant's writ petition on the ground defendant's Sixth Amendment right to a jury determination was violated when the trial court relied on the preliminary hearing transcript to find defendant personally used a firearm in the commission of his prior strike offense. We also rejected the People's other objections and affirmed the order granting the writ petition.

The California Supreme Court granted review of our opinion and deferred action pending its decision in *In re Milton* (2022) 13 Cal.5th 893 (*Milton*), and it has now transferred the matter back to us with directions to vacate our original opinion and reconsider defendant's appeal in light of that decision. We vacated our original decision

⁴ *In re Dixon* (1953) 41 Cal.2d 756 (*Dixon*).

⁵ *In re Waltreus* (1965) 62 Cal.2d 218 (*Waltreus*).

and provided the parties the opportunity to file supplemental briefs. Having reconsidered defendant's appeal in light of *Milton* which held the *Gallardo* rule does not apply retroactively to final judgments, we reverse the trial court's order granting defendant's petition for writ of habeas corpus.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. *Defendant's Prior Strike Offense, RCSC Case No. CR44158*

On August 19, 1992, defendant pleaded guilty to one count of shooting at an occupied motor vehicle (§ 246) in RCSC case No. CR44158. In return, the personal firearm use allegation pursuant to section 12022.5 was dismissed and defendant was sentenced to the low term of three years in state prison. The parties stipulated that a factual basis for the plea could be taken from the preliminary hearing transcript, and the RCSC court found a factual basis for the plea in the preliminary hearing transcript.

B. *SBSC Case No. FSB11452*

On the night of June 23, 1996, codefendant Rodrick Blackburn "shot and killed two teenage boys, for no apparent reason other than that he 'hate[d] Mexicans.'" (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1524 (*Blackburn*)). There was testimony during defendant's criminal trial that he "encouraged Blackburn to shoot the teenagers," and that "[w]hen the shooting was over, [defendant] drove Blackburn away." (*Ibid.*)

On June 5, 1997, an amended information was filed charging defendant with two counts of first degree murder (§ 187, subd. (a)). The amended information also alleged

that in the commission of both counts a principal was armed with a firearm (§ 12022, subd. (a)(1)). The amended information further alleged that defendant had suffered a prior serious or violent felony strike conviction (§§ 667, subds. (b)-(i), 1170.12, subd. (a)-(d)) based on defendant's 1992 conviction for shooting at an occupied motor vehicle. Defendant's motion to bifurcate the trial on the prior strike conviction was granted.

On June 18, 1997, a jury convicted defendant of two counts of second degree murder and found that a principal was armed with a firearm (§ 12022, subd. (a)(1)) as to both murders.

After defendant waived his right to a jury trial on the truth of his prior conviction, on June 20, 1997, the SBSC court found true that defendant had a prior conviction for shooting at an occupied motor vehicle in violation of section 246,⁶ RCSC case No. CR44158. It appears, however, that the court reserved ruling on whether the prior qualified as a strike. In response to defendant's question, "What was this we just went through?" the trial court explained: "We had a court trial on whether or not the prior conviction that was alleged against you that we had separated out from the jury trial, whether that was true or not. And I made a finding that it's true. It's all we did today was find that you had suffered that prior conviction. [¶] The attorneys still have the right

⁶ A violation of section 246 is currently listed as a serious felony in the serious felony list but was not part of the list prior to 2002. (§ 1192.7, subd. (c) ["As used in this section, 'serious felony' means any of the following: . . . (33) discharge of a firearm at an inhabited dwelling, vehicle, or aircraft, in violation of Section 246.'], as amended, Stats. 2002, ch. 606, § 3 (AB 1838), effective Sept. 17, 2002.)

to challenge whether or not it's a strike and what other affect it might have on you prior to the date of sentencing.”

The sentencing hearing was held on January 30, 1998. At that time, the parties and the trial court assumed the prior conviction was found true as “a prior strike” and entertained arguments regarding striking the strike. In relevant part, the prosecutor noted that the preliminary hearing transcript showed that “defendant engaged in a gun battle with another vehicle on the freeway” when he committed the prior offense for shooting at a motor vehicle. The trial court treated the prior conviction as a strike (§ 1192.7, subd. (c)(8)), and sentenced defendant to a total term of 62 years to life in state prison.

Defendant subsequently appealed, arguing, in pertinent part, that there was insufficient evidence that his prior conviction for shooting at an occupied motor vehicle (§ 246) qualified as a “strike.” (*Blackburn, supra*, 72 Cal.App.4th at p. 1525.) On June 23, 1999, a panel of this court affirmed the judgment, with a modification to clarify that the victim restitution order was joint and several between defendant and his codefendant Blackburn. (*Id.* at pp. 1535-1536.) This court found sufficient evidence supported the determination that the prior conviction qualified as a “strike” based on a review of the preliminary hearing transcript from RCSC case No. CR44158. (*Id.* at pp. 1531-1532.) As described in the preliminary hearing transcript, defendant was seen holding a gun, defendant was the main participant in attempting to get the victim/vehicle to pull over, there was no evidence defendant's passenger had a gun, and the passenger did not have a clear shot at the victim but defendant did. (*Ibid.*) In addition, this court

reasoned that it was immaterial that the personal use of a firearm allegation was dismissed because it was not necessary to prove the prior strike. (*Id.* at pp. 1527 & 1530.)

On August 30, 2018, defendant filed the instant petition for writ of habeas corpus in the superior court on the grounds that (1) there was insufficient evidence to support the prior strike finding under *Gallardo* because the trial court had engaged in constitutionally prohibited judicial factfinding in violation of his Sixth Amendment right to a jury trial by relying on the preliminary hearing transcript to find he had personally used a firearm in RCSC case No. CR44148, and (2) he was denied the effective representation of counsel with respect to the prior strike.

On October 9, 2018, the habeas court filed an order inviting an informal response to defendant's habeas petition solely on the *Gallardo* issue after a lengthy discussion of *Gallardo* itself. In its order, the habeas court recognized that the SBSC court had found defendant's prior strike true in the underlying proceeding.

On October 26, 2018, the People filed an informal response. In summary, the People pointed out that even if the court applied *Gallardo* retroactively, defendant's prior strike finding would stand because he had stipulated to the preliminary hearing transcript as a factual basis. The People also claimed that numerous procedural bars and doctrines, such as the law of the case, the collateral estoppel doctrine, and the *Waltreus* doctrine, prevented defendant from relitigating the true finding on the prior strike conviction if *Gallardo* was not applied retroactively.

Defendant filed a reply to the People’s informal response on November 27, 2018, realleging “his claims raised under the new law as decided in” *Gallardo*.

On December 5, 2018, the habeas court issued an order to show cause. The habeas court again noted the petition relied upon *Gallardo* and ordered the People to show cause “why the relief requested in the petition” should not be granted.

The People filed a return on January 3, 2019, addressing the *Gallardo* issue and numerous procedural bars to defendant’s attempt to relitigate the prior strike allegation.

On January 16, 2019, defendant filed a traverse to the People’s return. Defendant argued *Gallardo* applied retroactively to collaterally challenge his prior strike conviction.

A hearing on defendant’s habeas petition was held on March 15, 2019. Prior to argument, the habeas court noted: “And we had a discussion before the lunch hour, because I wanted to point out to Counsel something that I noticed in reviewing the record. And so, with that in mind, I’d ask Counsel include discussion of that issue in any comments that you have for the Court.” The court was referring to whether the SBSC found the prior conviction qualified as a strike. The court explained: “I think everybody assumed—The way I read the transcript, everybody assumed at the sentencing hearing that Judge Christianson had made the factual finding. When the appeal was taken, the issue was whether or not there was sufficiency of the evidence on appeal. Nobody looked at the question of whether or not Judge Christianson ever actually made the finding beyond a reasonable doubt. [¶] And I think everybody from Judge Christianson to the justices on the Court of Appeal to all of the lawyers just assumed that that finding

had been made. I don't blame the justices on the Court of Appeal because, clearly, the lawyers should have raised that issue, and they did not."

The prosecutor argued that defendant's claim was procedurally barred under the *Waltreus/Dixon* doctrines and law of the case. The prosecutor also asserted that defendant's issue was barred because it was a new ground added by the habeas court and not raised in defendant's petition. The prosecutor objected to the habeas court applying *Gallardo* retroactively and asserted that *Gallardo* would not provide defendant relief even if the case was applied retroactively.

Defendant's counsel argued that *Gallardo* applied retroactively and that the prior conviction "was neither alleged nor proven beyond a reasonable doubt that [defendant] was armed with and personally discharged a gun." Defense counsel further noted "[t]he fact that the Court struck the firearm enhancement in the interest of justice substantially shows that insufficient evidence exists that [defendant] was the person that actually fired the gun" and that "[a]nything beyond that would require judicial factfinding, which is prohibited under *Gallardo*." Defense counsel also asserted that there were no procedural bars because the prior conviction was invalid and "a challenge to an illegal sentence will always lie" in the interest of justice.

Following argument, the habeas court found *Gallardo* applied retroactively and that pursuant to *Gallardo*, "resolution of this factual dispute by the trial court violated [defendant's] [S]ixth [A]mendment right to have a jury decide, beyond a reasonable doubt, whether he personally used a firearm in the Riverside case, case

number CR44158.” The habeas court therefore granted defendant’s petition for writ of habeas corpus and concluded defendant “shall be resentenced in case number FSB11452 as if his prior strike conviction was not a strike.”

The habeas court noted prior to 2002, in order for a conviction for shooting at an occupied motor vehicle (§ 246) to qualify as a strike, there must be an additional finding by the jury or an admission by the defendant that he or she personally used a firearm. The habeas court also observed that, although the trial court found the prior conviction in RCSC case No. CR44158 occurred, the trial court made no finding beyond a reasonable doubt defendant personally used a firearm in the commission of the offense and expressly reserved determination of the issue of whether the prior conviction qualified as a strike. The habeas court also stated that neither the jury nor the trial court ever found beyond a reasonable doubt that defendant personally used a firearm in RCSC case No. CR44158, required for the prior conviction to qualify as a strike.

The habeas court rejected the People’s argument that defendant admitted personal firearm use by stipulating to the preliminary hearing transcript as a factual basis for the guilty plea in RCSC case No. CR44158. The court explained defendant’s stipulation to the preliminary hearing as a factual basis for the guilty plea did not include an admission he personally used a firearm because defendant specifically negotiated a dismissal of the personal firearm use allegation as part of the plea agreement and personal firearm use was not necessary to violate section 246. The habeas court concluded the trial court

could not resolve a disputed fact by relying on the preliminary hearing transcript under *Gallardo*.

The habeas court also rejected the People's claim it was barred from granting the writ on the ground there had been no finding of personal firearm use because defendant had not made that specific claim in his writ petition. In so holding, the habeas court concluded defendant had argued the strike had not been found true by a jury beyond a reasonable doubt, which encompassed the issue of whether a finding had been made the prior qualified as a strike. In addition, *Gallardo* permitted review of whether the prior qualified as a strike. The habeas court noted that, before the hearing on the writ petition, it had notified the parties that there had been no finding on whether the prior qualified as a strike, and the parties addressed the issue at the hearing. The habeas court further rejected the People's argument that the SBSC court had made a finding defendant had personally used a firearm in the commission of his prior conviction.

On March 15, 2019, the habeas court issued a written order granting defendant's petition for writ of habeas corpus and ordering defendant to be resentenced as if his prior conviction for violating section 246 in RCSC case No. CR44158 was not a strike. The court concluded *Gallardo* applied retroactively and therefore under *Gallardo*, the trial court violated defendant's Sixth Amendment right to have a jury decide beyond a reasonable doubt whether he personally used a firearm in RCSC case No. CR44158. The court also found that at defendant's sentencing hearing on January 30, 1998, "the parties and the trial court *assumed* that a violation of Penal Code section 246 must include

personal use of a firearm, thereby ignoring that a person could violate the statute without personal use as an aider and abetter [*sic*]. (See *Blackburn*, [*supra*,] 72 Cal.App.4th at [p.] 1531.) Although the trial court applied the beyond a reasonable doubt standard for its finding that the prior conviction was true (RT 634:10-11), it never made any finding that [defendant] ‘personally use[d] a firearm’ in case no. CR44158 beyond a reasonable doubt as required. [Citations.]” (Bold and italics in original.) Finally, the habeas court determined remand was unnecessary because the record affirmatively established defendant never admitted to personal use of a firearm when he committed the prior conviction.

On April 9, 2019, the People filed a timely notice of appeal. On October 13, 2020, in a nonpublished opinion, we affirmed the habeas court’s order and concluded the habeas court did not err in applying *Gallardo* retroactively. On December 23, 2020, the California Supreme Court granted review of our opinion and deferred action pending its decisions in *Milton*, *supra*, 13 Cal.5th 893.

On November 9, 2022, the Supreme Court transferred the matter back to us with directions to vacate our original opinion and reconsider defendant’s appeal in light of *Milton*. We subsequently vacated our original decision and provided the parties the opportunity to file a supplemental brief.

III

DISCUSSION

In their supplemental brief, the People generally assert that following *Milton*, the habeas court's judgment must be reversed because the court's ruling was based on *Gallardo*. The People also contend that absent *Gallardo*, law of the case dictates the trial court properly considered the preliminary hearing transcript to determine defendant's strike conduct and the transcript constituted sufficient evidence of the strike. The People further maintain that the sentence was not unauthorized. Defendant responds in his supplemental brief that the prior strike for violating section 246 in RCSC case No. CR44158 was properly dismissed by the habeas court as an unauthorized sentence.

The California Supreme Court in *Gallardo, supra*, 4 Cal.5th 120, held that, when determining whether a prior conviction is a serious felony for purposes of increasing a sentence, the trial court is limited to "those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea." (*Id.* at p. 136; see *id.* at p. 134.) Such a determination about the nature of a prior conviction thus is to be made by the court solely based on the record of conviction. (*Id.* at p. 138.) Where there has been a plea, the determination of whether the plea encompassed a relevant admission about the nature of the crime is limited to the record of the conviction entered on the plea. (*Id.* at pp. 138-139.) Our Supreme Court concluded the trial court in *Gallardo* had engaged in constitutionally prohibited factfinding by looking beyond the

defendant’s record of conviction to find that a prior conviction qualified as a strike. (*Id.* at pp. 134-137.) The Supreme Court thus remanded the matter, instructing the trial court to reconsider its factual finding of the defendant’s knife use by considering only “the record of the prior proceeding” to determine “what facts [the defendant] necessarily admitted in entering her plea.” (*Id.* at pp. 140, 130, 137; see *Milton, supra*, 13 Cal.5th at p. 910.)

A. *Milton* Decision

Recently, the California Supreme Court in *Milton, supra*, 13 Cal.5th 893, determined that the *Gallardo* rule does not apply retroactively to a defendant’s unauthorized sentence under the state and federal retroactivity tests for assessing retroactivity of judicial decisions. (*Milton*, at pp. 904-919.) The court concluded that the rule announced in *Gallardo* is a “new procedural rule and that it is not retroactive to cases on collateral review under both state and federal tests for retroactivity. Thus, it does not apply to petitioner’s final judgment.” (*Milton*, at p. 919, abrogating *In re Brown* (2020) 45 Cal.App.5th 699.)

The Supreme Court noted the general principles of retroactivity as follows:

“California courts have applied two tests for retroactivity, often referred to as the federal and state tests. (*In re Thomas* (2018) 30 Cal.App.5th 744, 754 (*Thomas*)). Under both tests, a judicial decision that creates a ‘new rule’ is generally not given retroactive effect in cases on collateral review that were final when the rule was announced. (*Teague v. Lane* (1989) 489 U.S. 288, 306 (*Teague*); *Donaldson v. Superior Court* (1983) 35 Cal.3d

24, 36.) Thus, the threshold question under both tests is whether a judicial decision constitutes a new rule. (*In re Ruedas* (2018) 23 Cal.App.5th 777, 799 (*Ruedas*.) A new rule, however, will nevertheless be given retroactive effect under either test if it is substantive, as opposed to procedural. (*Teague, supra*, 489 U.S. at p. 311 [citation].) Therefore, the second question under both tests is whether the new rule announced by the judicial decision is procedural or substantive.” (*Milton, supra*, 13 Cal.5th at p. 904.)

“Under the federal test, rules that are both new and procedural do not apply retroactively to final judgments, without exception. (*Edwards v. Vannoy* (2021) 593 U.S. ___, 141 S.Ct. 1547, 1551-1552, 1560 [the United States Supreme Court’s decision striking down Louisiana’s nonunanimous jury verdict law is not retroactive to final judgments because it is a new procedural rule].) In contrast, in California, a new procedural rule may nevertheless be retroactive under [*In re*] *Johnson* (1970) 3 Cal.3d 404 (*Johnson*).” (*Milton, supra*, 13 Cal.5th at pp. 904-905.) Following a lengthy analysis of the retroactivity tests, our Supreme Court concluded that the rule announced in *Gallardo* is a new rule under both the federal and state law retroactivity tests. (*Milton*, at pp. 905-906.) The court noted that *Gallardo* “announced a new rule under the federal test because precedent that existed at the time petitioner’s conviction became final did not dictate our decision in *Gallardo*.” (*Milton*, at p. 906.)

The Supreme Court further concluded that the *Gallardo* rule is a procedural, not a substantive rule, under both the federal and state law retroactivity tests. (*Milton, supra*, 13 Cal.5th at p. 907.) The court explained, “Both federal and state cases have held that a

rule is substantive rather than procedural where it “alters the range of conduct or the class of persons that the law punishes.” [Citations.] “This includes decisions 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.” [Citations.]” (*Ibid.*) The court noted, for example, the law relating to a natural and probable consequences theory of liability, which can no longer serve as a basis for a first degree murder conviction, was a substantive change in the law that applied retroactively to final judgments “because all defendants who had been convicted of first degree murder under the now-invalidated natural and probable consequences theory were categorically entitled to relief from their convictions as a result of the new rule.” (*Id.* at p. 908)

“Procedural rules, by contrast, “regulate only the manner of determining the defendant’s culpability.” [Citation.] Such rules alter “the range of permissible methods for determining whether a defendant’s conduct is punishable.” [Citation.] “They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.” [Citations.] ‘If a new rule regulates only the procedures for determining culpability, the *Teague* balance generally tips in favor of finality. The chance of a more accurate outcome under the new procedure normally does not justify the cost of vacating a conviction whose only flaw is that its procedures “conformed to then-existing constitutional standards.” [Citation.] Some examples of

procedural rules are ones that ‘alter[] only the procedures used to obtain the conviction,’ “‘ allocate decisionmaking authority” between judge and jury, [citation], or regulate the evidence that the court [may] consider in making its decision.’ [Citation.]” (*Milton, supra*, 13 Cal.5th at p. 908, italics omitted, quoting *Welch v. United States* (2016) 578 U.S. 120, 129-131 (*Welch*).)

The Supreme Court determined “the *Gallardo* rule ‘regulate[d] the evidence that the court could consider’ in making prior conviction determinations [citation] by precluding courts from looking at anything other than ‘those facts that were established by virtue of the [prior] conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea’ [citation].” (*Milton, supra*, 13 Cal.5th at p. 909, citing *Welch, supra*, 578 U.S. at p. 130 & *Gallardo, supra*, 4 Cal.5th at p. 136.)

Finally, our Supreme Court concluded the *Gallardo* rule is not retroactive under the state test announced in *Johnson*. (*Milton, supra*, 13 Cal.5th at pp. 909-917.) Under *Johnson*, the retroactivity of a new rule is determined by ““(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.”” (*In re Johnson* (1970) 3 Cal.3d 404, 410.) The court noted that “for a new rule to apply retroactively, its “‘major” or ‘primary purpose’ must be ‘to promote reliable determinations of guilt or innocence,’ i.e., “‘to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so

raises serious questions about the accuracy of guilty verdicts.””” [Citation.] For these purposes, the threshold for applying a case retroactively on collateral review is necessarily demanding, given the important systemic interests in the stability and finality of judgments. [Citation.]” (*Milton, supra*, 13 Cal.5th at p. 915, italics omitted.)

Our high court explained “the first *Johnson* factor is critical in determining retroactivity, and the second factor of law enforcement’s reliance on the old rule, and the third factor of the burden on the administration of justice ‘are of significant relevance only when the question of retroactivity is a close one after the purpose of the new rule is considered.’ [Citation.]” (*Milton, supra*, 13 Cal.5th at p. 919.) The court concluded “the first *Johnson* factor’s effect on the issue of retroactivity is determinative” and did not discuss “whether the second and third *Johnson* factors also weigh against applying *Gallardo* retroactively.” (*Milton*, at p. 919.)

The high court rejected the petitioner’s argument that *Gallardo* is retroactive under the *Johnson* standard because the “‘fundamental purpose of *Gallardo* is to promote fair and reliable determinations of the defendant’s guilt or innocence on the allegation that he suffered a prior conviction qualifying as a strike under California law.’” (*Milton, supra*, 13 Cal.5th at p. 915.) The court explained that although the rule announced in *Gallardo* modified the permissible procedures for finding facts about a defendant’s prior convictions, “the factfinding procedures in place prior to *Gallardo* did not lack basic integrity or fairness,” such as “denying an indigent defendant an attorney, foreclosing a criminal appeal because of inability to pay, or using an unfair procedure for determining

whether a confession admitted in evidence is actually voluntary.” (*Milton*, at p. 915.)

“During the many years in which it was the sentencing court’s role to make findings about the nature of prior convictions, for example, a pre-*Gallardo* sentencing court ‘still had to apply the beyond-a-reasonable-doubt standard of proof’ in determining whether a prior conviction was a serious or violent felony. [Citations.] In addition, a pre-*Gallardo* sentencing court was restricted to reviewing the record of the prior conviction and ‘no further,’ which ensured the court would not base its determination on potentially unreliable information outside the record of conviction. [Citation.]” (*Milton*, at p. 915, italics omitted.)

Our high court further pointed out that “there were other safeguards in place to ensure the sentencing court would not base its findings on unreliable material in the record of conviction.” (*Milton, supra*, 13 Cal.5th at p. 915.) The court noted, in contrast to an “unreliable probation report, a preliminary hearing transcript on which the sentencing court relied was sufficiently reliable ‘because the procedural protections afforded the defendant during a preliminary hearing tend to ensure the reliability of such evidence. Those protections include the right to confront and cross-examine witnesses and the requirement those witnesses testify under oath, coupled with the accuracy afforded by the court reporter’s verbatim reporting of the proceedings.’” (*Id.* at p. 916.)

B. *Analysis*

In this case, pursuant to *Milton*, we find the habeas court erred in applying the *Gallardo* rule retroactively. As such, we agree with the People that under then applicable law, the trial court in SBSC case No. FSB11452 was permitted to review defendant's record of conviction, including the preliminary hearing transcript, to determine his underlying conduct in the prior offense for shooting at an occupied motor vehicle. The preliminary hearing transcript contained sufficient evidence that defendant personally used a firearm in the commission of the prior offense. Furthermore, as noted in *Milton*, defendant could have contested or objected to the gun use facts if they were not true at the time he pleaded guilty to shooting at an occupied motor vehicle in RCSC case No. CR44158. "Because gun use could result in a longer sentence, petitioner would have had the incentive to contest it at his original sentencing and presumably would have done so if there were any question whether he used a gun" in the commission of shooting at an occupied vehicle. (*Milton, supra*, 13 Cal.5th at p. 917.) "More to the point, California defendants prior to *Gallardo*, in challenging whether the prosecution had proven a fact about a prior conviction beyond a reasonable doubt, could raise their lack of incentive to challenge that fact during the original proceedings, in the course of arguing the beyond-a-reasonable-doubt standard was not satisfied. [Citations.]" (*Milton*, at pp. 917-918.)

Moreover, the firearm use facts in this case relate directly to the key element of discharging a firearm, not to some extraneous enhancement like great bodily injury. Shooting a firearm is, in fact, an element of shooting at an occupied motor vehicle. (See

§ 246.) Although it is possible to commit this offense as an aider and abettor, the stipulated facts of the preliminary hearing transcript show defendant pleaded guilty as the shooter and there was no question as to defendant's identity. In other words, the preliminary hearing transcript of defendant's prior offense clearly demonstrates that defendant was the actual shooter. There is no evidence to support defendant's implied contention that he was merely an aider and abettor.

In addition, absent *Gallardo's* retroactive application, this court's prior opinion controls under law of the case. Our Supreme Court has defined the doctrine of law of the case as follows: ““That where, upon an appeal, the [reviewing] court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal and . . . in any subsequent suit for the same cause of action”” (*People v. Murtishaw* (2011) 51 Cal.4th 574, 589.)

In his direct appeal, defendant, in relevant part, argued that there was insufficient evidence that his prior conviction for shooting at an occupied motor vehicle (§ 246) qualified as a “strike.” (*Blackburn, supra*, 72 Cal.App.4th at p. 1525.) We rejected this argument and affirmed the judgment on June 23, 1999. (*Id.* at pp. 1535-1536.) We found sufficient evidence supported the determination that the prior conviction qualified as a “strike” based on a review of the preliminary hearing transcript from RCSC case No. CR44158. (*Id.* at pp. 1531-1532.) As described in the preliminary hearing transcript,

defendant was seen holding a gun, defendant was the main participant in attempting to get the victim/vehicle to pull over, there was no evidence defendant's passenger had a gun, and the passenger did not have a clear shot at the victim but defendant did. (*Ibid.*) In addition, this court reasoned that it was immaterial that the personal use of a firearm allegation was dismissed because it was not necessary to prove the prior strike. (*Id.* at pp. 1527 & 1530.) As noted in *Milton*, ““The application of [the various] procedural bars and limitations on the retroactivity of changes in the criminal law serves to protect the finality of judgments on collateral review.”” (*Milton, supra*, 13 Cal.5th at p. 905; see *In re Martinez* (2017) 3 Cal.5th 1216, 1222; *Teague v. Lane* (1989) 489 U.S. 288, 306 [the government has a legitimate interest in having judgments remain final, and collateral review ““is not designed as a substitute for direct review””].)

We also agree with the People that since the rule announced in *Gallardo* is not retroactive, and the habeas court reasoned that the strike finding issue stemmed from *Gallardo*, neither the habeas court nor defendant can use the procedural mistakes to attack the trial court's original strike finding. Although section 1158 requires that a judge or jury find whether a defendant has suffered a prior conviction, the statute does not require the factfinder employ specific language or procedure. (§ 1158.) Thus, even if a court fails to make a formal finding, a court's factual statements may suffice if they show the court made the finding in substance.

In contrast, failure to mention a prior until after sentencing shows a not true finding. (See *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1440 (*Gutierrez*.) Defendant's reliance on *Gutierrez* is misplaced. There, the defendants waived a jury trial regarding their prior conviction allegations and stipulated that the trial court could determine the truth of the prior convictions at the probation hearing. At the probation hearing, no trial or discussion of the prior convictions occurred. During sentencing, the trial court acquiesced in the court clerk's suggestion that the prior convictions be stayed. The reviewing court concluded that the appellate record did not reflect a finding as contemplated by section 1158. (*Gutierrez*, at pp. 1439-1440.) The reviewing court also declined to "equate the trial court's acquiescence in [the] clerk's suggestion . . . as an implied judicial finding that the priors had been proved." (*Id.* at p. 1440.)

Initially, we note *Gutierrez* involved a direct appeal case; not one collaterally attacking the judgment. Moreover, unlike *Gutierrez*, here, the trial court found defendant had suffered a prior strike conviction for shooting at an occupied vehicle after a bifurcated trial on the priors. During the court trial on the priors, the prosecutor offered a variety of documents to prove the prior, such as defendant's section 969(b) packet, related certified court records from Riverside County, and a fingerprint comparison between defendant's fingerprints and the prints in the 969(b) packet. The parties stipulated to defendant's identity as the one who suffered the prior conviction. The prosecutor highlighted areas of the preliminary hearing transcript demonstrating that defendant was the shooter. Defendant stipulated to the facts the prosecutor highlighted,

including the prosecutor's claim that defendant "had a handgun and shot at another vehicle" in the prior. By stipulating to his conduct of the prior strike conviction, defendant effectively admitted to the prior strike of shooting at an occupied vehicle. Furthermore, all parties believed the trial court found the prior conviction to be true, and defendant never raised the issue on direct appeal. At the outset of the sentencing hearing on January 30, 1998, the trial court noted that "[a]lso found true was a prior strike." Defendant did not refute the statement and never challenged the actual finding. Additionally, in denying defendant's motion to strike the prior strike, the trial court specifically noted that the prior "[i]nvolves the use of a firearm," further indicating the court found defendant's prior conduct constituted a strike. Following this discussion, the court pronounced judgment.

As the People note, any ambiguity in the record relates to when the trial court found the strike prior true, not whether this finding was made. There was no complete failure to mention the prior strike as occurred in *Gutierrez*, and the trial court substantially complied with section 1158. In any event, based on the foregoing, any error with regard to announcing the strike prior finding was harmless under the circumstances. (See *People v. Watson* (1956) 46 Cal.2d 818.) The record of conviction clearly shows that defendant suffered a prior strike for shooting at an occupied vehicle, and the trial court made the strike finding following a bifurcated trial on the prior. Thus, any error in failing to announce the true finding was harmless. (See *People v. Epps* (2001) 25 Cal.4th 19, 29; *People v. Kelii* (1999) 21 Cal.4th 452, 459.)

We also reject defendant’s argument that the sentence was unauthorized and thus the habeas court properly dismissed the strike. As the *Milton* court explained, “[t]he argument is circular. If we conclude the *Gallardo* rule is retroactive, petitioner’s sentence was unlawful at the time of sentencing and is unauthorized. If the *Gallardo* rule is not retroactive, his sentence was lawful and is authorized.” (*Milton, supra*, 13 Cal.5th at p. 919, fn. 13.)

The *Dixon* and *Waltreus* doctrines also prevent defendant from relitigating the sufficiency of the evidence supporting the prior strike finding on habeas. Our Supreme Court has established procedural rules limiting habeas use. (*In re Clark* (1993) 5 Cal.4th 750, 763-764, superseded by statute on other grounds as stated in *Briggs v. Brown* (2017) 3 Cal.5th 808.) One such rule “has come to be known as the *Waltreus* rule; that is, legal claims that have previously been raised and rejected on direct appeal ordinarily cannot be reraised in a collateral attack by filing a petition for a writ of habeas corpus.” (*In re Reno* (2012) 55 Cal.4th 428, 476 (*Reno*)). This rule is “consistent with the very nature of habeas corpus” as “an extraordinary remedy applicable when the usual channels for vindicating rights—trial and appeal—have failed.” (*Id.* at p. 477.) And because “habeas corpus cannot serve as a substitute for an appeal, . . . in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.” (*Dixon, supra*, 41 Cal.2d at p. 759.) This has come to

be known as the *Dixon* rule. We note sufficiency of the evidence claims generally may not be raised in a petition for writ of habeas corpus. (*Reno*, at p. 514.)

IV

DISPOSITION

The order granting the petition for writ of habeas corpus is reversed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

MILLER
Acting P. J.

FIELDS
J.