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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MORRIS GLEN HARRIS, JR.,	) S-_____
	)
Petitioner,	) (2nd Dist. No. B264839)
	)
v.	) (Trial Ct. No. BA408368)
	)
THE SUPERIOR COURT OF LOS ANGELES COUNTY,	) (Related to S227878)
	)
Respondent,	)
	)
PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Real Party in Interest.	)

SUPREME COURT
FILED

DEC 28 2015

Frank A. McGuire Clerk

Deputy

PETITION FOR REVIEW

RONALD L. BROWN, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA
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PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner Morris Glen Harris Jr. respectfully petitions this court for review of the 2-1 published decision by the Second District Court of Appeal, Division Five, issued November 18, 2015, denying his Petition for Writ of Prohibition. The decision was issued after this court granted review and transferred the case back to the Court of Appeal. The majority held that although petitioner was entitled to have his conviction charge reduced to a misdemeanor pursuant to Proposition 47, the prosecution was entitled

to withdraw from the plea bargain as a result of being substantially deprived of its benefit and to reinstate the original, more serious, charge. The majority also subjected petitioner to additional punishment by reinstating the maximum sentence available on the original charge.

The dissenting justice wrote that petitioner was entitled to the benefit of Proposition 47 and that, pursuant to this court's decision in *Doe v. Harris* (2013) 57 Cal.4th 64, plea agreements are deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law. The dissent wrote that the trial court had no power to reinstate charges because Proposition 47 did not, either expressly or impliedly, grant that power.

A copy of the Court of Appeal's opinion is attached as Appendix A. An Order Modifying the Dissenting Opinion issued December 1, 2015, is attached as Appendix B.

ISSUE ON REVIEW

When a defendant pleads guilty to a lesser felony charge pursuant to a plea bargain, and that charge is later reduced to a misdemeanor pursuant to Proposition 47, may the prosecution and the trial court vacate the plea, reinstate the original, more serious charge(s), and subject the defendant to increased punishment?

IMPORTANCE OF ISSUE

Proposition 47, an initiative passed by almost 60 per cent of California's voters, made significant changes to the way California treats

offenders. The voters mandated that specified crimes could henceforth only be filed as misdemeanors for qualified defendants, thus removing prosecutorial charging discretion. In addition, and most relevant here, the voters also allowed convicted persons to petition the courts to reduce an enumerated felony conviction to a misdemeanor, specifying that the reduction would occur regardless of whether the conviction occurred after trial or plea.

It is very rare that a Court of Appeal issues an opinion that is as seriously damaging to a voter-approved initiative as did the *Harris* majority. The majority opinion has the potential to not only eviscerate Proposition 47, but carried to its logical conclusion, eviscerate the Three-Strikes sentencing initiative, Proposition 36. It simply cannot be the will of the People of the State of California that an initiative that by its very terms applies to convictions obtained by pleas, which represent more than 95 per cent of all convictions, would not apply to plea bargains. Yet that is the unreasonable conclusion reached by the *Harris* majority.

In 2013 this court issued *Doe v. Harris*, wherein it was clearly held that plea bargains incorporate and contemplate not only existing law, but also the reserve power of the state to amend the law. This decision was reinforced in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871. Proposition 47, obviously, is a change in the law and *Doe v. Harris* establishes that it applies to existing convictions including plea bargains. The Court of Appeal majority (hereafter "the majority") was wrong when it

said that *Doe v. Harris* was distinguishable. The majority's attempt to limit *Doe v. Harris* to what it calls "statutory conditions" as opposed to negotiated terms must fail. The holding in *Doe v. Harris* contains no such limitation and cannot be read so narrowly. Language this clear needs no interpretation and it is apparent that this court meant what it wrote.

The majority relied upon *People v. Collins* (1978) 21 Cal.3d 208, which allowed the reinstatement of the original charges after the conviction charge was decriminalized and the defendant potentially freed from all criminal culpability and restraint. Although *Collins* was not mentioned in either *Doe v. Harris* or *Johnson*, it can no longer be considered valid law in light of those two decisions. The majority's reliance upon *Collins* was error.

In addition, the majority failed to recognize, as pointed out by the dissent, that Proposition 47 is a wholly-contained statutory construct that only gives the trial court one power: to reduce an eligible and suitable defendant's qualifying crime to a misdemeanor. The trial court was without jurisdiction to reinstate dismissed charges and the Court of Appeal did not have the power to expand Proposition 47 to allow this.

This is a question of significant import throughout the state. The majority opinion cannot be allowed to stand and wipe out the application of Proposition 47 to up to 95 per cent of the cases within its ambit. *Harris* is inconsistent with *T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, which held that Proposition 47 *does* apply to plea bargained cases. Review

is necessary to settle this important, repeating question of law and to secure uniformity of decision. (Cal. Rules of Court, Rule 8.500, subd. (b)(1).)

STATEMENT OF FACTS AND PROCEDURE

Petitioner was charged by information with robbery in violation of Penal Code section 211. It was alleged that petitioner had a prior robbery conviction that was both a "strike" and a five-year prior. The crime occurred on February 11, 2013. (Felony Information attached to the Petition for Writ of Prohibition as Exhibit A.)

The preliminary hearing transcript explains that on February 11, 2013, petitioner approached victim Francisco Diego from behind, hit him on the side of the face, and took his cell phone. Mr. Diego gave chase and told two nearby police officers about what had happened. The officers captured petitioner and the cell phone was recovered on the ground next to him. Mr. Diego identified petitioner as the person who stole his phone.

At pretrial the prosecution added Penal Code section 487, subdivision (c), grand theft from the person. Petitioner pleaded guilty and admitted the prior "strike" conviction. He was sentenced to 6 years in state prison pursuant to the plea agreement. The robbery charge and the remaining allegations were dismissed. (Superior Court's Computerized Minute Orders, attached to the Petition for Writ of Prohibition as Exhibit B.)

On January 27, 2015, petitioner filed his Proposition 47 recall petition, pursuant to Penal Code section 1170.18, which was attached to the Petition for Writ of Prohibition as Exhibit C. Petitioner set forth a prima facie case that he was eligible and suitable for Proposition 47 relief.

On February 25, 2015, the prosecution filed a "Motion to Withdraw from the Plea and Reinstate Charges," which was attached to the Petition

for Writ of Prohibition as Exhibit D. The prosecution argued that it was entitled to the benefit of its bargain, citing *People v. Collins, supra*, 21 Cal.3d 208. The prosecution argued that general contract provisions applied even if there was a change in the law. The prosecution's request was that it be allowed to withdraw from the plea, set it aside, and reinstate the previously dismissed robbery count.

On March 5, 2015, petitioner's counsel filed "Points and Authorities Re Entitlement to Proposition 47 Relief," which was attached to the Petition for Writ of Prohibition as Exhibit E. Petitioner relied upon *Doe v. Harris, supra,* 57 Cal.4th 64, wherein this court explained that plea agreements are deemed to incorporate and contemplate not only the existing laws, but also the reserve power of the state to amend the law. The fact that the parties have entered into a plea agreement does not insulate them from changes in the law.

Petitioner argued that Proposition 47, by its own terms, applies to convictions obtained by plea and is to be construed liberally and broadly. Petitioner refuted the "benefit of the bargain" argument advanced by the prosecution. Petitioner argued that excluding plea-bargained crimes from Proposition 47 relief would gut the initiative because more than 90 per cent of criminal convictions are obtained by plea.

Petitioner explained how *Doe v. Harris* mandated that the changes brought by Proposition 47 had to be applied. Petitioner also pointed out numerous other instances where sentencing reforms were applied to defendants even though the convictions were obtained through plea bargains. Petitioner argued that *Collins* had been overruled *sub silentio* by *Doe v. Harris* and did not apply.

On March 11, 2015, respondent court issued its written Proposed Order, Exhibit F to the Petition for Writ of Prohibition. The court

explained that the issue was not so much whether petitioner was entitled to Proposition 47 relief, but rather whether the prosecution is entitled to relief when the fundamental terms of the plea agreement are altered. (Exh. F, p. 4.) The court concluded it was without jurisdiction to deny the petition because petitioner was eligible and suitable. (Exh. F, p. 5.) The court granted relief. (Exh. F, p. 8.)

The court also concluded that the prosecution would be allowed to withdraw from the plea, set it aside, and reinstate the dismissed charge and allegations. (Exh. F, p. 8.) The trial court determined that the prosecution is entitled to receive the benefit of its plea bargain and that when the prosecution does not realize its benefit, then that is grounds for setting aside the agreement, vacating the plea, and reinstating any dismissed charges. (Exh. F, p. 11.) The court distinguished *Doe v. Harris* on the ground it did not deal with the issue of the prosecution's remedy for a breached plea agreement. (Exh. F, pp. 12-13.) The trial court argued that *Doe v. Harris* and *People v. Collins* are consistent because they apply the same rule. (Exh. F, p. 13.) The court concluded that because the Proposition 47 reduction to a misdemeanor deprived the prosecution of the benefit of its bargain, then under general contract law the plea agreement must be set aside. (Exh. F, pp. 14-15.) The court further stated that although it had approved the original plea agreement of a reduction from a robbery to a grand theft, it would reject such an agreement that, after Proposition 47, would only involve a misdemeanor conviction and a short stint in jail. (Exh. F, pp. 15-16.)

The court argued that petitioner had voluntarily chosen to forego the benefit of his bargain when he made the Proposition 47 motion to reduce. The court wrote that the choice is the defendant's: either seek a reduction and lose the benefit of the plea bargain or forego the benefit of Proposition

47 in order to keep the conviction of a lesser offense. The court also concluded that giving up the plea bargain did not disadvantage the defendant. (Exh. F, pp. 16-18.) The court said that if counts were reinstated, petitioner could not receive a greater sentence than he received as part of the plea agreement. (Exh. F, pp. 22-25.) The court granted the prosecution's motion to withdraw from the plea and reinstate charges. (Exh. F, p. 26.)

On April 6, 2015, petitioner's counsel filed "Objections to Proposed Order," which was attached to the Petition for Writ of Prohibition as Exhibit G. Petitioner framed the issue as whether or not, when a defendant gets the benefit of a Proposition 47 reduction to a misdemeanor, the prosecution is able to force the defendant to withdraw his plea and face the original charges. (Exh. G, pp. 1-2.)

At a hearing on April 6, 2015, the court said that reducing the conviction charge to a misdemeanor undercut the plea bargain. The court said it would never have agreed to a misdemeanor based upon the facts of the case and petitioner's record. That being said, Proposition 47 required the court to grant the motion and reduce the charge to a misdemeanor. The court also stated that the prosecution was entitled to its plea bargain, which meant a felony conviction and 6 years in state prison. (Reporter's Transcript of the Proceedings April 6, 2015, attached as Exhibit H to the Petition for Writ of Prohibition, hereafter RT, 3: 1-23.)

The court ordered petitioner out from state prison so that he could understand the consequences of the court's intended action. The only way for petitioner to avoid the consequence of having his plea vacated would be for him to withdraw his Proposition 47 petition. (RT 4: 5-28, 5: 1-21, 6: 7-15.)

On May 12, 2015, the court issued an amended proposed order. The order was attached to the Petition for Writ of Prohibition as Exhibit I. The court's amendments dealt with *T.W. v. Superior Court* (2015) 236 Cal.App.4th 646. The trial court said that *T.W.* did not address the issue of whether there could be terms of a plea agreement that are so fundamental to the agreement that they could not be altered by subsequent legislation. The trial court distinguished *T.W.* by noting that the trial judge in that case said the existence of a plea bargain completely barred Proposition 47 relief. (Exh. I, pp. 7-9 and footnotes 7, p. 8, and 8, p. 9.) On May 22, 2015, the court made the amended proposed order final. The court stayed the order. (Reporter's Transcript of the Proceedings May 22, 2015, attached to the Petition for Writ of Prohibition as Exhibit J.) The final order was attached as Exhibit K.

On June 16, 2015, petitioner filed a Petition for Writ of Prohibition in the Second District Court of Appeal. On July 10, 2015, Division 5 issued an order denying the petition. A two-judge majority wrote:

> "Petitioner was originally charged with robbery in violation of Penal Code section 211. Pursuant to a plea agreement he pled to a felony grand theft person charge in violation of Penal Code section 487 and received an agreed-upon sentence of six years. The robbery charge was dismissed. While petitioner was entitled to a reduction of his grand theft conviction to a misdemeanor and to recall his sentence pursuant to Penal Code section 1170.18, the People were also entitled to move to withdraw the plea bargain as a result of being substantially deprived of its benefits including a six year sentence. Petitioner fails to demonstrate the respondent court erred in granting the People's motion to withdraw the guilty plea and reinstate the robbery charge under Penal Code section 211. (*People v. Collins* (1978) 21 Cal.3d 208, 215; *People v. Nitschmann* (2010) 182 Cal.App.4th 705, 707-710.)"

The third justice separately wrote: "I would grant an order to show cause to decide this issue, which is one of statewide importance."

On July 17, 2015, a Petition for Review was filed. An answer and reply were filed and on September 23, 2015, this court granted review and transferred the case back to the Court of Appeal. On October 7, 2015, the Court of Appeal issued its order to show cause. The prosecution filed a written return and petitioner filed his reply. Oral argument was heard on November 16, 2015. The Court of Appeal, in a 2-1 decision, issued its published opinion on November 18, 2015. Justice Richard Mosk dissented. A modification of the dissenting opinion was filed on December 1, 2015. The opinion and modification are attached as Attachments A and B.

The majority framed the issue as whether the People may withdraw from the plea agreement and reinstate the original charges where the plea-bargained felony charge becomes a misdemeanor as a result of Proposition 47. The majority concluded, relying upon *People v. Collins*, *supra*, 21 Cal.3d 208, that principles of contract law applied to plea bargains and that when the prosecution lost the benefit of its bargain through the reduction of the conviction charge to a misdemeanor pursuant to Proposition 47, the bargain was violated and the original charge could be reinstated. The majority distinguished *Doe v. Harris, supra*, 57 Cal.4th 64, saying that *Doe* only applied to statutory consequences of a plea (such as the sex offender registration at issue) and did not apply to negotiated terms, such as the length of the sentence. The majority distinguished the cases cited by

petitioner, claiming they were either inapplicable or related to statutory terms rather than negotiated terms.

The majority also concluded that restoration of the original, more serious charge restored the status quo ante and therefore petitioner could be sentenced to the maximum possible sentence (15 years) regardless of the six-year sentence imposed as part of the plea agreement.

The dissent concluded that Proposition 47 did not give the court power to rescind the plea, recall the sentence, or reinstate the original charges. The dissent relied upon *Doe v. Harris* for the proposition that plea bargains are deemed to incorporate the power of the state to change the law and that the plea bargain was not breached or made revocable by Proposition 47. The dissent argued that the law had changed, that petitioner was entitled to the reduction, and that no law allowed the court to reinstate the original charges. The dissent distinguished *Collins*, finding that it involved a case where the defendant gained *total* relief from vulnerability to sentence because his crime of conviction had been repealed. *Collins* is not applicable because petitioner did not escape vulnerability to punishment but remained convicted with a lesser punishment. The dissent also wrote that allowing plea bargains to be revoked would frustrate the voters' intent and expectations and could also impact any statute that would retroactively reduce a sentence. The dissent was undoubtedly referring to Proposition 36, the Three Strikes resentencing initiative.

ARGUMENT

I

STANDARD OF REVIEW

There are no disputed factual issues. The issue presented is purely legal and is subject to independent, de novo review. (*People v. Cromer* (2001) 24 Cal.4th 889, 893-94.)

II

PRINCIPLES OF STATUTORY CONSTRUCTION

Proposition 47, a voter initiative, is construed in the same manner as statutes enacted by the Legislature.

> "In interpreting a voter initiative we apply the same principles that govern statutory construction. [Citation.] Thus, 'we turn first to the language of the statute, giving the words their ordinary meaning.' [Citation.] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. [Citation.] When the language is ambiguous, 'we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.' [Citations.] In other words, 'our primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure.' [Citation.]" (*People v. Briceno* (2004) 34 Cal.4th 451, 459, some internal quotation marks omitted.)

If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine intent is unnecessary. (*Kavanaugh v. W. Sonoma County Union High School District* (2003) 29 Cal.4th 911, 919.) Courts are not at liberty to seek hidden meanings not suggested by the statute. (*People v. Knowles* (1950) 35 Cal.2d 175, 183.)

III

THE TRIAL COURT DID NOT HAVE JURISDICTION TO VACATE THE PLEA BARGAIN AND REINSTATE THE ORIGINAL CHARGES

The majority concluded that the Proposition 47 reduction of the conviction crime to a misdemeanor violated the terms of the plea agreement, resulting in the prosecution not receiving the benefit of its bargain. Relying upon *People v. Collins*, the majority held that the prosecution was entitled to withdraw from the plea bargain and reinstate the original counts – including the original maximum sentence. The majority's conclusion is incorrect. *Doe v. Harris* controls and the change in the law wrought by Proposition 47 is deemed to be incorporated into the plea agreement. Proposition 47 did not authorize the plea bargain to be vacated and the original charges reinstated.

Proposition 47 enacted Penal Code section 1170.18, which creates a comprehensive statutory scheme requiring a court to resentence defendants who have been convicted of qualifying crimes and who are both eligible and suitable as those terms are defined. There has been no dispute that petitioner was both eligible and suitable for Proposition 47 relief.

The majority erred when it allowed the prosecution to withdraw from the plea agreement and reinstate the original charge. There is nothing in section 1170.18 that gives courts that power. That statute only allows courts to reduce a qualifying charge to a misdemeanor, resentence the defendant, and place him on parole. Courts have no power to do anything else and the court acted in excess of its jurisdiction when it vacated the plea agreement and reinstated the original charge. Justice Mosk's dissent got it right. The majority failed to recognize that it had no power to read

Proposition 47 to add power not envisioned by the voters or contained in the language of the initiative.

In pertinent part, Penal Code section 1170.18 states:

> (a) A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ("this act") had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.
>
> (b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, those sections have been amended or added by this act, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.
>
> (d) A person who is resentenced pursuant to subdivision (b) shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole. . . .
>
> (e) Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence.
>
> (i) The provisions of this section shall not apply to persons who have one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.

Assuming that a defendant is eligible and suitable, a court only has the authority to recall the sentence and resentence the person to a misdemeanor. The person must be given credit for time served and placed on parole unless parole is waived. The court cannot impose a longer sentence than the original sentence.

Courts do not have inherent power to recall a prison sentence and resentence the inmate. That power is strictly a creation of statute. Courts do not have to power to enlarge the recall statutes and perform actions that the statutes do not explicitly allow. The trial court and the majority seriously departed from the provisions of Proposition 47. The trial court erred as a matter of law, vastly exceeded its jurisdiction, and made a void order. The majority compounded that error.

The well-established rule is that courts lose resentencing jurisdiction once sentence has been executed. (*See People v. Thomas* (1959) 52 Cal.2d 521; *Holder v. Superior Court* (1970) 1 Cal.3d 779, 783.) In 1976 the Legislature enacted Penal Code section 1170, subdivision (d). The Legislature created an exception to the general rule and gave courts the power to recall a sentence within 120 days of commitment on the court's own motion and within specified parameters. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 455.) Trial courts do not have a free-floating power to recall prison sentences. The power granted by Penal Code section 1170, subdivision (d), is limited and subject to certain conditions. (*People v. Delson* (1984) 161 Cal.App.3d 56, 62.) Section 1170, subdivision (d)'s provisions must be strictly followed. The 120-day time frame, for example, is mandatory and courts do not have the power to extend it for any reason. (*People v. Lockridge* (1993) 12 Cal.App.4th 1752, 1755.)

Penal Code section 1170.126, enacted by Proposition 36, is another sentence recall statute. Courts acting pursuant to section 1170.126 must strictly follow the conditions set forth in the statute.

In *People v. Brown* (2014) 230 Cal.App.4th 1502 an inmate who was ineligible for 1170.126 resentencing argued that the trial court had the power to dismiss disqualifying priors pursuant to Penal Code section 1385. The *Brown* court explained that Proposition 36 did not give trial courts the power to resentence beyond the conditions specified in the statute. The only power the trial court had was to deny the resentencing petition if the defendant did not statutorily qualify.

Proposition 47 is an additional exception to the rule that courts do not have the inherent power to recall executed prison sentences. Just as with Penal Code sections 1170, subdivision (d), and 1170.126, courts are without power to act beyond the power granted by the statutory scheme.

Proposition 47 created a complete statutory scheme. In so doing the voters precluded the court from imposing other conditions. This inherent prohibition is similar to that found in the deferred entry of judgment and former diversion statutes. There, courts only have the powers enumerated in the statutes. Courts lack the power to impose additional conditions not permitted by the statute, such as a search and seizure condition. (*Frederick v. Justice Court* (1975) 47 Cal.App.3d 687, 689-690; *see also Terry v. Superior Court* (1999) 73 Cal.App.4th 661.)

With Proposition 47, voters gave trial courts the power to do only those things enumerated in Penal Code section 1170.18. The trial court determines eligibility and suitability; the court can put the person on parole; and cannot resentence to a greater term. There is no provision in the statutory scheme for the court to do anything else. There is no provision in the statutory scheme for the court to vacate the plea bargain and then

reinstate dismissed counts as the trial court did and the majority approved. The voters did not open that door when they approved Proposition 47. The trial court's error was jurisdictional and therefore its order is void. (*People v. Brewer* (2015) 235 Cal.App.4th 122, 136-37.)

The trial court properly considered and granted petitioner's Proposition 47 reduction petition. The court then veered off of the Proposition 47 pathway and issued an order that it had absolutely no jurisdiction to issue. Proposition 47 did not give the court that authority and the court had no inherent authority to reinstate counts and vacate a plea bargain. The majority erred when it upheld the trial court's action.

IV

DOE V. HARRIS ESTABLISHES THAT PLEA BARGAINS ARE SUBJECT TO THE POWER OF THE STATE TO CHANGE THE LAW; THERE WAS NO LEGAL BASIS TO GRANT THE PROSECUTION'S MOTION TO WITHDRAW FROM THE PLEA BARGAIN AND REINSTATE THE ORIGINAL CHARGE AND POTENTIAL SENTENCE

In its written order, the trial court phrased the issue this way: "whether the terms that are altered by the application of Penal Code section 1170.18 were so fundamental to the plea agreement that it would be illegal to apply them to the plea bargain in this case." (Exh. K, p. 7.) The majority similarly stated that Proposition 47 altered a material term of the plea agreement (the sentence and felony conviction) and therefore the plea could not stand.

The issue is this: What happens when a plea-bargained felony charge becomes a misdemeanor as a result of Proposition 47? Does the defendant get the benefit of the Proposition 47 reduction? If yes, can the defendant be

forced to withdraw his plea and once again face the original, more serious felony charge(s)?

The original charge here was robbery, a strike. The negotiated disposition was a plea to grand theft person, a non-strike, for 6 years in state prison. Grand theft person is now a Proposition 47 misdemeanor, petitioner was both eligible and suitable for the reduction, and the court properly granted the reduction. The prosecution, however, moved to withdraw from the plea agreement and reinstate the original charge and enhancements. The trial court improperly granted the prosecution's motions. The majority improperly upheld the trial court's ruling.

The rule in California is very clear.

> "We ... rephrased the question as: 'Under California law of contract interpretation as applicable to the interpretation of plea agreements, does the law in effect at the time of a plea agreement bind the parties or can the terms of a plea agreement be affected by changes in the law?' We respond that the general rule in California is that the plea agreement will be 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy.' (*People v. Gipson* (2004) 117 Cal.App.4th 1065, 1070.) That the parties enter into a plea agreement thus does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them." (*Doe v. Harris* (2013) 57 Cal.4th 64, 66, some internal quotation marks omitted.)

Doe v. Harris, when applied to this case, means exactly what it says: the law has changed and petitioner is entitled to the benefit of that change.

As stated above, there is nothing in Proposition 47 that endows the court with the power to force a defendant to withdraw his plea and to reinstate dismissed counts. *Doe v. Harris* cannot reasonably be read to allow such an occurrence. The fact is that this court has repeatedly *rejected*

the argument that when there is a disadvantageous change in the law the defendant can avoid that change by hiding behind the terms of a plea agreement.

> "Both *Swenson* [*Swenson v. File* (1970) 3 Cal.3d 389] and *Gipson* recognize that the Legislature, for the public good and in furtherance of public policy, and subject to the limitations imposed by the federal and state Constitutions, has the authority to modify or invalidate the terms of an agreement. Our explanation in *Swenson* that, as a general rule, contracts incorporate existing but not subsequent law, does not mean that the Legislature lacks authority to alter the terms of existing contracts through retroactive legislation. Nor should it be interpreted to mean that the parties, although deemed to have existing law in mind when executing their agreement, must further be deemed to be unaware their contractual obligations may be affected by later legislation made expressly retroactive to them, or that they are implicitly agreeing to avoid the effect of valid, retroactive legislation. *Gipson* explains that the parties to a plea agreement—an agreement unquestionably infused with a substantial public interest and subject to the plenary control of the state—are deemed to know and understand that the state, again subject to the limitations imposed by the federal and state Constitutions, may enact laws that will affect the consequences attending the conviction entered upon the plea. The holdings in the cases are not inconsistent; both reflect California law. *Gipson*, however, applies here, while *Swenson* does not." (*Doe v. Harris* at p. 71.)

This language is very strong and very clear. The Legislature, and the voters via initiative, can change the law and alter the terms of plea bargains, subject to Constitutional limitations.

This court further explained:

> "As we have said, the general rule in California is that plea agreements are deemed to incorporate the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. As an adjunct to that rule, and consistent with established law holding that silence regarding a statutory consequence of a conviction does not

> generally translate into an implied promise the consequence will not attach, prosecutorial and judicial silence on the possibility the Legislature might amend a statutory consequence of a conviction should not ordinarily be interpreted to be an implied promise that the defendant will not be subject to the amended law." (*Doe v. Harris* at p. 71.)
>
> "For the reasons we have explained, the general rule in California is that a plea agreement is 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. (*Gipson, supra,* 117 Cal.App.4th at p. 1070.) It follows, also as a general rule, that requiring the parties' compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement, nor does the failure of a plea agreement to reference the possibility the law might change translate into an implied promise the defendant will be unaffected by a change in the statutory consequences attending his or her conviction. To that extent, then, the terms of the plea agreement can be affected by changes in the law." (*Doe v. Harris* at pp. 73-74.)

This is clear language. A plea agreement is *not* breached just because there has been a change in the law that disadvantages one side or the other. This is not a situation where one side or the other has breached the plea agreement[1]/, thus allowing a remedy such as specific enforcement of the plea agreement or withdrawal of the plea. (See, for example, *People v. Mancheno* (1982) 32 Cal.3d 855, 860.)

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[1] / The trial court and the majority blame petitioner for putting himself in a situation where the plea must be withdrawn. This assertion is ludicrous. The law has changed and petitioner has done nothing more than avail himself of the change in the law that applies to him. A defendant cannot be punished for asserting his or her rights. "For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right." (*United States v. Goodwin* (1982) 457 U.S. 368, 372.)

This court reinforced the meaning of *Doe v. Harris* this year in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871.

> "As for offenders who entered plea agreements, the general rule in California is that a plea agreement is deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. (*Doe v. Harris* (2013) 57 Cal.4th 64, 73.) It therefore follows that requiring the parties' compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement, nor does the failure of a plea agreement to reference the possibility the law might change translate into an implied promise the defendant will be unaffected by a change in the statutory consequences attending his or her conviction. (*Id.* at pp. 73–74.)" (*Johnson* at p. 888, fn. 10, internal quotation marks omitted.)

The fact that the law change was unknown to the prosecution, the defendant, and the court is of no moment. What is significant is that when legislation is retroactive, and not merely prospective, it will act to defeat the expectations of those who acted in reliance upon then-existing law. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1213-14.)

Although *Evangelatos* involved civil law, the concept is equally applicable to criminal law, within Constitutional limitations. Proposition 47's terms are very clear: it is to be applied as if it were in existence at the time of the commission of the crime. (Pen. Code § 1170.18, subd. (a).)

Another case that has applied *Doe v. Harris* is *People v. Smith* (2014) 227 Cal.App.4th 717, which considered how an amendment to Penal Code section 1203.4 impacted a plea agreement. The *Smith* Court examined, explained, and applied *Doe v. Harris.*

> "We start from the premise that, in the absence of constitutional restrictions, the general rule governs here (*Doe, supra*, 57 Cal.4th at p. 68), and that rule is plea agreements do not insulate the parties thereto 'from changes in the law that the

> Legislature has intended to apply to them.' (*Id.* at 66.) The corollary to that rule also governs here: 'prosecutorial and judicial silence on the possibility the Legislature might amend a statutory consequence of a conviction should not ordinarily be interpreted to be an implied promise that the defendant will not be subject to the amended law.' (*Id.* at 71.)" (*Smith* at p. 730.)
>
> "In other words, in the absence of constitutional constraints, the contract to which a grant of probation gives rise must be 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy.' (*Doe, supra*, 57 Cal.4th at p. 66, quoting *People v. Gipson* (2004) 117 Cal.App.4th 1065, 1070.) We conclude, in the absence of constitutional constraints, a probationer's entitlement to relief under section 1203.4 is not frozen at the time of the probationary grant but is subject to subsequent legislative amendments to the statute." (*Smith* at p. 731.)

Another way to look at it is this: "The subsequent change in the law supersedes the terms of the plea agreement." (*People v. Murillo* (2002) 102 Cal.App.4th 1414, 1420.) Although the majority claims that new laws only trump statutory consequences of plea and not negotiated terms such as sentence, *Murillo* undercuts that claim. In *Murillo* the defendant had entered into a plea agreement for 16 months in prison if she failed probation. (*Murillo* at p. 1420.) The *Murillo* court held that Proposition 36 (the drug initiative, not the Three Strike initiative) controlled and that the plea agreement was superseded. This is an example of how the majority got it wrong.

T.W. v. Superior Court (2015) 236 Cal.App.4th 646 specifically applied *Doe v. Harris* in a Proposition 47 case to allow a plea bargained charge to be reduced to a misdemeanor. It is yet another case where a change in the law superseded the plea bargain. *T.W.* did not merely involve the application of statutory consequences of a plea, but instead the very

terms of the negotiated disposition. *T.W.* cannot be distinguished from our case.

In *T.W.* the juvenile court refused to reduce the minor's charge to a misdemeanor because it concluded that Proposition 47 did not apply to plea bargains. Much like our facts, the prosecution bargained to dismiss a charge of robbery in return for a plea to a lesser charge, receiving stolen property.

The *T.W.* court examined the statutory scheme and noted that it plainly applied to convictions obtained both by trial and plea. The court analyzed Proposition 47's language with an eye toward implementing the intent of the voters, and concluded that the language and intent of Proposition 47 plainly applied to plea bargains. The *T.W.* court applied *Doe v. Harris* to support its conclusion.

> "This outcome is consistent with the general rule announced by our Supreme Court in *Doe v. Harris* (2013) 57 Cal.4th 64: [T]he general rule in California is that the plea agreement will be deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. . . . [Citation.] That the parties enter into a plea agreement thus does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them. (*Id.* at p. 66.)" (*T.W.* at p. 653, fn. 4.)

Our case is very similar to *T.W.* in that the most serious charge, which was dismissed as part of the plea agreement, is a robbery charge. The conviction charge in our case is a less-serious grand theft, while the adjudicated charge in *T.W.* is less-serious receiving stolen property. Really, there is no difference between the two cases and *T.W.* undercuts the majority's holding.

California law is replete with examples of cases that hold that plea bargains are deemed to incorporate the reserve power of the state to amend

the law or enact additional laws. (*See, e.g., Way v. Superior Court* (1977) 74 Cal.App.3d 165; *People v. Acuna* (2000) 77 Cal.App.4th 1056; and *People v. Gipson, supra,* 117 Cal.App.4th 1065.) The passage of Proposition 47 is not the first time that sentences have been reduced for inmates serving terms they agreed to as part of plea bargains. Courts have long held that legislation reducing the punishment for offenders may be applied to inmates serving sentences. (*See Way v. Superior Court, supra,* 74 Cal.App.3d 165; *People v. Community Release Bd.* (1979) 96 Cal.App.3d 792; *Freeman v. United States* (2011) ___ U.S. ___, 131 S.Ct. 2685.)

In California, sentences were reduced for many inmates serving indeterminate sentences under the Indeterminate Sentencing Law when the state transitioned to the Determinate Sentencing Law ("DSL"). These sentence reductions were challenged under several theories including the argument that the new law did not apply to plea bargains.

The court in *Way* held that the "plea bargain between the prosecution and the defendant is merely an agreement between them as to a disposition which will be submitted to the judge for his adoption, if he so chooses. It vests no rights other than those which relate to the immediate disposition of the case." (*Way* at p. 180.) *Way* upheld the retroactive application of the DSL to inmates who resolved their cases through plea bargains, even though that could result in the early release of prisoners.

The majority, apparently seeing that *Way* is on point, relegated *Way* to a footnote and tried to distinguish it by claiming that it did not address plea bargains nor did it consider reinstating the original charges. In fact, the *Way* court *did* consider plea bargains and retroactivity and held as quoted above.

Way also undercuts the majority's claim that *Doe v. Harris* and the other cases cited by petitioner only applied to statutory consequences of a

plea and not negotiated items such as sentence length. *Way* specifically involved some defendants with plea-bargained sentences and the fact that those sentences would be shortened by the change from the Indeterminate Sentencing Law to the Determinate Sentencing Law. *Way* is not distinguishable.

In *People v. Acuna, supra,* 77 Cal.App.4th 1056, the defendant pleaded guilty to violating Penal Code section 288. At the time of the defendant's plea and sentencing, Penal Code section 1203.4 permitted him to apply to the court to have his conviction expunged after probation concluded. However, in 1997, the statute was amended to prohibit "expungement" for convictions of Penal Code section 288. On appeal, Acuna argued that the application of the amended statute to his case deprived him of the benefit of an implied term of his plea bargain that he would be permitted to seek expungement under the law in effect at the time of his plea. (*Acuna* at p. 1062.) The Court of Appeal rejected those arguments and ruled that the retroactive application of the amendment to the defendant did not deny him the benefit of his plea bargain. (*Id.*)

In *People v. Gipson, supra,* 117 Cal.App.4th 1065, the Court of Appeal considered whether a prior conviction could be used as a "strike" when the conviction was sustained prior to the passage of the Three Strikes Law. Gipson asserted that his 1992 plea bargain "was a contract between the State and him which the Legislature could not impair by subsequent enactments." Gipson further asserted that the subsequently enacted Three Strikes provisions under which he was sentenced violated the contract clauses of both the federal and state Constitutions. (*Gipson* at p. 1068.) The Court of Appeal denied the defendant's contract clause challenge and held that the plea bargain contemplated the Legislature's ability to change the law. (*Gipson* at p. 1070.)

These cases stand for the proposition that regardless of whether a subsequent change in the law is beneficial or detrimental to a defendant, retroactive application of changes in the law does not violate a plea bargain.

V

PEOPLE V. COLLINS IS DISTINGUISHABLE AND HAS BEEN IMPLIEDLY OVERRULED BY *DOE V. HARRIS*

The trial court, and the Court of Appeal, relied upon *People v. Collins* (1978) 21 Cal.3d 208. *Collins* is factually distinguishable from petitioner's case. In addition, *Collins* has been limited or overruled *sub silentio* by *Doe v. Harris*.

Collins is readily distinguishable because that case involved a statute defining a crime that was repealed entirely. As stated by this court, "[w]hen a defendant gains *total relief* from his vulnerability to sentence, the state is substantially deprived of the benefits for which it agreed to enter the bargain." (*Collins* at p. 215, emphasis added) In *Collins*, the defendant was indicted in 1974 on fifteen separate felony counts. Pursuant to a plea bargain, defendant pleaded guilty to one count of non-forcible oral copulation, and all other charges were dismissed. Between the time that he pleaded and was sentenced, the Legislature completely repealed his conviction charge. Mr. Collins objected to being sentenced to prison on the now-repealed crime.

On appeal, this court agreed that the defendant could not be sentenced on the repealed crime. This court held that the prosecution was deprived of the benefit of its bargain by the relief the court was granting (reversing the sole conviction), and concluded that dismissed counts could be restored. (*Collins* at p. 215)

Collins presents a significantly different factual scenario. In *Collins*, the entire crime had been repealed. As this court wrote, "it is [the

defendant's] escape from vulnerability to sentence that fundamentally alters the character of the bargain." (*Collins* at p. 215.) Here, petitioner remains convicted and his punishment has been reduced due to Proposition 47.

Moreover, to the extent that *Collins* might be said to apply to Proposition 47 cases, it cannot be reconciled with *Doe v. Harris*. *Collins* was not cited in *Doe*. Overruling a prior case may be done expressly or indirectly, and when done indirectly, overruling may occur in two stages. (1) A prior authority may be first overlooked, ignored, or purportedly distinguished on untenable grounds. (2) Then, in a later decision, it may be recognized that the early case was impliedly overruled by the later one. (Witkin, *California Procedure* (5th ed. 2008) Ch. XIII, § 541.)

Collins cannot be reconciled with *Doe v. Harris* and thus cannot be said to reflect the current state of the law.

VI

REINSTATING THE ORIGINAL POTENTIAL SENTENCE WAS ERROR

The majority not only allowed the original charge to be reinstated, it also reinstated the original potential maximum sentence. This is very clear error.

The majority claims that by filing a Proposition 47 petition, petitioner repudiated the plea agreement. Nothing could be further from the truth. Petitioner did nothing more than the law allows. He cannot be punished for asserting his Constitutional and statutory rights. (*United States v. Goodwin, supra,* 457 U.S. 368, 372.)

Although petitioner has argued that *Collins* is no longer valid law, there is one part of *Collins* that does remain and is controlling here. In *Collins* this court made it very clear that principles of double jeopardy

preclude imposing a greater sentence upon reversal than was imposed originally. (*Collins* at pp. 216-217.)

Proposition 47 itself also contains clear language prohibiting what the majority is allowing: "Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence." (Pen. Code § 1170.18, subd. (e).)

The Court of Appeal majority is just plain wrong and they cite nothing that supports their conclusion.

VII

THE MAJORITY'S RULING LEADS TO ABSURD CONSEQUENCES, WOULD GUT THE INITIATIVE, AND IS CONTRARY TO THE INTENT OF THE VOTERS

Proposition 47 by its own language contemplates its application to cases that are resolved by pleas, including plea bargains. (Penal Code § 1170.18(a).) The reality of criminal practice in California is that approximately 95 per cent of all criminal cases are resolved through plea bargains. (*Plea Bargains are Ubiquitous. But are they Un-American?* by San Francisco Public Defender Jeff Adachi, San Francisco Examiner, June 21, 2015, http://www.sfexaminer.com/justice-matters-plea-bargains-are-ubiquitous-but-are-they-un-american/ as of December 22, 2015.) The Court of Appeal in this case, however, construed Proposition 47 so that it cannot be applied to plea bargained cases. Why would the voters pass a law that applies to pleas but not to plea bargains? The conclusion that this is what the voters intended is unreasonable.

Proposition 47's language makes the initiative's goals extremely clear. The initiative seeks to channel incarceration spending to serious crime, to maximize alternatives to incarceration for nonserious crime, and to invest the savings in children's and adult programs. These goals apply to

individuals convicted of all qualifying offenses, including convictions after trial or plea.

Proposition 47 includes a Purpose and Intent clause enumerating, with greater specificity, the intent and expectation that substantial cost savings be realized by the passage of the initiative. These lofty cost-savings estimates would be unachievable if individuals convicted by plea bargain were excluded from relief. The savings anticipated from reductions in the population of prisoners would largely evaporate.

The statute specifically includes convictions obtained by plea and does not exclude convictions obtained by plea bargain. The holding of the majority is inconsistent with the statutory requirement that Proposition 47 must be liberally construed. The last sentence of the Proposition reads: "This act shall be liberally construed to effectuate its purposes." (Prop. 47, Sec. 18.)

CONCLUSION

It is respectfully requested this court grant the Petition for Review.

Respectfully submitted,

RONALD L. BROWN, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

Albert J. Menaster,
Rourke Stacy,
Mark Harvis,
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By _____
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Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

Counsel of record certifies, pursuant to California Rules of Court, rule 8,204(c)(1), the Petition for Review in this action contains 8,310 words, including footnotes. Counsel has relied on the word count of the word processing program used to prepare this brief.

Date: December 23, 2015

MARK HARVIS

APPENDIX A

Filed: 11/18/15

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MORRIS GLEN HARRIS, JR.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

No. B264839

(Super. Ct. No. BA408368)

(Henry J. Hall, Judge)

ORIGINAL PROCEEDING. Petition for writ of prohibition from an order of the Superior Court of Los Angeles County. Henry J. Hall, Judge. Petition denied.

Ronald L. Brown, Public Defender, Albert J. Menaster, Head Deputy Public Defender, Rourke Stacy, Mark Harvis, Deputy Public Defender, for Petitioner.

Jackie Lacey, District Attorney, Phyllis Asayama, Matthew Brown, John Pomeroy, Deputy District Attorneys, for Real Party in Interest.

As part of a plea agreement, defendant Morris Glen Harris, Jr. (defendant) pled guilty to a felony charge of grand theft from a person and agreed to admit a prior strike and receive a six-year prison sentence, in exchange for dismissal of the more serious felony charge of robbery. More than a year later, California voters passed Proposition 47, which allowed defendant to petition for reduction of his felony grand theft conviction to a misdemeanor. The issue presented is whether the People may withdraw from the plea agreement and reinstate the original charges where the plea-bargained felony charge becomes a misdemeanor as a result of Proposition 47.

Under the circumstances of this case, we conclude that reduction of the plea-bargained felony charge to a misdemeanor under Proposition 47 deprives the People of the benefit of the bargain of its plea agreement. Therefore, the People are entitled to withdraw from the plea and reinstate the previously-dismissed charges, thus returning the parties to the *status quo ante*.

FACTUAL AND PROCEDURAL BACKGROUND

On February 11, 2013, Francisco Pascual Diego was walking down the street when a person he later identified as defendant approached him from behind, hit him on the face, and took his cell phone. Diego chased defendant and flagged down two police officers. Diego pointed out defendant, who was running down the street, and told the officers that defendant had stolen his cell phone. There was no one else running down the street. The officers chased defendant and detained him. Diego's cell phone was found on the ground about one foot away from defendant's left foot.

The People filed an information charging defendant with one count of robbery in violation of Penal Code section 211.[1] The information alleged that defendant had six prior felony convictions, including a prior conviction for robbery (§ 211), which is a serious felony under section 667, subdivision (a)(1) and therefore a "strike" for purposes of the three strikes law.

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1 All further statutory references are to the Penal Code, unless otherwise specified.

Defendant then sought to resolve the case for a "non-strike" offense. On April 17, 2013, the parties entered into a plea agreement, by which defendant pled to one count of grand theft from a person (§ 487, subd. (c)), which is not a serious or violent felony under sections 667.5, subdivision (c) and 1192.7, subdivision (c), and therefore not a "strike" offense for purposes of the three strikes law. As part of the agreement, defendant admitted the prior strike allegation and the People dismissed the robbery charge and other related allegations. Defendant was sentenced to six years in prison in accordance with the parties' plea agreement. He was given credit for 170 days in custody: 85 actual days and 85 days of good time/work time. Because defendant admitted a prior "strike," his post-sentencing credits are capped at one-fifth the total term of imprisonment. (§ 1170.12, subd. (a)(5).) Thus, his earliest possible release date was October 7, 2017.

On November 4, 2014, California voters passed Proposition 47, "The Safe Neighborhoods and Schools Act." Its goal was to "ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70.) To that end, a number of felony offenses were redefined as misdemeanors, including thefts of property valued at less than $950. (See § 490.2, subd. (a).)

Proposition 47 also enacted section 1170.18, which creates a statutory scheme for the resentencing of individuals who were already serving a felony sentence for a crime that became a misdemeanor under Proposition 47. Section 1170.18, subdivision (a) states: "A person currently serving a sentence for a conviction, *whether by trial or plea*, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496,

or 666 of the Penal Code, as those sections have been amended or added by this act." (§ 1170.18, subd. (a) [emphasis added].)

On its face, therefore, Proposition 47 was intended to apply to prisoners who pled to felonies covered by the law, as well as those convicted following trial. (See also *T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 653 [petitioner entitled to Proposition 47 relief even though his conviction was obtained by plea agreement].) Section 1170.18 also makes clear that the inmate must choose to petition for resentencing. A court may not grant Proposition 47 relief *sua sponte* to a prisoner who does not proactively seek it.

Pursuant to section 1170.18, defendant filed a petition for recall of sentence on January 27, 2015, seeking to have his grand theft conviction reclassified as a misdemeanor. Taking into account his pre-sentencing custody credits, he had served just over two years and two months in prison at that time.

The People did not contest defendant's claim that he was entitled to relief under Proposition 47. Instead, it filed a motion to withdraw from the plea agreement and reinstate the previously-dismissed charges. The People argued that defendant was entitled to reclassification of his conviction, but the result would deny the People the benefit of the bargain of the negotiated plea agreement, thus entitling it to withdraw from the agreement. The trial court then ordered defendant to personally appear so that he could decide, with the advice of counsel, whether to proceed with his petition, or to withdraw it in light of the People's motion to withdraw from the plea agreement.

After defendant elected to proceed with his petition for relief under Proposition 47, the trial court issued an order granting both defendant's petition for recall of sentence and the People's motion to withdraw from the plea and reinstate the original charges. Defendant subsequently filed a petition for writ of mandate, seeking review of the trial court's order granting the People's motion to withdraw the plea agreement and reinstate the previously dismissed charges. After we summarily denied the petition, the Supreme Court granted a petition for review and directed us to issue an order to show cause. On October 7, 2015, we issued an order to show cause why the court should not grant the relief sought by defendant. We now deny the petition.

DISCUSSION

A. Legal Standard

"We traditionally review findings of fact under a deferential standard of substantial evidence, and findings of law under a de novo standard." (*People v. Holmes* (2004) 32 Cal.4th 432, 442.) "A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles." (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) "'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636.)'" (*Ibid.*)

B. Benefit of the People's Bargain

The Supreme Court has explained the nature of plea bargaining as follows: "'The process of plea bargaining which has received statutory and judicial authorization as an appropriate method of disposing of criminal prosecutions contemplates an agreement negotiated by the People and the defendant and approved by the court. . . . Pursuant to this procedure the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged.'" (*People v. Collins* (1978) 21 Cal.3d 208, 214 (*Collins*), quoting *People v. Orin* (1975) 13 Cal.3d 937, 942.)

"'"A plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound."'" (*People v. Segura* (2008) 44 Cal.4th 921, 931.) The trial court may decide not to approve the terms of a plea agreement if it does not believe the agreed-upon disposition is fair. (*Ibid.*) However, once the trial court accepts the agreement, then it, like the parties, are bound by its terms. (*Id.* at p. 930.)

In *Collins*, the Supreme Court addressed head on the question of what happens when a change in law deprives either the People or the defendant of the benefit of the bargain of the plea agreement. The defendant in *Collins* was charged with fifteen felony counts. (*Collins*, *supra*, 21 Cal.3d at p. 211.) Pursuant to a plea agreement, he pled to

one count of non-forcible oral copulation in exchange for dismissal of the other fourteen charges. (*Ibid.*) Before judgment was entered, the court found the defendant to be a mentally disordered sex offender and ordered him committed for an indefinite period. (*Ibid.*) While defendant was committed, the Legislature decriminalized non-forcible oral copulation. (*Ibid.*) The Supreme Court held the defendant could not be convicted and sentenced as contemplated by the plea agreement, as the pled-to offense was no longer a punishable crime. (*Id.* at p. 213.) At the same time, the Court held, the People were entitled to restore the dismissed counts. (*Id.* at p. 215.) This was because the change in law had "destroy[ed] a fundamental assumption underlying the plea bargain — that defendant would be vulnerable to a term of imprisonment" — thus depriving the People of the benefit of its bargain. (*Id.* at pp. 215-216.)

The People argue, and we agree, that *Collins* controls the outcome in this case. As part of the plea agreement, the parties agreed that defendant would serve a six-year prison term in exchange for dismissal of the robbery charge and related allegations. This prison term was a "fundamental assumption" of the plea bargain. (See *Collins*, *supra*, 21 Cal.3d at p. 215 ["The state, in entering a plea bargain, generally contemplates a certain ultimate result; integral to its bargain is the defendant's vulnerability to a term of punishment"].) At the time of his petition for resentencing under Proposition 47, defendant had served just over two years in prison, including his pre-sentencing custody credits. Because misdemeanors are punishable by a maximum of six months in county jail (§ 19), defendant would be immediately released upon resentencing, having already served the maximum sentence for the reclassified crime.

As in *Collins*, defendant is unquestionably entitled to a reduction in his sentence under Proposition 47, if he seeks it. The result, however, is a windfall to defendant that neither party contemplated at the time they entered their plea agreement. As the *Collins* court stated: "Defendant seeks to gain relief from the sentence imposed but otherwise leave the plea bargain intact. This is bounty in excess of that to which he is entitled." (*Collins*, *supra*, 21 Cal.3d at p. 215 [footnote omitted].) The People's remedy is to seek restoration of the dismissed charges and allegations. (*Ibid.*)

We are not persuaded by defendant's argument that *Collins* is distinguishable because that case involved a statute defining a crime that was repealed entirely. *Collins* applies the unremarkable principle that plea agreements are contracts entered into between the People and the defendant for reciprocal benefits. (*Id.* at p. 214.) "When either the prosecution or the defendant is deprived of benefits for which it has bargained, corresponding relief will lie from concessions made." (*Ibid.*) The People are surely deprived of the benefit of its bargain whether the bargain-for term of imprisonment is entirely eliminated (as in *Collins*) or drastically reduced (as in this case). (See *In re Blessing* (1982) 129 Cal.App.3d 1026, 1031 [prosecution permitted to withdraw from plea where change in law reduced the defendant's negotiated sentence of 16 1/3 years to 12 1/3 years].)

The defendant also argues that *Collins* was impliedly overruled by *Doe v. Harris* (2013) 57 Cal.4th 64 (*Doe*). Again, we disagree. *Doe* does not address *Collins*, and the holding in *Doe* does not repudiate the Supreme Court's reasoning in *Collins* in a way that renders the two decisions irreconciliable. (See *Richmond Ramblers Motorcycle Club v. Western Title Guaranty Co.* (1975) 47 Cal.App.3d 747, 758 ["'[O]verruling by implication is no more favored than repealing by implication, and important cases of record of recent origin are not ordinarily to be considered as overruled by implication'"]; *Meskell v. Culver City Unified School Dist.* (1970) 12 Cal.App.3d 815, 824 ["'[A] subsequent decision cannot, by mere implication, be held to overrule a prior case unless the principle is directly involved and the inference is clear and impelling'"].)

The defendant in *Doe* was charged with six counts of lewd and lascivious acts upon a child under 14. (*Id.* at p. 66.) Pursuant to a plea agreement, he pled to one of the counts in exchange for dismissal of the others. (*Ibid.*) The written change of plea form stated that the maximum penalties for his conviction would be probation, participation in work furlough programs, fines, testing as required by former section 290.2, and registration as a sex offender under section 290. (*Doe, supra* 57 Cal.4th at p. 66.) The parties did not discuss section 290 during the plea negotiations, other than to acknowledge that the defendant would have to register under its provisions. (*Doe, supra,*

57 Cal.4th at p. 67.) At the time of the plea, section 290 provided that information gathered as part of sex offender registration process was available only to law enforcement officers. (*Doe, supra,* 57 Cal.4th at p. 66.) Thirteen years later, the Legislature adopted "Megan's Law," making public the names, addresses, and photographs of registered sex offenders. (*Doe, supra,* 57 Cal.4th at p. 66.) In 2007, the defendant filed a civil complaint in federal court, asserting that application of the law's public notification provisions to him violates his plea agreement. (*Id.* at p. 67.) The district court agreed with the defendant, finding that "'one cannot reasonably interpret the language of the plea agreement, which reads "P.C. 290," to mean [anything] other than compliance with that section of the Penal Code, as it was written at the time of the plea.'" (*Ibid.*)

On appeal, the Ninth Circuit Court of Appeal certified a question to the Supreme Court, which rephrased the inquiry as follows: "'Under California law of contract interpretation as applicable to the interpretation of plea agreements, does the law in effect at the time of a plea agreement bind the parties or can the terms of a plea agreement be affected by changes in the law?'" (*Doe, supra,* 57 Cal.4th at p. 66.) After reviewing a series of relevant cases, the Court responded: "the general rule in California is that the plea agreement will be '"deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy . . . ."'" (*Id.* at p. 73.) Concomitantly, "requiring the parties' compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement, nor does the failure of a plea agreement to reference the possibility the law might change translate into an implied promise the defendant will be unaffected by a change in the statutory consequences attending his or her conviction." (*Id.* at pp. 73-74.)

Doe did not involve a negotiated term of a plea agreement, but rather, a "statutory consequence" of conviction. The sex offender registration requirement at section 290 is "a statutorily mandated element of punishment for the underlying offense." (*People v. McClellan* (1993) 6 Cal.4th 367, 380.) It "is not a permissible subject of plea agreement

negotiation" and neither the prosecutor nor the court has authority to exempt a defendant from mandatory sex offender registration. (*Ibid.*) Precisely because the requirement of sex offender registration was not bargained-for (and could not have been bargained-for) between the parties, a change in law that affects it cannot possibly undermine or alter the bargain made by the parties. (See also *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 888 fn. 10 [citing *Doe* for the proposition that a defendant's plea agreement is not violated where subsequent changes in the case law alter the defendant's eligibility for relief from sex offender registration requirements].)

The notion that *Doe* referred to unbargained-for "statutory consequences" of a conviction, rather than a negotiated term of the plea agreement, is reinforced by the cases examined and relied upon by the *Doe* Court. The holding in *Doe* — that a plea agreement is "'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. . . .'" (See *Doe*, *supra*, 57 Cal.4th at pp. 66, 73; *People v. Gipson* (2004) 117 Cal.App.4th 1065, 1070 (*Gipson*).)

The defendant in *Gipson* pled guilty in 1992, when section 667 provided for a recidivist penalty of five years for each prior serious felony and a one-year enhancement for each prior prison term served. (*Gipson*, *supra*, 117 Cal.App.4th at p. 1068.) When the defendant committed another felony nine years later, section 667 had been amended by the three strikes law to requiring doubling of the base term for each prior serious felony conviction. (*Gipson*, *supra*, 117 Cal.App.4th at p. 1068.) Like the sex offender registration provision addressed in *Doe*, the recidivist penalties at section 667 are "statutory consequences" of a conviction. They are not negotiated as part of a plea agreement. And like the *Doe* Court, the *Gipson* court held that the defendant's 1992 plea agreement was deemed to incorporate "'the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy.'" (*Gipson*, *supra*, 117 Cal.App.4th at p. 1070.)

Three other cases discussed in the *Doe* opinion also relate to the statutory consequences of a conviction, rather than negotiated terms of the plea agreements. *In re*

Lowe (2005) 130 Cal.App.4th 1405, addressed the Governor's authority to review parole decisions — an authority that did not exist at the time of the defendant's plea agreement. The court noted that the parties' plea agreement did not contemplate who would make defendant's parole decision, and concluded that the Governor's review of the defendant's parole determination did not violate his plea agreement. (*Id.* at 1426.)

People v. Acuna (2000) 77 Cal.App.4th 1056 and *People v. Arata* (2007) 151 Cal.App.4th 778 both involved defendants who pled to committing a lewd act upon a child under age 14 at a time when the law permitted them to seek expungement of the conviction after they successfully completed probation. (*Acuna, supra*, 77 Cal.App.4th at p. 1058; *Arata, supra*, 151 Cal.App.4th at pp. 781-782.) The law was amended to prohibit expungement before the two defendants completed probation. In *Acuna*, the court held that the change in law did not deprive the defendant of the benefit of his plea agreement, which did not mention expungement. (*Acuna, supra*, 77 Cal.App.4th at p. 1062.) The *Arata* court granted relief, finding that the "implicit promise" of expungement was "significant in the context of the plea bargain as a whole." (*Arata, supra*, 151 Cal.App.4th at p. 788.)

Notably, in discussing *Arata*, the *Doe* Court observed that the *Arata* court "did not find that as a general rule any law in effect at the time of a plea agreement becomes a term of the agreement." (*Doe, supra*, 57 Cal.4th at p. 73.) In other words, the *Doe* Court understood the *Arata* decision in light of the court's factual conclusion that expungement was a "term of the agreement" at issue in that case. The suggestion, of course, is that the result would have been different if expungement were simply a consequence that attached to the defendants' convictions, rather than a negotiated term. This distinction is consistent with *Doe*'s statement that "it is not impossible the parties to a particular plea bargain might affirmatively agree or implicitly understand the consequences of a plea will remain fixed despite amendments to the relevant law." (*Id.* at p. 71.)

In this case, there can be no question that Proposition 47 changes material and negotiated terms of the plea agreement, rather than the "statutory consequences" attached to defendant's conviction. Defendant was on felony probation at the time of the crime

charged in this case. He had six alleged prior felonies, including a serious felony that counts as a first "strike" under the three strikes law. He was charged with robbery, a violent felony that would have counted as a second "strike" against him. There was no doubt that the crime he committed was a robbery, and his counsel never argued otherwise. Nor does there appear to have been any weaknesses in the prosecution's case against him. He was arrested as he fled the scene with the victim's cell phone, which was found on the ground about a foot away from his left foot. The victim positively identified him at the scene. His maximum exposure was fifteen years. As the trial court observed, a plea to a misdemeanor and a short county jail sentence was "*not* a viable and just resolution" of the case and it would not have approved the plea if that, in fact, had been the proposed disposition.

Rather, the People agreed to a six-year prison term and a felony disposition in exchange for a quick and certain resolution. Those were unquestionably "integral" and negotiated terms in the plea agreement (as in *Collins*), rather than unnegotiable statutory consequences that attached to the conviction (as in *Doe* and the cases it discusses). Because Proposition 47 "fundamentally alters the character" of the bargain in this case and deprives the People of the benefit of its bargain, we hold under *Collins* that the People are entitled to withdraw from the plea agreement and reinstatement of the previously-dismissed charges against defendant.[2]

We are not persuaded by defendant's argument that our holding would "gut" Proposition 47 because the vast majority of all criminal cases are resolved through plea

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[2] Defendant's reliance on *Way v. Superior Court* (1977) 74 Cal.App.3d 165 (*Way*) is also misplaced. *Way* consolidated two cases filed by judges, district attorneys, and taxpayers who challenged the retroactivity provision of the Determinate Sentencing Law (DSL). The plaintiffs argued that the retroactivity provision had to be invalidated because it undermined numerous plea bargains and therefore violates article I, section 9 of the California Constitution, which states: "'A . . . law impairing the obligation of contracts may not be passed.'" (*Way, supra,* 74 Cal.App.3d at p. 180.) The *Way* court did not address whether retroactive application of the DSL deprive the People of the benefit of its bargain, nor did it consider whether the People could withdraw from the plea bargain and reinstate previously-dismissed charges. It therefore has no bearing on our decision today.

bargains. Although the interpretation of a ballot initiative turns on the voters' intent, the issue raised by defendant does *not* involve an interpretation of Proposition 47. On its face, Proposition 47 permits inmates to petition for resentencing and reclassification of their crimes even if their conviction resulted from a plea. However, Proposition 47 never addresses the issue presented here, *i.e.*, whether the reclassification and resentencing deprives the People of the benefit of its bargain. That is a contract issue, and its resolution is not controlled by the statutes enacted by Proposition 47, but rather by the laws governing contract interpretation. After all, "voters are presumed to have been aware of existing laws at the time the initiative was enacted." (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1048.) In the face of the voters' silence on the matter, the traditional rules of contract govern.

Nor do we believe the voters' intent is contrary to our holding in this case. Proposition 47 was intended to reduce penalties for certain defendants who have committed nonserious and nonviolent crimes. At the same time, its intent was *not* to reduce penalties for those who have committed serious crimes. To that end, the initiative states: "The people enact the Safe Neighborhoods and Schools Act to ensure that prison spending is focused on violent and serious offenses, [and] to maximize alternatives for nonserious, nonviolent crime." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70.)

Under our holding today, defendants who committed serious crimes but pled down to a less serious felony may choose to keep the benefit of that bargain by declining to petition for resentencing under section 1170.18, or they may seek a trial on the more serious crime that was alleged against them. What they may not do is claim the benefit of a law that was intended to assist nonserious and nonviolent criminals, when their actual crimes were serious or violent or both. This result is fully in line with the intent of the voters, who intended to withhold relief from serious or violent criminals just as much as they intended to grant relief to nonserious and nonviolent criminals.

C. *Benefit of the Defendant's Bargain*

Having concluded that the People may reinstate the original robbery charge and related allegations against defendant, the next question that arises is whether any sentencing restrictions will apply if defendant is later convicted of the previously dismissed charges. Citing *Collins* and double jeopardy principles, the trial court held that defendant's exposure was limited to the six years that he agreed to as part of his plea agreement. In its return to the order to show cause, the People argue this decision was erroneous, and that the parties must be returned to the *status quo ante*.

Because the People did not file a petition for writ of mandate challenging this decision, the matter is not squarely before this court. (See *Campbell v. Superior Court* (2005) 132 Cal.App.4th 904, 922 [court may not grant writ relief to respondent based on arguments raised in opposition, unless the respondent has filed her own petition for writ of mandate].) Nonetheless, because this matter may arise upon subsequent proceedings, we provide the following guidance to the trial court.

In concluding that the defendant in *Collins* was entitled to preserve the benefit of his bargain, the Supreme Court highlighted the fact that the plea agreement in that case was undermined by "external events and not defendant's repudiation" of the agreement. (*Collins*, *supra*, 21 Cal.3d at p. 216.) It cited to double jeopardy cases, where the Court's concern "was specifically to preclude vindictiveness and more generally to avoid penalizing a defendant for pursuing a successful appeal." (*Ibid.*) Given that the defendant in *Collins* was merely exercising his right to overturn an erroneous conviction, he should not be "penalized . . . by being rendered vulnerable to punishment more severe than under his plea bargain." (*Id.* at p. 217.) In other words, the plea agreement in *Collins* was voided by external events, and not through the repudiation of the defendant. As a result, he was permitted to keep the benefit of his bargain and his sentence was capped at his maximum exposure under the plea agreement.

In this case, however, Proposition 47 does not void defendant's plea agreement, but only renders it voidable at defendant's option. He may elect to keep the benefit of his bargain and not petition for resentencing. Once he decides to exercise his option to

petition for a lesser conviction than what he agreed to, then he effectively repudiates the plea agreement. Having done so, the plea agreement is deemed to be rescinded, and the parties are returned to the *status quo ante*. (See *Collins*, *supra*, 21 Cal.3d at p. 216 fn. 3 ["whether the defendant repudiated his guilty plea . . . is a significant inquiry when determining whether the defendant ought to be permitted to enforce a plea bargain undermined by external events"].)

DISPOSITION

The petition for writ of prohibition is denied.

CERTIFIED FOR PUBLICATION

KIRSCHNER, J. *

I concur:

TURNER, P.J.

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

CERTIFIED FOR PUBLICATION

Harris v. SCLA
B264839

MOSK, J., dissenting

I respectfully dissent.

Petitioner originally was charged with robbery (Pen. Code, § 211[1]) and other offenses, but pursuant to a plea agreement[2] in 2013, he pled guilty to grand theft from a person (§ 487, subd. (c)) and was sentenced to six years in prison. Before completing that sentence, petitioner successfully petitioned to have his conviction reduced to a misdemeanor under Proposition 47, "The Safe Neighborhoods and Schools Act" (§ 1170.18), approved by the voters in November 2014. Then, at the request of the People, real party in interest, the respondent court, in effect, vacated petitioner's plea and set his case for trial on the theory that the People did not receive the benefit of the bargain in the plea agreement.

A majority of this court denied petitioner's petition for a writ to set aside the respondent court's order. I dissented and said we should issue an order to show cause. The Supreme Court granted a petition for review and transferred the case back to this court with directions to vacate the order denying mandate and to issue an order directing the respondent court to show cause why the relief sought by petitioner should not be granted.

I agree with petitioner's position that when a defendant pleads guilty to a lesser felony charge pursuant to a plea bargain, and that charge is later reduced to a misdemeanor pursuant to Proposition 47, the trial court cannot rescind the plea, recall the sentence, and reinstate the original charge or charges.

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1 All further statutory references are to the Penal Code.

2 See section 1192.7, subdivision (b) for a definition of plea bargaining.

A. Standard of Review

The issue here is one of law, and therefore the review is de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 893-894.)

B. Section 1170.18

Proposition 47 enacted section 1170.18, which provides in part as follows: "(a) A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act. [¶] (b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, those sections have been amended or added by this act, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. [¶] . . . [¶] (d) A person who is resentenced pursuant to subdivision (b) shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole. [¶] (e) Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence. [¶] . . . [¶] (i) The provisions of this section shall not apply to persons who have one or more prior convictions for an offense specified in clause (iv) of

subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290."

C. Analysis

As petitioner satisfied the criteria set forth in section 1170.18 enacted by Proposition 47, the trial court properly resentenced him to a misdemeanor. That statute only permits the trial court to reduce the qualifying felony conviction to a misdemeanor, resentence the petitioner, and place him on parole. That statute does not authorize the trial court to reinstate dismissed counts.

The trial court did not have any inherent authority to reinstate counts upon a recall of the sentence. Courts have only the powers specified by statute. (See *Frederick v. Justice Court* (1975) 47 Cal.App.3d 687, 689-690; see *Terry v. Superior Court* (1999) 73 Cal.App.4th 661, 665; see also *People v. Segura* (2008) 44 Cal.4th 921, 930.)

A change in the law does not affect a plea agreement. In *Doe v. Harris* (2013) 57 Cal.4th 64 (*Doe*), the defendant entered into a plea agreement in which he agreed to plead nolo contendere to one of six counts of lewd and lascivious acts upon a child under the age of 14 (former § 288, subd. (a)), an offense that required sex offender registration, including providing certain information (former § 290), which at the time was only available to law enforcement. Years later the Legislature made that information available to the public. (§ 290.46.) The defendant filed an action in a federal court arguing that requiring him to comply with the new law's notification provisions violated the plea agreement. In responding to a question certified by the United States Court of Appeals for the Ninth Circuit, the California Supreme Court considered whether a defendant's plea agreement was, in effect, breached or violated by the amendment to California's Sex Offender Regulation Act (§ 290 et seq.). The court held that the defendant was bound by the plea agreement notwithstanding the change in the law. The court said that, as explained in *People v. Gipson* (2004) 117 Cal.App.4th 1065, "the parties to a plea agreement—an agreement unquestionably infused with a substantial public interest and

subject to the plenary control of the state—are deemed to know and understand that the state, again subject to the limitations imposed by the federal and state Constitutions, may enact laws that will affect the consequences attending the conviction entered upon the plea." (*Doe, supra*, 57 Cal.4th at p. 70.). The court added that "prosecutorial and judicial silence on the possibility the Legislature might amend a statutory consequence of a conviction should not ordinarily be interpreted to be an implied promise that the defendant will not be subject to the amended law." (*Id.* at p. 71.) The court said that the "general rule in California is that the plea agreement will be '"deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy."' [Citation.] That the parties enter into a plea agreement thus does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them." (*Id.* at p. 66.) Thus, a plea agreement is not breached or revocable just because a change in the law disadvantages one party or the other. (See also *Way v. Superior Court of San Diego County* (1977) 74 Cal.App.3d 165.)

The following language in the dissent from *Doe, supra,* 57 Cal.4th 64 supports the application of *Doe* in the instant case: "Today, this court's majority holds that 'requiring the parties' compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement . . . .' (Maj. opn., *ante*, at p. 73.) This broad language means that new changes in the law must be followed even though they were not contemplated by the parties when they negotiated the terms of their agreement, which is a form of contract." (*Id.* at p. 74, Kennard, J., dissenting.)

Both a defendant, as in *Doe*, *supra,* 57 Cal.4th 64, and the People, as here, are bound by a plea agreement despite a later change in the law. There is no meaningful distinction in the context of this case between the "statutory consequences" of a plea-agreed conviction as in *Doe* and a negotiated term of a plea agreement. Both involve the consequences of the plea agreement and the conviction resulting from it.

The Supreme Court reaffirmed the principle that plea agreements are not subject to changes in the law in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 889, footnote 10 when it said, "As for [sex] offenders who entered plea agreements, 'the general rule in California is that a plea agreement is '"deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy."' (*Doe*[, *supra,*] 57 Cal.4th [at p.] 73.) It therefore follows that 'requiring the parties' compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement, nor does the failure of a plea agreement to reference the possibility the law might change translate into an implied promise the defendant will be unaffected by a change in the statutory consequences attending his or her conviction.' (*Id.* at pp. 73-74.)"

Other cases have followed *Doe, supra*, 57 Cal.4th 64. For example, the court in *People v. Smith* (2014) 227 Cal.App.4th 717, 730, which considered how an amendment to section 1203.4 impacted a plea agreement, said, "We start from the premise that, in the absence of constitutional restrictions, the general rule governs here (*Doe, supra*, 57 Cal.4th at p. 68), and that rule is plea agreements do not insulate the parties thereto 'from changes in the law that the Legislature has intended to apply to them.' (*Id.* at p. 66.) The corollary to that rule also governs here: 'prosecutorial and judicial silence on the possibility the Legislature might amend a statutory consequence of a conviction should not ordinarily be interpreted to be an implied promise that the defendant will not be subject to the amended law.' (*Id.* at p. 71.) [¶] . . . [¶] In our view, the contract envisioned by [defendants] must be subject to the same rules as those that govern plea bargains and other contracts, as stated in *Doe*. In other words, in the absence of constitutional constraints, the contract to which a grant of probation gives rise must be '"deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy."' (*Doe, supra*, 57 Cal.4th at p. 66, quoting *People v.*

Gipson[, *supra,*] 117 Cal.App.4th [at p.] 1070.) We conclude, in the absence of constitutional constraints, a probationer's entitlement to relief under section 1203.4 is not frozen at the time of the probationary grant but is subject to subsequent legislative amendments to the statute."

The court in *T.W. v. Superior Court* (2015) 236 Cal.App.4th 646 (*T.W.*) applied *Doe, supra*, 57 Cal.4th 46 in a Proposition 47 case to permit a plea bargained disposition to be reduced to a misdemeanor. In that case, the juvenile court had refused to reduce the minor's adjudication to a misdemeanor because it concluded that Proposition 47 did not apply to plea bargains. The juvenile had admitted the truth of the allegation that he received stolen property in violation of section 496. The prosecution dismissed a charge of robbery in violation of section 211 as part of the plea agreement. The court noted that Proposition 47 applied to convictions obtained both by trial and plea and concluded that the language and intent of Proposition 47 plainly intended it to apply to plea-bargained dispositions. The court said, "This outcome is consistent with the general rule announced by our Supreme Court in *Doe*[, *supra,*] 57 Cal.4th 64: '[T]he general rule in California is that the plea agreement will be '"deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. . . ."' [Citation.] That the parties enter into a plea agreement thus does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them.' (*Id.* at p. 66.)" (*T.W.*, *supra,* 236 Cal.App.4th at p. 653, fn. 4.)

Also persuasive is the United State Supreme Court case of *Freeman v. United States* (2011) __ U.S. __, 131 S.Ct. 2685, in which a plurality decision held that federal defendants who enter into plea agreements that specify a particular sentence as a condition for a guilty plea are eligible for a sentence reduction under 18 U.S.C. section 3583(c)(2), which authorizes a district court to modify a sentence when the defendant has been sentenced to a term of imprisonment based on a sentence range that has subsequently been lowered by the Sentencing Commission through a retroactive

amendment to the Sentencing Guidelines. The plurality took the view that sentences imposed pursuant to binding agreements are eligible for later modification by a change in the law. Justice Sotomayor in a concurring opinion concluded, "In short, application of section 3582(c)(2) to an eligible defendant does not—and will not—deprive the Government of the benefit of its bargain." (*Freeman v. United States, supra,* 131 S.Ct. at p. 2699.)

People v. Collins (1978) 21 Cal.3d 208 (*Collins*), cited by the real party in interest, does not govern. That case involved a fully repealed statute defining a crime. The court said, "When a defendant gains *total relief* from his vulnerability to sentence, the state is substantially deprived of the benefits for which it agreed to enter the bargain." (*Id.* at p. 215, italics added.) In *Collins*, the defendant was indicted in 1974 on 15 separate felony counts, including six counts of burglary, two counts of forcible rape, three counts of forcible oral copulation, and other charges. Pursuant to a plea bargain, defendant pleaded guilty to one count of non-forcible oral copulation, and all other charges were dismissed. Between the time that he pleaded and was sentenced, the Legislature completely repealed the statute that was the basis of his conviction. Thus, the defendant had been sentenced on a charge that had been repealed. Our Supreme Court agreed that the defendant could not be sentenced on the repealed crime, and reversed the conviction. The court held that the prosecution was deprived of the benefit of its bargain by the relief the court was granting (reversing the sole conviction), and concluded that the dismissed counts could be restored. (*Ibid.*) Unlike in *Collins*, petitioner here does not "escape from vulnerability to sentence" (*ibid.*), for he remains convicted and his punishment is simply reduced.

Even if *Collins, supra,* 21 Cal.3d 208 is not distinguishable from the instant case, it cannot be reconciled with *Doe, supra*, 57 Cal.4th 64, which did not mention *Collins*, and thus *Collins*, to the extent applicable, must be deemed impliedly overruled. (See *Everett v. Everett* (1976) 57 Cal.App.3d 65, 71 ["If *Stevens v. Kelly* [(1943) 57 Cal.App.2d 318] ever correctly stated California law, it surely did not survive *Berry v. Chaplin* [(1946) 74 Cal.App.2d 652], which simply ignored it. The two cases cannot

coexist in a jurisdiction which purports to decide disputes on a rational basis"].) As stated in 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, section 541, page 612, "Overruling may also occur in two stages: (1) A prior authority may be first overlooked, ignored, or purportedly distinguished on untenable grounds. (2) Then, in a later decision, it may be recognized that the early case was 'impliedly overruled' by the later one."

People v. Collins (1996) 45 Cal.App.4th 849, cited by real party in interest is not applicable. That case involved a plea agreement conditioned on the juvenile's truthfulness. The trial court found that the juvenile gave false testimony and thus set aside the plea bargain and reinstated the original petition. That case had nothing to do with a change in the law, but rather with the failure of the juvenile to comply with his express obligation to be truthful. To the extent that case and *In re Blessing* (1982) 129 Cal.App.3d 1026, another case cited by real party in interest, support real party in interest's position, in view of *Doe, supra,* 57 Cal.4th 64, they are no longer good law.

In re Ricardo C. (2013) 220 Cal.App.4th 688, also was cited by real party in interest. The court held that a juvenile court's dispositional order was unlawful when it ordered a minor placed in a facility other than the Youth Offender Program to which the parties had agreed as part of a negotiated plea agreement. The court in what appears to be dicta said that the juvenile court should have set aside the plea and reinstated all the allegations of the petitions filed against minor. Thus, this case involving a juvenile proceeding (see *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209 [Proposition 47 applies to juvenile proceedings]) concerned the trial court's decision—not a change of law. To the extent applicable here, it would be inconsistent with existing law as set forth in *Doe, supra,* 57 Cal.4th 64. In *People v. Superior Court (Sanchez)* (2014) 223 Cal.App.4th 567, referred to by real party in interest, the trial court imposed a sentence less than agreed to in the plea bargain. Under those circumstances, the court said the People were entitled to reinstatement of all counts against the defendant. Here,

in contrast, the sentence under the plea agreement was consistent with the plea agreement and authorized by law. Thus, *People v. Superior Court* (*Sanchez*) is distinguishable.

If applying Proposition 47 to plea agreements can result in vacating the plea and reinstating the original changes, such application would lead to absurd results and would be contrary to the intent of the voters. Plea agreements resolve a vast majority of criminal cases. (See Recent Cases, 121 Harv. L.Rev. (2008) 2230.) If a reduction of a sentence under Proposition 47 results in the reinstatement of the original charges and elimination of the plea agreement, the financial and social benefits of Proposition 47 would not be realized, and the voters' intent and expectations would be frustrated. Plea agreements would be subject to nullification depending on later enacted provisions. The District Attorney conceded at oral argument that if her position prevailed "quite a few cases" would be affected. Presumably, also affected could be plea bargains in cases covered by Proposition 36 (§ 1170.126), which provides mandatory probation and drug treatment for various nonviolent drug possession offenses. Convictions pursuant to plea bargains should not be subject to being set aside by the People years later because of a change in the law

Accordingly, I would grant the petition for writ of mandate.

MOSK, J.

APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MORRIS GLEN HARRIS, JR.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

No. B264839

(Super. Ct. No. BA408368)
(Henry J. Hall, Judge)

ORDER MODIFYING DISSENTING OPINION

THE COURT:

It is ordered that the dissenting opinion filed herein on November 18, 2015, be modified as follows.

Delete the first full sentence on page 9 beginning with the word "Presumably," and replace it with the following:

Also affected may be plea bargains in cases covered by any statute enacted that would retroactively result in a reduced sentence.

Associate Justice Richard M. Mosk

DECLARATION OF PROOF OF SERVICE

I, the undersigned, declare I am over eighteen years of age, and not a party to the within cause; my business address is 320 West Temple Street, Suite 590, Los Angeles, California 90012;

That on December 23, 2015, I served the within Petition for Review (Re: Morris Glen Harris, Jr./2nd Dist. No. B264839/Trial Ct. No. BA408368), on each of the persons named below by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the City of Los Angeles, addressed as follows:

SECOND DISTRICT COURT OF APPEAL
DIVISION 5
RENALD REAGAN STATE BUILDING
300 S. SPRING STREET, 2ND STREET, NORTH TOWER
LOS ANGELES, CA 90013

OFFICE OF THE ATTORNEY GENERAL
LANCE WINTERS, ESQ.
STATE OF CALIFORNIA
300 SOUTH SPRING STREET, #1702
LOS ANGELES, CA 90013

HONORABLE HENRY J. HALL, JUDGE
LOS ANGELES SUPERIOR COURT
DEPARTMENT 111
CSF/CJC
210 WEST TEMPLE STREET, 11-314
LOS ANGELES, CA 90012

LOS ANGELES SUPERIOR COURT COUNSEL
FRED BENNETT, ESQ.
111 NORTH HILL STREET, ROOM 546
LOS ANGELES, CA 90012

I further declare that I served the above referred-to document by hand-delivering a copy thereof addressed to:

JACKIE LACEY, DISTRICT ATTORNEY
JOHN POMEROY, DDA
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 23, 2015 at Los Angeles, California.

VIVIAN WHITELEY
Declarant