IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MORRIS GLEN HARRIS, JR., Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent, PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	**Case No. S231489** 2d Dist. No. B264839 LASC No. BA408368

Review of Original Proceedings in the Court of Appeal
Los Angeles County Superior Court
Honorable Henry J. Hall, Judge Presiding

ANSWER BRIEF ON THE MERITS

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MORRIS GLEN HARRIS, JR., Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent, PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	**Case No. S231489** 2d Dist. No. B264839 LASC No. BA408368

ISSUES PRESENTED

1. Are the People entitled to withdraw from a plea agreement for conviction of a lesser offense and to reinstate any dismissed counts if the defendant files a petition for recall of sentence and reduction of the conviction to a misdemeanor under Proposition 47?

2. If the defendant seeks such relief, are the parties returned to the status quo with no limits on the sentence that can be imposed on the ground that the defendant has repudiated the plea agreement by doing so?

INTRODUCTION

Petitioner and defendant Morris Glen Harris, Jr. (hereafter Harris), was charged with one count of second degree robbery (Pen. Code, § 211)[1] with various sentencing allegations. His maximum sentence, as charged, would have been 15 years. Pursuant to a plea agreement, Harris agreed to plead guilty to a lesser offense, grand theft from a person (§ 487, subd. (c)), also admitting an allegation of a prior "strike" conviction. The

[1] Unless otherwise indicated, all statutory references are to the Penal Code.

agreement specified a 6-year prison sentence. In exchange, the People dismissed the robbery charge and all other allegations.

Proposition 47 was then passed by the electorate, rendering grand theft from a person in this context a misdemeanor. Harris then had the option of petitioning for immediate resentencing. He chose to do so. This reduction would have resulted in his immediate release from custody, approximately two years and eight months earlier than agreed to by the parties.

The People filed a motion requesting that, if Harris was no longer able to serve his agreed-upon prison term, then the court should order the plea agreement rescinded and reinstate the original charge and allegations.

The People herein will contend that this Court's long line of cases interpreting plea agreements as contracts continue to apply, and must apply to rescind the agreement between the People and Harris. Further, after such rescission, the parties should be returned to the same positions they were in prior to the agreement and there should be no artificial limit on a future sentence that Harris could receive should he be convicted at trial.

STATEMENT OF THE CASE AND FACTS

Harris was charged in case number BA408368 by Information with violating section 211, second degree robbery. (Exh. A, p. 1.)[2] It was further alleged that Harris suffered a prior conviction of a serious and violent felony in 2000 for second degree robbery, both as a prior "strike" conviction under sections 1170.12 and 667.5, and as a five-year

[2] References to Exhibits (hereafter Exh.), are to Petitioner's Exhibits Supporting Petition for Writ of Prohibition filed in the Court of Appeal, case number B264839.

enhancement under section 667, subdivision (a)(1).[3] (Exh. A, p. 2.) Based upon the charges and allegations in the Information, the maximum sentence that Harris faced was imprisonment in the state prison for 15 years. (Exh. A, pp. 1-2.)

A preliminary hearing was held on March 14, 2013. At the preliminary hearing, victim Francisco Pascual Diego testified that on February 11, 2013, he was walking on Winston Street towards Wall Street in the County of Los Angeles, talking to a friend on his cell phone. Harris approached Diego from behind, hit Diego on the left side of his face near the ear, and took Diego's cell phone. Diego chased Harris and, while doing so, Diego flagged down two officers from the Los Angeles Police Department. Diego pointed out Harris, who was running down the street, and told the officers that Harris had stolen his cell phone. There was no one else running down the street. The officers chased Harris and detained him. Diego's phone was recovered on the ground one foot from Harris's left foot. At the scene Diego identified Harris as the person who had stolen his phone. (Exh. K, pp. 147-148.) At the conclusion of the preliminary hearing, counsel for Harris made no argument that the facts supported any charge other than a robbery, and Harris was then held to answer for that charge. (*Ibid.*)

On April 17, 2013, before Judge Henry J. Hall, Harris sought to settle the case for a "non-strike" offense. (Exh. K, p. 149.) Pursuant to a plea agreement, the People agreed to add an additional count of grand theft from a person (§ 487, subd. (c)), a felony, as count 2. Harris pleaded guilty to that count, and admitted the prior strike conviction. (Exh. B, pp. 7-10.)

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[3] The page of the Information containing this allegation was not included in Exhibit A as filed by Petitioner in the Court of Appeal, but the admission of that allegation is contained in the court's minutes. (Exh. B, p. 10.)

While robbery was a serious and violent felony, and could be used as a new strike in the future, grand theft from a person was not a strike. In exchange, Harris agreed to a sentence of 6 years in the state prison.

On May 7, 2013, Judge Hall sentenced Harris to 6 years in state prison, pursuant to the agreement. Count 1 (robbery), and all remaining allegations, were dismissed by the court on the People's motion, pursuant to section 1385. Harris was given credit for 170 days in custody: 85 actual days and 85 days of good time/work time. (Exh. B, pp. 11-14.) Because of his admission of a prior "strike" conviction, the total amount of post-sentence credits awarded to Harris would not exceed one-fifth of the total term of imprisonment. (§1170.12, subd. (a)(5).) Based upon that calculation, and the amount of pre-sentence credits that Harris received, his release date from state prison would not have been before October of 2017.

In November of 2014, the voters passed Proposition 47, which reduced several offenses that are related to theft or drugs from felonies (or alternative felonies or misdemeanors, commonly called "wobblers) to straight misdemeanors unless certain other elements were met. All thefts, including thefts of vehicles and firearms, inter alia, are now misdemeanor petty theft if the value taken is less than $950. (§ 490.2.)

On January 27, 2015, Harris filed a Petition for Recall of Sentence pursuant to section 1170.18, subdivision (a). (Exh. C, pp. 26-27.) Resentencing Harris to a misdemeanor would have resulted in his immediate release, since he had already served more than the maximum sentence for petty theft (180 days in county jail). This would have been approximately two years and eight months before his expected release date for his agreed-upon sentence.

Because of Harris's pending petition, on February 25, 2015, the People filed a motion to withdraw from the plea and reinstate the original charge and allegations. (Exh. D, pp. 28-33.) After further briefing,

on April 2, 2015, Judge Hall prepared a Proposed Order granting both Harris's request to reduce his conviction to a misdemeanor and also the People's motion to withdraw from the plea and reinstate the charges. The court's Proposed Order further would have limited Harris's potential sentence to six years, the same sentence he bargained for, even if he were convicted at trial. (Exh. F, pp. 66-91.)

At a hearing on April 6, 2015, the court and counsel discussed the effect of the Proposed Order. Harris was present, having been ordered out from state prison. (Exh. H, p. 104.) The court made clear that it had no ability to deny Harris's petition requesting the reduction to the misdemeanor. However, the court also made clear its intention, should Harris proceed with his petition, to grant the People's motion to reinstate the original charge and allegations. The robbery would not be reinstated if Harris withdrew his petition. (Exh. H, pp. 104-108.) After conferring with her client, counsel for Harris requested time for Harris to consider how to proceed. The matter was set for May 22, 2015, and Harris was ordered to be present. (Exh. H, p. 109.)

Prior to May 22, 2015, the court prepared an Amended Proposed Order. (Exh. I, pp. 112-138.) At the hearing on May 22, 2015, with Harris again present in court, his counsel indicated that Harris would not withdraw his petition and that he would take a writ challenging the court's order granting the People's motion to reinstate the charge and allegations. (Exh. J, p. 2.) On May 22, 2015, the court issued its final Order granting Harris's request to reduce his conviction to a misdemeanor and also the People's motion to reinstate the original charge. (Exh. K, pp. 147-174.) That order was stayed for 30 days to allow Harris time to bring a writ petition. (Exh. J, p. 144.)

On June 16, 2015, Harris filed a Petition for Writ of Prohibition in the Court of Appeal. On July 10, 2015, the Court of Appeal

issued its order summarily denying Harris's Petition. On July 15, 2015, Harris filed a Petition for Review before this Court, in case number S227878. On September 23, 2015, this Court granted the petition for review and transferred the matter back to the Court of Appeal with directions to vacate its order denying mandate and to issue an order to show cause.

On November 18, 2015, the Court of Appeal issued a published opinion denying the writ of prohibition. The court further held that Harris's sentence would not be limited to the six years he bargained for, should he be convicted of robbery. Justice Mosk dissented, and would have granted the petition. On December 1, 2015, that dissent was modified in part, which resulted in no change to the judgment.

On December 28, 2015, Harris filed his Petition for Review of the Court of Appeal's opinion. That petition was granted by this Court on February 24, 2016.

ARGUMENT

I

STANDARD OF REVIEW

Appellate courts review questions of law de novo, and questions of fact for substantial evidence. (See *People v. Waidla* (2000) 22 Cal.4th 690, 730.) The main issue in this case is the interpretation of a plea agreement, whether there was a breach, and if so, what is the appropriate remedy. Plea agreements are contracts, and interpreted according to ordinary contract principles. (*People v. Segura* (2008) 44 Cal.4th 921, 929–930.) Reviewing courts interpret contracts de novo when that interpretation does not turn on the credibility of extrinsic evidence. (See *In re Ricardo C.* (2013) 220 Cal.App.4th 688, 696.) As the facts here are not in dispute, and there is no issue of credibility, the standard of review here is de novo.

II

PROPOSITION 47 BACKGROUND

In November of 2014, Proposition 47 amended several offenses that are related to theft or drugs from felonies (or wobblers) to straight misdemeanors unless certain other elements were met. (See Health & Saf. Code, §§ 11350, subd. (a); 11377, subd. (a); 11357, subd. (a); Pen. Code, §§ 459.5; 473, subd. (b); 476a, subd. (b); 490.2; 496, subd. (a); 666.) Relevant here, all thefts of $950 or less are now misdemeanor petty theft, including thefts of vehicles and firearms. (§ 490.2.) Proposition 47 did not affect robbery (§ 211).

Proposition 47 also added section 1170.18, which created two procedures for persons who had been convicted of felonies to reduce their convictions to misdemeanors under the new laws: a "resentencing" provision under section 1170.18, subdivision (a), for persons currently serving a sentence, and a "re-designation" provision under section 1170.18, subdivision (f), for persons who have completed a sentence. Importantly, Proposition 47 did not automatically provide relief to any such persons. It is entirely the choice of the person as to whether to bring a petition requesting resentencing under subdivision (a), or an "application" to designate the conviction a misdemeanor under subdivision (f). The court may not act on its own without such a request. The People may not bring such a petition or application. (§ 1170.18, subds. (a) & (f).)

Here, Harris was convicted of grand theft from a person under section 487, subdivision (c), with no indication that the property was worth more than $950. The People do not dispute that Harris was generally eligible to be resentenced to petty theft under the terms of section 1170.18, but that does not end the inquiry. Since the People originally charged him with robbery—a charge unaffected by Proposition 47—and reduced the charge as part of a plea agreement only because he agreed to serve six years

in prison, resentencing Harris before he completed his sentence violated that agreement. As will be shown, this entitles the People to a remedy.

III

PLEA AGREEMENTS ARE CONTRACTS SUBJECT TO REMEDIES, INCLUDING RESCISSION, WHEN A PARTY BREACHES THE AGREEMENT OR FAILS TO PERFORM FOR ANY REASON

The basic principles of plea agreements are well established. A plea agreement is a form of contract, and is interpreted according to general contract principles. (*People v. Segura*, *supra*, 44 Cal.4th 921, 930.) Once accepted by the court, both the People *and the defendant* must abide by the terms of the agreement. (*Id.* at p. 931.) The court lacks jurisdiction to unilaterally alter a material term of a plea agreement without the consent of *both* parties. (*Ibid*; *People v. Martin* (2010) 51 Cal.4th 75, 80.)

A plea agreement is primarily a contract between the defendant and the People, but requires the approval of the court, and ultimately will be enforced by the court. (See *People v. Orin* (1975) 13 Cal.3d 937, 942.) Although the court may choose not to approve a plea agreement, once it approves the agreement it may not unilaterally alter its terms. For example, in *Segura*, the defendant asked the court to modify his probation term of 365 days in jail to 360 days, citing the court's general power to modify probation terms under section 1203.3. (*People v. Segura*, *supra*, 44 Cal.4th at p. 928.) This Court held that the length of incarceration was a term integral to the agreement, so that once a court approves such an agreement the court has no jurisdiction to alter the term, notwithstanding its general sentencing discretion or its general power to modify probation terms. (*Id.* at pp. 931–932, 935.) As another example, in *People v. Blount* (2009) 175 Cal.App.4th 992, 995, the defendant asked the court to

use its power under section 1170, subdivision (d),[4] to recall and modify a previously negotiated prison sentence. The Court of Appeal held that the plea agreement limited the court's power under that section, following *Segura*. (*People v. Blount, supra*, at pp. 998–999.) Thus, once it approves a plea agreement, the court's power to alter that agreement is limited.

When there is a violation of a plea agreement, the aggrieved party has the right to a contract remedy, which varies depending on the circumstances of the case. The available remedies are usually either specific performance (including "substantial" specific performance), or rescission of the agreement. (See *People v. Brown* (2007) 147 Cal.App.4th 1213, 1224–1227.) Of these remedies, rescission (i.e., withdrawing from the agreement) is the preferred remedy when the agreed-upon sentence is invalid or unauthorized. (*Id.* at p. 1224.) The result is to place the parties back in their original position. (See *People v. Calloway* (1981) 29 Cal.3d 666, 671.)

A "violation" of a plea agreement does not necessarily require wrongdoing, or a willful breach. Where a court simply cannot impose an agreed-upon sentence—e.g., because the sentence is illegal—the proper remedy is to rescind the plea entirely, not unilaterally impose a different sentence. For example, in *People v. Superior Court (Sanchez)* (2014) 223 Cal.App.4th 567, 570, a plea agreement specified that the defendant would plead guilty to one count of attempted murder and be sentenced to 25 years to life, in exchange for the dismissal of several other counts. Before sentencing, the court discovered that this was an illegal sentence, and that the maximum punishment for the charge was life, with a minimum term of only seven years. (*Ibid.*) The People asked the court to either impose the agreed-upon term, or vacate the plea. (*Ibid.*) The court declined either

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[4] That section allows the court to recall a prison sentence within 120 days and resentence the defendant to an equal or lower term. (§ 1170, subd. (d)(1).)

option, and sentenced the defendant to the lower term. (*Id.* at p. 571.) The Court of Appeal issued a writ of mandate reversing this order. It held that the mistake of law nullified the plea agreement, and required the court to vacate the plea. (*Id.* at p. 574.)[5] Unilaterally reforming the bargain was in excess of the court's jurisdiction. (*Id.* at p. 573.)

Similarly, in *People v. Bean* (1989) 213 Cal.App.3d 639, 641, the People charged the defendant with burglary and petty theft with a prior conviction (former § 666). Pursuant to a plea agreement, he pleaded guilty to a felony violation of "attempted petty theft with a prior conviction," with the other counts dismissed. (*People v. Bean*, *supra*, at p. 641.) After being sentenced to a felony sentence the defendant appealed, arguing that the crime of *attempted* petty theft with a prior did not exist. (*Id.* at p. 642.) The Court of Appeal agreed, finding that Bean was convicted of a non-crime. (*Id.* at p. 645.) The defendant further argued that his conviction should be modified to attempted petty theft, a misdemeanor. (*Ibid.*) The Court of Appeal disagreed, finding that this would deprive the People of the benefit

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[5] *Sanchez* criticized another case, *People v. Velasquez* (1999) 69 Cal.App.4th 503, 507, which reached a different outcome, and held a similar mistake against the People. In *Velasquez*, the defendant agreed to a sentence of "no greater than three years," but since a three-year-term was not authorized for that charge, the appellate court reduced the sentence to two years. (*Id.* at p. 505.) *Sanchez* opined that *Velasquez* failed to consider contract principles, as required by the California Supreme Court. (*People v. Superior Court (Sanchez)*, *supra*, 223 Cal.App.4th at p. 575.)

It is unnecessary to resolve any conflict between these cases because they are distinguishable from each other. A plea agreement that specifies a sentence of "no greater than three years" is not breached by imposing a two-year sentence, since a greater term was not actually part of the agreement, and the court retained discretion. In any event, *Velasquez* was decided before *People v. Segura*, *supra*, 44 Cal.4th at p. 936, so to the extent it held that mistakes of law regarding a specific sentence are to be held against the People, the holding is now questionable.

of their bargain. (*Ibid.*) The proper remedy was therefore to vacate the plea and reinstate the original charges. (*Id.* at p. 646.)

Importantly, not every direct consequence of a conviction becomes a term of the *plea agreement* itself. For example, the parties' silence regarding mandatory statutory consequences does not become a promise that such a consequence will not attach. In *People v. Villalobos* (2012) 54 Cal.4th 177, 183, the parties' silence regarding the mandatory victim restitution fine (§ 1202.4, subd. (b)) did not imply a promise that *no fine* would be imposed. Instead, the specific amount of such fine was not a part of the plea agreement and therefore was left to the court to set at its discretion. This Court therefore held that imposing a $4000 fine did not violate the plea agreement. (*People v. Villalobos*, *supra*, at p. 186.)[6] Similarly, the trial court's failure to inform the defendant of his duty to register as a sex offender "did not transform the court's error into a *term of the parties' plea agreement.*" (*People v. McClellan* (1993) 6 Cal.4th 367, 379, italics in original.) Thus, requiring the defendant to register as a sex offender did not violate the plea agreement. (*Id.* at p. 381.)

When determining whether a term is actually part of the plea agreement, the "core question" is whether it was "*actually negotiated* and made a part of the plea agreement." (*People v. Crandell* (2007) 40 Cal.4th 1301, 1309, italics added.) For example, if the parties actually negotiate for a specific victim restitution fine (as opposed to the silence in *Villalobos*), then it becomes part of the plea agreement, and the court violates the plea agreement by imposing any other amount. (See *id.* at p. 1309.)

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[6] Relatedly, the parties may actually negotiate a specific fine amount. (See *People v. Soria* (2010) 48 Cal.4th 58, 65, fn. 6.) If they do so, then the amount is a term of the agreement, and a court could not impose a different fine without violating the agreement.

Consistent with these principles, there is one term of a plea agreement that is always fundamental: the negotiated term of incarceration. This Court so held in *People v. Segura*, *supra*, 44 Cal.4th 921. There, the defendant sought to have the court modify a negotiated jail term from 365 days to 360 days, over the People's objection. (*Id.* at p. 927.) This Court held that doing so would violate the plea agreement, despite the court's general power to modify conditions of probation:

> But when, as in the present case, the parties negotiate a plea agreement that, among other express provisions, grants probation incorporating and conditioned upon the service of a specified jail term, the resulting term of incarceration is not—and may not be treated as—a mere standard condition of probation. Rather, the term of incarceration is in the nature of a condition precedent to, and constitutes a material term of, the parties' agreement.

(*Id.* at p. 935.) Thus, when the parties negotiate for a specific jail or prison term, it becomes an integral term of the plea agreement that the court may not unilaterally alter.

Moreover, after finding a breach of the plea agreement, the court does not further evaluate prejudice to the party. "*A violation of a plea bargain is not subject to harmless error analysis*. A court may not impose punishment significantly greater than that bargained for by finding the defendant would have agreed to the greater punishment had it been made a part of the plea offer." (*People v. Walker* (1991) 54 Cal.3d 1013, 1026, italics added, overruled on other grounds by *People v. Villalobos*, *supra*, 54 Cal.4th at p. 183.) Where a specific sentence is an express, negotiated term, it is part of the plea agreement, and not subject to *any* unilateral change.

Even if the conduct of Harris in bringing his petition for resentencing is not considered a "breach" of the plea agreement, existing law makes clear that a party to a plea agreement may rescind that agreement "[i]f the consideration for the obligation of the rescinding party,

before it is rendered to him, fails in a material respect *from any cause*." (Civil Code § 1689, subd. (b)(4), italics added.)

All of these principles are well-established. The only issue here is whether a change in the law may similarly cause a plea agreement to fail, entitling one party to rescission. This question was definitively answered in the affirmative by this Court in *People v. Collins* (1978) 21 Cal.3d 208 (*Collins*).

IV

THE TRIAL COURT PROPERLY REINSTATED THE INITIAL CHARGE AND ALLEGATIONS BECAUSE THE PEOPLE ARE ENTITLED TO THE BENEFIT OF THEIR BARGAIN

Collins definitively establishes that a change in the law which prevents the court from imposing an agreed-upon sentence may cause a plea agreement to fail, and the proper remedy is to rescind the agreement entirely and put the parties back in their original position.

The defendant in *Collins* was charged with multiple counts of burglary and forcible sex offenses. He reached a plea agreement with the People and pled guilty to one count of non-forcible oral copulation. He was then found to be a mentally disordered sex offender, proceedings were suspended, and he was sent to Patton State Hospital. He had not yet been sentenced. He stayed at Patton for 556 days. During that time, the Legislature changed the law so that non-forcible oral copulation was no longer a crime. Eventually the trial court reinstated criminal proceedings, and sentenced Collins (over his objection) to state prison for one to fifteen years on the non-forcible oral copulation charge. (*Collins*, *supra*, 21 Cal.3d at pp. 211-212.)

This Court reversed the conviction because the new law decriminalizing consensual oral copulation applied retroactively to Collins,

and he could not remain convicted of conduct that was no longer a crime. (*Collins*, *supra*, 21 Cal.3d at p. 213.) But this Court also held that the People were allowed to reinstate the previously dismissed counts, because reversing the conviction deprived the People of any benefit from the plea agreement. (*Id.* at p. 215.) The Court reasoned that "[c]ritical to plea bargaining is the concept of reciprocal benefits." (*Id.* at p. 214.)

> 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. We recognized this in ... *People* v. *Orin* (1975) [13 Cal.3d 937, 942] and in *People v. West* (1970) 3 Cal.3d 595, 604, when we first gave explicit approval to the process of plea bargaining: "Both the state and the defendant may profit from a plea bargain. The benefit to the defendant from a lessened punishment does not need elaboration..." 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. Whether the defendant formally seeks to withdraw his guilty plea or not is immaterial; it is his escape from vulnerability to sentence that fundamentally alters the character of the bargain.

(*Ibid.*) This Court acknowledged that holding otherwise would destroy the concept of reciprocal benefits:

> 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.* The intervening act of the Legislature in decriminalizing the conduct for which he was convicted justifies a reversal of defendant's conviction and a direction that his conduct may not support further criminal proceedings on that subject; but it also destroys a fundamental assumption underlying the plea bargain -- that defendant would be vulnerable to a term of imprisonment. The state may therefore seek to reestablish defendant's vulnerability by reviving the counts dismissed.

(*Id.* at p. 215, italics added.)

Collins also held that the unique circumstances of that case required the defendant's potential sentence to be limited to what he bargained for originally, citing principles of double jeopardy. (*Collins*, *supra*, 21 Cal.3d at pp. 216–217.) This aspect of *Collins* is distinguishable from Harris's case, and will be addressed separately below. (See *post* page 46.)

Since *Collins*, other cases have held that intervening changes after a plea agreement was reached give rise to the People's right to rescind the agreement and reinstate original charges. In *In re Blessing* (1982) 129 Cal. App.3d 1026 (*Blessing*), the defendant was charged with multiple robberies with the use of a firearm, and assaults on police officers with the use of a firearm. Pursuant to a plea agreement, the defendant was convicted of five counts of robbery and two counts of assault upon a peace officer, and admitted the use of a firearm as to each count. Five additional counts of robbery with use of a firearm were dismissed. The agreed-upon sentence was 16 years 4 months in state prison. Per the agreement, the defendant's sentence in another then-pending matter was to run concurrent with this sentence. (*Id.* at pp. 1028-1029.) The court noted that the People made substantial concessions when they bargained for that sentence. (*Id.* at p. 1030.) Subsequent to the sentence, this Court ruled in *People v. Harvey* (1979) 25 Cal.3d 754 that enhancements for the use of a firearm could not run consecutively on certain subordinate offenses. The application of that ruling to defendant Blessing would have reduced his sentence by 4 years. (*Blessing, supra*, 129 Cal.App.3d at pp. 1028-1029.) The court cited to *Collins*, *supra*, for the proposition that the defendant's vulnerability to a term of punishment was integral to the prosecution entering into the bargain. (*Ibid.*) Even though the defendant did not seek "total relief" from his sentence, as was the situation in *Collins*, the court nonetheless found

that the People were entitled to withdraw from the agreement and have the dismissed counts revived, if they so desired. (*Id.* at p. 1031.)

In *In re Ricardo C., supra*, 220 Cal.App.4th 688 (*Ricardo C.*), the Minor was charged in two separate juvenile petitions. Charges included attempting to dissuade a witness, attempted robbery, and two counts of making criminal threats. (*Id.* at p. 691.) The parties reached an agreement whereby the Minor would admit the attempted robbery charge, the other charges in both petitions would be dismissed, and the Minor would go into a specific placement facility that was highly restrictive. (*Id.* at pp. 691-692.) Counsel for the minor stated that one of the dismissed charges was a strike, and "we were interested in getting rid of the strike as part of the disposition. That is the reason we agreed to the disposition." (*Id.* at p. 694.) However, after the probation officer recommended a less restrictive placement for the minor, the court ordered that the minor go to a placement different than the one that had been agreed to by the parties. (*Ibid.*) On appeal, the court interpreted the agreement under general contract law. The court noted that "[b]oth the accused and the People are entitled to the benefit of the plea bargain." (*Id.* at p. 698.) " 'When either the prosecution or the defendant is deprived of benefits for which it has bargained, corresponding relief will lie from concessions made.' " (*Ibid.*, quoting *Collins*, *supra*, 21 Cal.3d at p. 214.) The court held that it was error for the juvenile court to apply and enforce certain parts of the plea bargain, while ignoring the specific placement which had been material to the People's agreement in the first place. The judgment was reversed, and the juvenile court was ordered to reinstate the original charges. (*Id.* at pp. 699-700.)

The same result occurred, as described above, in *People v. Superior Court* (*Sanchez*), *supra*, 223 Cal.App.4th 567. The defendant had been charged with numerous violent offenses, including several "strike" offenses. Pursuant to a plea agreement, the defendant pled no contest to

one count of attempted murder for a sentence of 25 years to life in the state prison, and the other counts were dismissed by the People. (*Id.* at p. 570.) However, unbeknownst to the parties when they reached the agreement, this was an illegal sentence: the statutory punishment was actually life in prison, with parole eligibility after only 7 years. (*Ibid.*) The People asked the court to sentence the defendant to the term agreed upon, or else to vacate the plea. The defendant urged the court to sentence him to the statutory term of life in prison with parole eligibility after 7 years, and the court did so. (*Id.* at pp. 570-571.) The Court of Appeal reversed the sentence and ordered the trial court to withdraw the plea and reinstate the original charges. (*Id.* at pp. 577-578.) The court applied "general contract principles" to the plea agreement. (*Id.* at p. 573.) Among other citations to the Civil Code, the court specifically cited Civil Code section 1689, subdivision (b)(4) for the proposition that a party may rescind a contract such as this one if consideration fails in a material respect. (*Ibid.*) The consideration that failed was the defendant's being incarcerated in the state prison for 25 years to life. The sentence as ordered by the trial court prejudiced the People's right to such consideration, and the People were entitled to rescind the agreement. (*Id.* at p. 574.)

Just as in *Collins*, *Blessing*, *Ricardo C.*, and *Sanchez*, the People here are entitled to withdraw from the plea agreement with Harris and have the original charges reinstated. In each of those cases, the defendants sought to disadvantage the People by enjoying the favorable parts of the agreement, but jettisoning the parts given in exchange.

Notably, in none of these cases did the defendant formally seek to withdraw the plea itself. In *Collins*, the issue arose due to an intervening change in the law. However, the court made it clear that whether he acted to withdraw his plea or not, "it is his escape from vulnerability to sentence that fundamentally alters the character of the

bargain." (*Collins*, *supra*, 21 Cal.3d at p. 215.) Clearly in this case Harris escaped from vulnerability to the agreed-upon sentence of 6 years when he petitioned for, and the court granted, resentencing to a misdemeanor under section 1170.18. Per *Collins*, that fundamentally altered the character of the bargain. Likewise, in *Blessing*, *Ricardo C.*, and *Sanchez*, the defendant did not seek to set aside the plea agreement, but rather to alter its terms for various reasons: a change in the sentencing law (*Blessing*), a court's decision not to follow a placement agreed to in the plea agreement (*Ricardo C.*), and a mistake of law resulting in an illegal sentence agreement (*Sanchez*).

When Harris sought resentencing, that affected a fundamental part of the plea agreement, and the People are entitled to rescission. The robbery count had only been dismissed as part of the agreement because Harris agreed to serve a six-year prison sentence. Dismissing the robbery was substantial consideration for that sentence. It was a greater charge, and moreover remains a violent felony under current law, and therefore could potentially be alleged as a strike in a future case.[7] Resentencing Harris essentially makes his agreed-upon term an unlawful sentence, just like in *Collins*, *Blessing*, and *Sanchez*. Allowing him to keep the dismissed robbery charge, but also escape the remainder of the prison sentence, is "bounty in excess of that to which he is entitled." (*Collins*, *supra*, 21 Cal.3d at p. 215.) The People should be allowed to withdraw from the plea agreement and the strike offense and original allegations must be reinstated.

In sum, the court exceeds its jurisdiction by unilaterally altering a material term of a plea agreement. (*People v. Segura*, *supra*, 44 Cal.4th at p. 931–932.) When the court *cannot* impose an agreed-upon

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[7] The dismissal of a strike offenses in *Ricardo C.* and *Sanchez* were noted as crucial benefits given to the defendants by the People in their agreements.

sentence, whatever the reason, the remedy is not to unilaterally alter the sentence to the defendant's benefit, but rather to rescind the agreement entirely. (*People v. Superior Court* (*Sanchez*), *supra*, 223 Cal.App.4th at p. 574.) This is so even when the court is prevented from imposing the sentence by a retroactive change in the law. (*Collins*, *supra*, 21 Cal.3d at p. 215.) Applying these well-established rules to Harris's case, the trial court correctly ruled that his resentencing under new section 1170.18 allowed the reinstatement of the dismissed robbery count, since the six-year term was material consideration for the dismissal. The Court of Appeal's holding in this regard should be affirmed.

V

DOE V. HARRIS DOES NOT OVERRULE THIS COURT'S PRIOR PRECEDENTS ON PLEA AGREEMENTS

Harris's chief argument here is that this Court's decision in *Doe v. Harris* (2013) 57 Cal.4th 64 (*Doe*)[8] mandates that he be resentenced to a misdemeanor outright, notwithstanding the violation of the plea agreement. This is incorrect. *Doe* actually dealt with a different but related issue: whether a plea agreement's silence about the mandatory statutory consequences of a conviction makes a defendant immune from retroactive changes in the law that flow from that conviction. *Doe* is distinguishable because the People are not arguing here that Harris's conviction is immune from Proposition 47, and furthermore *Doe* did not involve a material term of a plea agreement.

Doe involved an automatic consequence that arose as a result of a conviction for a sex offense. The defendant pleaded no contest in 1991

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[8] Although the plaintiff in that case was a John Doe, the defendant was the California Attorney General, and coincidentally shares a name with the petitioner here. *Doe* is therefore the most useful shorthand for this case.

to one count of lewd and lascivious acts upon a child under the age of 14 years. (§ 288, subd. (a).) Five other counts alleging the same charge were dismissed as part of the plea agreement. He was placed on probation and ordered to participate in a work furlough program, pay certain fines, submit a blood and saliva sample for testing (pursuant to former section 290.2), and register as a sex offender pursuant to section 290. Each of those items were set forth on the written plea form. (*Doe, supra,* 57 Cal. 4th at p. 66.) The form included a reference to the defendant's obligation to register in accordance with section 290, but did not state what those registration requirements were, nor what section 290 required the defendant to do. (*Id.* at p. 67.) In 1991, section 290 mandated that persons convicted of specified sex offenses, including section 288, subdivision (a), register and provide their fingerprints and photographs. (*Ibid.*) The statute further stated that such information was to be used only by law enforcement and was not to be made available to the public. (*Ibid.*) Effective in 2004, after the passage of "Megan's Law," such information was made available to the public. (*Ibid.*) It was this consequence of his conviction that the defendant challenged.

Doe filed a complaint in federal district court to enjoin the changes in Megan's Law from applying to him, contending it violated a term of his plea agreement. (*Doe*, *supra*, 57 Cal.4th at p. 67.) He prevailed, and the state appealed to the Ninth Circuit, which then asked this Court to answer a question of California law:

> "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?"

(*Id.* at p. 66.) This Court answered as follows:

> [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.' " (*People v. Gipson* (2004) 117 Cal. App. 4th 1065, 1070 [12 Cal. Rptr. 3d 478] (*Gipson*).) 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 had intended to apply to them.

(*Ibid.*)

Because of this language, Harris asserts that *Doe* overruled *Collins* and, presumably, also *Blessing* and any other case following the same reasoning, despite not mentioning any of them. (Incidentally, *Ricardo C.* and *Sanchez* were decided after *Doe*.) As will be explained, *Doe* did not impair their validity in any way because the context, and issues, were different in crucial respects.

A

Doe Involved Immunity from Legislative Changes, Not the Rescission of a Plea Agreement

First, *Doe* was concerned with a defendant's *immunity* from future legislative changes, which is not at issue for Harris. The People have always agreed that Harris is eligible for relief under section 1170.18, and that his conviction for a *felony* grand theft cannot stand if it no longer meets the elements of the offense (i.e., the property was worth less than $950). But the law on the enforcement of plea agreements, though related, is not identical to the law on *immunity* from legislative change. *Doe* did not hold that a plea agreement must still be partially enforced, even though a fundamental premise no longer applies. Rescission is a completely separate question.[9]

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[9] It should be remembered that Doe did not move to withdraw his plea, but rather filed a complaint in federal district court seeking an injunction.

The difference between immunity and rescission is obvious. It is one thing to say that the Legislature may alter the law, even if it affects certain contracts in progress. For example, the state may ban the sale of alcohol, even though contracts for sale already exist. But it is quite another thing to say that one party to that contract must still perform its side, even though the consideration is destroyed. For example, why should one party still pay for the now-illegal liquor that never arrives? In that instance, the Legislature may validly change the law affecting the parties' contract, but the aggrieved party should also be able to rescind the deal entirely, since a fundamental premise (the legality of the sale, and receipt of the alcohol) no longer exists.

Moreover, the rule that contracts contemplate the "reserve power" of the Legislature to change the law was not newly created in *Doe*. *Doe* took this language from an earlier case, *People v. Gipson* (2004) 117 Cal.App.4th 1065, which in turn relied on another case, *In re Marriage of Walton* (1972) 28 Cal.App.3d 108. (*Doe*, *supra*, 57 Cal.4th at p. 70.) This principle comes from Contract Clause jurisprudence, and the United States Supreme Court had articulated a similar principle as early as 1934, if not earlier. (See *Home Bldg. & Loan Assoc. v. Blaisdell* (1934) 290 U.S. 398, 436 [54 S.Ct. 231, 78 L.Ed. 413], cited in *In re Marriage of Walton*, *supra*, at p. 112.) Thus, the idea that a contract did not immunize one from legislative changes is a very old idea, and existed long before the holdings in *Collins* and *Blessing*. *Doe* just reaffirmed this idea in the context of plea agreements, but it could not plausibly have overruled *Collins* on a longstanding issue of law.

Thus, the first issue in *Doe* was really about immunity from legislative changes, not what happens when those changes alter the consideration for a contract, and what contract remedies remain available. Instead, *Collins* controls that situation.

B

***Doe* Did Not Involve a Material Term of a Plea Agreement**

Second, *Doe* did not involve a negotiated term of a plea agreement. This Court specifically noted that Doe was not promised anything regarding the terms of sex offender registration as part of the plea agreement.[10] (*Doe*, *supra*, 57 Cal.4th at pp. 67, 71.) Analogizing to other law on plea agreements, the Court noted that silence regarding a consequence is not an implied promise that a consequence will *not* attach. (*Id.* at p. 71; see also discussion *ante* page 18.) Similarly, silence on a possible future statutory amendment of mandatory consequences was not an implied promise of immunity from later changes. (*Doe*, *supra*, at p. 71.) Moreover, this Court made it clear that the holding in *Doe* pertained to "statutory consequences" of a defendant's conviction, not negotiated terms of a plea agreement. (*Id.* at p. 74.) While some of the Court's language only referenced the law, the context made clear that the Court was referring to these statutory consequences that attached automatically, not *negotiated terms* like the prison sentence:

> "[R]equiring 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*."

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[10] In fact, it was not a term that *could* have been negotiated as part of the agreement. The sex offender registration requirement pursuant to section 290 is a statutorily mandated consequence of the underlying offense, and is not a permissible subject of plea agreement negotiation, because neither the prosecution nor the sentencing court has the authority to alter the legislative mandate. (*People v. McClellan*, *supra*, 6 Cal.4th 367, 380.)

(*Id.* at pp. 73-74, italics added.) The kinds of terms at issue in *Doe* were therefore different than the term at issue in Harris's case.

A review of the criminal cases discussed in *Doe* confirms that the Court was referring only to automatic statutory consequences, not negotiated terms of a plea agreement. Specifically, *Doe* relied on four cases to illustrate the distinction between terms of the plea agreement, and statutory consequences: *People v. Gipson*, *supra*, 117 Cal.App.4th 1065, *People v. Acuna* (2000) 77 Cal.App.4th 1056, *In re Lowe* (2005) 130 Cal.App.4th 1405, and *People v. Arata* (2007) 151 Cal.App.4th 778. (See *Doe*, *supra*, 57 Cal.4th at pp. 70, 72–73.)

First, *People v. Gipson*, *supra*, 117 Cal.App.4th 1065 (*Gipson*), which this Court held controlled the facts presented, involved a conviction by plea agreement in 1992, prior to the passage of the "Three Strikes" law. Gipson challenged the use of that conviction as a strike in his new case, contending that the conviction could only be used for an enhancement that existed at the time of his prior plea. (*Id.* at p. 1068.) The Court of Appeal rejected this argument, finding no violation of his plea agreement, and explaining that the plea contract only relates to the "immediate disposition of the case," not future use:

> His plea bargain 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... ." [Citation.] *The plea bargain "vest[ed] no rights other than those which relate[d] to the immediate disposition of the case."* [Citation.] The 1994 amendment to section 667 did not affect the 1992 plea bargain; it did not create or destroy any substantive rights defendant had in the plea bargain. Subsequent to the plea bargain, the Legislature amended the law; defendant committed another crime; defendant became subject to the penalty described in the amended statute. *The increased penalty in the current case had nothing to do with the previous case except that the existence of the previous case*

> *brought defendant within the description of persons eligible for a five-year enhancement for his prior conviction on charges brought and tried separately*. There was no error.

(*Id.* at p. 1070, italics added.) Thus, *Gipson* involved a term that was not at issue in the prior plea agreement, and a future statutory consequence that happened to flow from it. This is very different than the negotiated prison term at issue for Harris, which did relate to the "immediate disposition of the case."

Second, in *People v. Acuna*, *supra*, 77 Cal.App.4th 1056, the defendant was convicted of lewd or lascivious acts on a child (§ 288, subd. (a)) and was placed on probation. At the time of the plea and sentencing in 1993, section 1203.4 would have allowed him to apply for expungement after completing probation. However, prior to the expiration of his probation, the statute was amended to prohibit expungements for such convictions. His expungement motion was denied, and he appealed. (*Id.* at pp. 1058-1059.) The Court of Appeal affirmed the denial of his expungement motion. It was not a violation of the plea agreement because the availability of expungement was *not a term of the plea agreement*, and nothing in the record indicated that he would not have chosen to enter into the agreement had he known that he would not be able to obtain expungement. (*Id.* at p. 1062.) Like *Gipson*, this also involved a statutory benefit that applied (or not) simply because the conviction existed. It did not involve a term that was integral to the bargain itself, or which was a negotiated term of the plea agreement.

The other two cases relied upon in *Doe* are in accord with *Gipson* and *Acuna*. *In re Lowe*, *supra*, 130 Cal.App.4th at p. 1426 held that the defendant was not promised a specific release date, and a subsequent change in the Governor's review of parole decisions did not violate his plea agreement. *People v. Arata*, *supra*, 151 Cal.App.4th at p. 787, found that a

defendant *was* promised an expungement as a material term of his plea agreement, so a later law making him ineligible did not apply. Although this Court in *Doe* did not necessarily agree with *Arata*'s holding finding an implied promise, it did agree that *if* a term is actually part of the plea agreement, then it will be enforced notwithstanding a change in the law. (See *Doe*, *supra*, 57 Cal.4th at p. 73.)

By contrast, the enactment of section 1170.18 did not change any mere statutory consequence that flowed from Harris's conviction. It allowed him to petition for *resentencing*. When Harris chose to do so, it affected an agreed-upon, explicit term of the plea agreement: that he would serve six years state prison. This is different than the situation presented in *Doe*, and is instead controlled by *Segura*, *Collins*, and the other cases analyzing plea agreements.

C

None of the Other Cases Cited by Harris Undermine the Holding of *Collins*

Harris also cites *People v. Murillo* (2002) 102 Cal.App.4th 1414, 1420 for the proposition that "[t]he subsequent change in the law supersedes the terms of the plea agreement." That case does not stand for such a broad proposition. Defendant Murillo was convicted by plea agreement of a drug possession offense. While on probation, voters enacted Proposition 36, the "Substance Abuse and Crime Prevention Act of 2000," which limited the ability of the court to impose prison sentences for drug-related probation violations. After finding a probation violation, the court found that the plea agreement superseded new Proposition 36, and sentenced the defendant to 16 months in state prison. (*Id.* at pp. 1416-1417.) On appeal, the court held that was error, and that the lower court was bound by the terms of the new law. (*Id.* at pp. 1420–1421.) The short quote cited by Harris merely reinforces the ruling that the trial court was

constrained by the newly enacted statutes when exercising its discretion in sentencing. (*Id.* at p. 1420.) Moreover, *Murillo* involved only a single drug-possession count, for which the People agreed to probation. (See *id.* at p. 1466.) There is no indication that the People were deprived of a bargained-for benefit, since the court's future termination of that probation would be discretionary, notwithstanding Proposition 36. Also, rescission was not at issue there, nor was there any other count to reinstate, so even if the plea was rescinded the court would still be bound by Proposition 36 after a trial. *Murillo* only related to the court's current discretion to revoke probation, so its off-hand reference to altering plea agreements should not be read to override other longstanding law, such as *Segura* and *Collins*.

Harris also cites to *Way v. Superior Court* (1977) 74 Cal.App.3d 165 as an example of a case in which a plea bargain was deemed to incorporate the power of the state to amend the law. In *Way*, the new determinate sentencing laws were held to apply retroactively to inmates who had entered into plea agreements under the prior Indeterminate Sentencing Law (ISL). (*Id.* at p. 178.) But Harris fails to acknowledge that plea agreements under the ISL were very different than they are today, and misapplies the holding of *Way*. Under the ISL, the parties (and the court) only agreed upon a *charge*, and the actual prison sentence was later determined by the "Adult Authority" from within the statutory ranges. (*Id.* at p. 170; see also *In re Stanley* (1976) 54 Cal.App.3d 238.) Thus, neither the parties, nor the court, negotiated for a *specific sentence* within that range. The court in *Way* specifically noted that prison sentences (at the time) did not involve contracts at all:

> The short answer to this contention is that *prison sentences for crimes do not involve contractual considerations*. The "plea bargain" between the prosecutor 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. As stated by petitioners in their trial brief in the San Diego case, "[at] the very most the length of a defendant's prison term was an unstated, uncontrollable, peripheral expectation as to which both sides took a gamble."

(*Way v. Superior Court*, *supra*, at p. 180, italics added.) Of course, the law is very different today, and negotiated prison terms under the determinate sentencing laws are considered an enforceable part of a plea agreement, as acknowledged by cases like *Segura*. The holding of *Way*, understood in context, does not undermine those cases, or expand *Doe* beyond its plain holding.

Harris also discusses three other recently published cases on the same issues that have held differently than the lower court here. We will discuss each in turn, because some address slightly different arguments than the Court of Appeal did here.

In *People v. Perry* (2016) 244 Cal. App. 4th 1251[11], the defendant had been charged with robbery. Pursuant to a plea agreement, he was convicted of grand theft from a person and sentenced to six years in state prison. He sought resentencing under section 1170.18, subdivision (a), after serving over three years of that sentence. (*Id.* at p. 1255.) The People filed a motion to withdraw from the plea agreement and reinstate the original charges. The trial court granted the resentencing, denied the People's motion, and the Court of Appeal affirmed. (*Id.* at pp. 1260-1261.)

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[11] The People are aware that this Court has very recently granted review in this case, on April 27, 2016 (S233287.) That same day this Court also granted review in *People v. Brown* (2016) 244 Cal.App.4th 1170 (S233274) and *People v. Gonzalez* (2016) 244 Cal.App.4th 1058 (S233219). All three cases were described, and relied upon in part, by Harris in his Opening Brief on the Merits which was filed prior to the grants of review. We address those three cases herein not as authorities but merely to address the points raised by Harris.

In its analysis, the Court of Appeal failed to reference numerous authorities cited herein, most notably *People v. Segura*, supra, 44 Cal. 4th 921. The court distinguished *People v. Collins, supra*, 21 Cal. 3d 208, writing that *Collins* would only apply to situations where a defendant obtained total relief from his sentence. The court ignored *In re Blessing, supra*, 129 Cal.App.3d 1026, which applied the *Collins* rule to a mere reduction in sentence resulting from a change in the law. The court also did not explain why applicable law did not require the defendant to serve his agreed upon sentence prior to applying for Proposition 47 relief. In short, *Perry* was wrongly decided.

In *People v. Brown* (2016) 244 Cal.App.4th 1170[12], the defendant had been charged with multiple felony counts of receiving stolen property (§ 496, subd. (a)), and identity theft (§ 530.5, subd. (a).) Pursuant to a plea agreement, she was convicted of one count of receiving stolen property and ordered to serve two years in the county jail. (*Id.* at p. 1174.) One month after her sentencing, while she was apparently serving the time in jail, she petitioned for resentencing pursuant to section 1170.18, subdivision (a). At the hearing on that motion, apparently for the first time, the prosecutor requested of the court that if the motion were to be granted then the People should be released from the plea bargain. (*Id.* at pp. 1175-1176.) The court granted the petition for resentencing and declined to release the parties from the terms of their plea agreement. (*Id.* at p. 1176.) The Court of Appeal affirmed. (*Id.* at p. 1183.)

Like *Perry*, *Brown* was also wrongly decided. The decision mentioned the law of plea agreements and cited *Segura*, but then proceeded to state that *Doe* applied, with no analysis of the conflict with *Segura*. (*Id.* at pp. 1178–1179.) The court also distinguished *Collins* on the ground that

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[12] See footnote 11, *supra*.

it only applied when the defendant's sentence was completely eliminated, not just reduced. (*Id.* at p. 1183.) This was a superficial basis on which to distinguish *Collins*, and conflicts with the holding of *Segura*, which held that a *five day* reduction would have materially altered a term of a plea agreement. (*People v. Segura*, *supra*, 44 Cal.4th at p. 935.) The court, in a footnote, just noted its disagreement with *Blessing*, again with no further analysis. (*People v. Brown*, *supra*, at p. 1183, fn. 5.) The *Brown* holding suggests that the People only bargain for "some punishment" in every plea agreement, no matter what amount of punishment is stated. This is untrue, and the specific term of years is often vital to the disposition of a particular case. In short, the reasoning in *Brown* misconstrued this Court's language in *Doe*, and disregarded longstanding principles of California law.

In *People v. Gonzalez* (2016) 244 Cal.App.4th 1058[13], the defendant had been charged with robbery. Pursuant to a plea agreement, she was convicted of a felony charge of grand theft from a person, sentenced to felony probation for 36 months and ordered to serve 365 days in a work release program. (*Id.* at p. 1062.) Over three years later (it is not clear why the defendant was still on probation), the court heard the defendant's petition for resentencing pursuant to section 1170.18, subdivision (a). (*Id.* at p. 1063.) The People argued that they were entitled to the benefit of their bargain that the conviction remain a felony, which the trial court and the Court of Appeal ultimately rejected, relying on *Doe*. (*Id.* at p. 1068–1073.) However, unlike Harris, the defendant in *Gonzalez* was not seeking to gain early release from prison. Probation, unlike a bargained-for term of incarceration, only involves the *possibility* of future prison, so it is not clear that the *Collins* analysis applies with the same force. Thus,

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[13] See footnote 11, *supra*.

although the People believe that the *Gonzalez* court's analysis was wrong, the facts were distinguishable.

The People submit that *Perry, Gonzalez,* and *Brown* do not properly analyze this Court's precedents, they misconstrue *Doe*, and they find conflicts in the law of plea agreements where none should exist. The People believe that this Court must clarify *Doe*'s holding, and can do so in a way that harmonizes it with *Collins* and *Segura*, and is also consistent with prior Court of Appeal decisions such as *Sanchez*, *Bean*, and *Blessing*.

VI

PROPOSITION 47 DID NOT AFFECT THE LAW ON THE ENFORCEMENT OF PLEA AGREEMENTS, AND DID NOT OVERRULE ANY OF THIS COURT'S PRECEDENTS

When enacting a proposition, voters are presumed to be aware of existing law. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1048.) When the voters enacted Proposition 47, they are thus presumed to have been aware of this Court's plea-agreement jurisprudence, and the remedies when such a contract is breached, or a party otherwise fails to perform.[14] No language in the act purports to overrule these precedents. Furthermore, Proposition 47 was

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[14] For this particular case, the electorate is also presumed to have been aware of the provisions of Proposition 8 that it passed in 1982. That proposition added section 1192.7, subdivision (a)(2), which disfavors "plea bargaining" where an information charges a serious felony such as robbery. One of the enumerated exceptions is where a reduction would not "result in a substantial change in sentence." Given that Proposition 47 states no contrary intention regarding plea agreements in cases where a serious felony is charged, the voters presumably did not override their previous concerns about pleas in serious-felony cases. Still, the larger point is that the electorate was presumably aware of the law on *all* plea agreements, not just those that affected serious felonies.

fundamentally about the statutory punishments for crimes, and does not dictate how to decide individual cases. The latter is the function of trials and plea negotiations, not the Legislature or the voters. Thus, applying longstanding law on plea agreements does not conflict with the goals of Proposition 47.

Harris argues that Proposition 47 plainly contemplates its application to cases where a person is serving a sentence as a result of having pled guilty or no contest prior to trial. That is clearly true. Section 1170.18, subdivision (a) refers to persons currently serving a sentence for a conviction "whether by trial or plea."[15] Harris goes on, however, to assert that the body of contract law that has developed over the years as applied to plea bargains is rendered inapplicable to any matter that is subject to resentencing under Proposition 47. There is simply no authority for such a sweeping rule, which would essentially mean that new laws trump all other considerations in California law.

Harris does not explain why the newness of a rule should have a different effect on plea agreements than an existing rule. We already know that a plea agreement, once accepted by the court, may impliedly curtail a court's *existing* power to modify or reduce a sentence. For example, as previously noted, the court may not override a material term of a plea agreement by resentencing under section 1170, subdivision (d)(1), even though the court plainly has the general power to resentence. (See

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[15] Harris properly cites *T.W. v. Superior Court* (2015) 236 Cal.App. 4th 646 (*T.W.*) for the proposition that section 1170.18 allows resentencing for convictions that were obtained via plea agreement. That is as far as the holding goes, however. In *T.W.* the People made no effort to rescind the plea agreement and reinstate charges, and consequently there is no analysis of the application of contract law to a plea agreement affected by Proposition 47.

People v. Blount, *supra*, 175 Cal.App.4th at pp. 998–999.) Why should this rule be any different if section 1170, subdivision (d)(1), did not exist, and was instead enacted as a new resentencing provision? The principle is the same: once accepted, the terms of the plea agreement become a fundamental premise of the conviction itself, and cannot be altered without the consent of both parties.[16] The newness of the rule has no bearing on this.

Harris further argues that allowing the court to reinstate dismissed counts here would eviscerate the benefits of Proposition 47. This is incorrect. First, not all convictions by plea contained a negotiated sentence, so there is no issue of breach at all. Second, many cases with a negotiated sentence contained only one count, so there is nothing to reinstate. Third, many multiple-count cases had only charges that were affected by Proposition 47, so there is no *felony* that could be reinstated. Reinstating counts in any of these cases would be useless in most instances, and we are aware of no cases where the People have moved to reinstate previously dismissed counts that are now misdemeanors.[17]

But where, as here, the People agreed to dismiss a felony count—which *remains* a felony after Proposition 47—in exchange for a particular sentence, resentencing the defendant destroys a term that was

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[16] In such a case, the court might be able to exercise its new power, but if it then believed the sentence should be lower, it could not just impose it without giving the People a chance to rescind the agreement.

[17] Whether the People could move to reinstate dismissed counts that are now misdemeanors is a question for another day. For example, a serial thief originally charged with multiple felony counts who pleads guilty to one felony might instead be appropriately punished by multiple misdemeanor sentences run consecutively. Rescission therefore might be appropriate. But in other cases the reinstatement might only serve to harass the defendant, and there may be equitable reasons why a court might deny a motion to rescind the plea agreement. The point is that contract principles should still guide the determination, not the newness of Proposition 47.

fundamental to that bargain. Reinstating the dismissed count and allegations would not be an idle act, since it would allow the People to pursue the felony punishment that was integral to the original bargain. This does not eviscerate Proposition 47, but rather properly adjudicates this individual case.

Furthermore, the point of section 1170.18 is, roughly, to give convicted felons the same benefit as defendants who commit their crimes today. Here, the People would not have agreed to dismiss Harris's robbery count for something less than six years in state prison. The court would not have approved such a disposition. (Exh. K, p. 163.) Harris is therefore asking for a windfall beyond that which he would have obtained by committing a crime today. In the wise words of the elder Justice Mosk, this is "bounty in excess of that to which he is entitled." (*Collins*, *supra*, 21 Cal.3d at p. 215.) Since the agreement cannot be enforced, the People wish to negotiate (or proceed to trial) in Harris's case on the new legal landscape.

This is also similar to what happens when the Legislature adds elements to a crime after a defendant's trial, but before the conviction is final. The new elements will apply retroactively, and the defendant cannot stand convicted of the charge. (*People v. Figueroa* (1993) 20 Cal.App.4th 65, 70–71.) But the proper result is not to acquit the defendant outright, but rather to remand the case for retrial, and allow the People the opportunity to prove that additional element. (*Id.* at p. 71.) The situation here is analogous. A fundamental premise of Harris's conviction for grand theft, rather than robbery, was the six-year prison sentence. When that premise is destroyed by a change in the law, the People should be given an opportunity to prove that his offense was actually a robbery. Resentencing him outright, in this situation, is an unwarranted windfall.

Finally, if Harris withdraws his resentencing petition and completes his agreed-upon sentence, he will still get a benefit under

Proposition 47, just not the early release he desires. As described above, section 1170.18, subdivision (f), allows persons who have completed their sentence for a felony, which would now be a misdemeanor under Proposition 47, to apply to the court to have their conviction designated as a misdemeanor. If so designated, then the effect of the conviction in the future is the same as if resentencing had been granted pursuant to subdivision (a): the conviction is a misdemeanor "for all purposes" except for enumerated firearm restrictions. (§ 1170.18, subd. (k).) Harris is therefore still eligible for this relief if he completes his prison sentence, and will not be denied all benefits of Proposition 47.[18]

VII

THE COURT HAD JURISDICTION TO RULE UPON THE PEOPLE'S MOTION TO WITHDRAW FROM THE PLEA AGREEMENT AND REINSTATE THE CHARGES

Harris argues that the trial court lacked jurisdiction to hear the people's motion to withdraw from the plea agreement and reinstate the charge and allegations. This is incorrect.

The law of plea agreements also involves the jurisdiction of the court. Once it approves a plea agreement, the court "lacks jurisdiction to alter the terms of a plea bargain so that it becomes more favorable to a defendant unless, of course, the parties agree." (*People v. Segura*, *supra*, 44

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[18] Section 1170.18, subdivision (j) requires that either a petition or application be brought within three years of the enactment of Proposition 47 absent a "showing of good cause." That would require Harris to bring an application prior to November 4, 2017. As described above, his release date if he serves his agreed upon sentence would not be prior to October, 2017. Even if he was released after November 4, 2017, and therefore brought his application after that date, the court should find that his choice to perform such a material term of his plea agreement prior to filing his application constituted "good cause."

Cal.4th 921, 931, quoting *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217.) One Court of Appeal case has squarely held that the court retains the power to enforce a plea agreement after judgment. (*People v. Collins* (1996) 45 Cal.App.4th 849, 863.)

Here, the People did not seek to alter Harris's agreed-upon sentence. Rather, we were seeking to enforce the terms of the plea agreement. Since Harris was lawfully before the court under section 1170.18, the court had to further address whether unilaterally resentencing him would be unlawful for some other reason. Since the resentencing under section 1170.18 violated the agreement, the court had jurisdiction to provide a remedy.

Furthermore, if Harris insists on reexamining the trial court's powers, he may not like the result. Thus far, the People have not questioned the courts' power to resentence defendants convicted by plea under a new clemency statute, and have instead argued for reinstatement of previously dismissed felonies. But this Court has previously held that approving a plea agreement prevents a court from altering terms that violate the agreement, *even if the court has the general power to do so by statute*. (*People v. Segura*, *supra*, 44 Cal.4th at pp. 935–936 [holding that the general power to modify probation terms under section 1203.3 was limited by plea agreement].) The better jurisdictional question might be why a plea agreement, once accepted, impliedly trumps *existing* powers, but must yield absolutely to *new* powers. The better course may be to disapprove *T.W. v. Superior Court*, *supra*, 236 Cal.App.4th 646, 653, to the extent it is inconsistent with *Segura*, and hold that section 1170.18 may not alter convictions by plea that are already final.

VIII

PARTIES MUST HAVE A REASONABLE EXPECTATION THAT MATERIAL TERMS OF A PLEA AGREEMENT WILL BE PERFORMED

Plea agreements, or "plea bargains," while disfavored in their infancy, have since been found by this Court to be necessary to the proper administration of the state's judicial system. Negotiated plea agreements "benefit the system by promoting speed, economy and finality of judgments." (*People v. Panizon* (1996) 13 Cal.4th 68, 80.) "Plea negotiations and agreements are an accepted and 'integral component of the criminal justice system and essential to the expeditious and fair administration of our courts.'" (*People v. Segura, supra*, 44 Cal. 4th at p. 929.)

Just as in other types of contracts, it is important when parties enter into plea agreements that they understand the underlying ground rules and have reasonable expectations that the material terms of the agreement will be carried out. Parties are less likely to have such expectations when material terms are changed after the fact in ways that were not foreseeable to the parties when the contract was entered into.

At the same time, everyone understands that the criminal law is constantly evolving. At the time that the People and Harris entered into their agreement, both sides were aware of a number of ways in which statutory consequences of convictions had been changed. The calculation of custody credits, for example, had been changed numerous times and both parties to this agreement would have understood that further changes, either favoring defendants or prosecutors, were possible.

But this Court has definitively stated that the length of the agreed-upon term of incarceration is a material term of a plea agreement. (*People v. Segura, supra*, 44 Cal. 4th at p. 935 & fn. 10.) When the People

dismissed charges here based upon a particular sentence, we reasonably assumed that the sentence would be carried out. It would have served no purpose to insert useless language into plea agreements, such as "and you will actually serve your agreed-upon sentence, notwithstanding any change in the law," since this was already a clear expectation of the parties. It was not reasonably foreseeable that such a material term could be significantly changed without any recourse. If this Court finds that such reasonable expectations can be upset, then the result will be that in the future parties to plea agreements will lack basic assurances of their durability, and will be unsure of the finality of the resulting judgment.

Furthermore, applying the rule that Harris urges would essentially devolve plea agreements into guessing games, and would allow criminal punishments to be decided by happenstance in some cases. It is common for defendants to be charged with multiple counts (such as burglary, identity theft, and grand theft), but only enter a plea to one count for an agreed-upon sentence. When the bargains were struck, the charge did not matter, since the punishments were the same. Now, some of these charges have been affected by Proposition 47, but others have not. Defendants who happened to agree to certain counts (e.g., grand theft) will now be released early, while those who chose other counts (e.g., identity theft or car burglary) will not. This is untenable. Criminal punishments should be decided by the reasoned judgment of the parties. Allowing rescission of certain plea agreements after Proposition 47 simply allows the parties to negotiate on the new playing field, and reach a just result based on the facts of the individual case, not the happenstance of the conviction charge.

IX

AFTER RESCISSION, HARRIS SHOULD BE SUBJECT TO THE PUNISHMENT PROVIDED FOR BY THE ORIGINAL CHARGE AND ALLEGATIONS

Beyond the issue of rescission, there is also an issue of whether Harris's sentence after trial would be limited to the six years that he originally bargained for. The trial court here held that it would be so limited, but the Court of Appeal held that it would not. The Court of Appeal had it right, and that part of the holding should also be affirmed.

The trial court based its ruling on part of the holding in *Collins*. There, this Court held that the People were allowed to reinstate the original charges after a change in the law, but that Collins's sentence would also be limited to what he bargained for originally. (*Collins*, *supra*, 21 Cal.3d at p. 216.) Central to the Court's reasoning was that the plea agreement was undermined by external events, not any choice of the defendant's:

> Under the circumstances posed herein, however, the defendant is also entitled to the benefit of his bargain. This is not a case in which the defendant has repudiated the bargain by attacking his guilty plea; he attacks only the judgment, and does so on the basis of external events -- the repeal and reenactment of section 288a -- that have rendered the judgment insupportable. This court has long recognized that the state has no interest in preserving erroneous judgments [citation] and that convictions should not rest on noncriminal conduct. Here external events and not defendant's repudiation undermined this plea bargaining agreement. Accordingly, we must fashion a remedy that restores to the state the benefits for which it bargained without depriving defendant of the bargain to which he remains entitled.

(*Ibid.*) The Court analogized to principles of double jeopardy, and to due-process principles prohibiting longer sentences after a successful appeal. (*Id.* at pp. 216-217.)

Harris's case is different than *Collins* in a crucial respect. This Court has acknowledged that the rule from *Collins* does not apply when "a defendant seeks to withdraw a guilty plea *or repudiate a plea bargain*." (*People v. Hanson* (2000) 23 Cal.4th 355, 360, fn. 2, italics added.) Here, Harris's sentence has not become void as a matter of law, but rather he has *chosen* to pursue resentencing under a new sentence-modification statute. If he had not brought such a petition, his sentence would have remained lawful. He has essentially repudiated the bargain, and this matter falls outside the rule in *Collins* limiting a defendant's sentence exposure.

This is also not a case of prosecutorial vindictiveness. Due process prevents increasing charges after a successful appeal in order to prevent "chilling" the right to appeal. (See *Crane v. Superior Court* (1980) 106 Cal.App.3d 777, 784.) While the right to bring an appeal is an important right that is validly protected by limitations on sentencing after a successful appeal, the right to bring a petition under section 1170.18 need not be so protected. Unlike an appeal, Harris is not trying to correct any error in his conviction. Instead, he is trying to selectively enforce the plea bargain to his benefit, while getting rid of his agreed-upon sentence. Furthermore, pretrial procedures have never carried the same presumption of vindictiveness as post-trial procedures. (See *People v. Michaels* (2002) 28 Cal.4th 486, 514-515.) Moreover, the People are not seeking to increase Harris's exposure, but rather to restore his original exposure after he repudiated the plea agreement. This should be treated just like any other plea agreement that fails, for whatever reason.

Since Harris has chosen to repudiate a material term of his agreement, it makes sense to treat the entire contract as void. By bringing

his petition for resentencing, Harris caused his consideration for the plea agreement to fail in a material respect, and gave rise to the People's right of rescission under Civil Code section 1689, subdivision (b)(4). Civil Code section 1688 provides that, "A contract is extinguished by its rescission." Therefore, the parties should be placed where they were prior to the agreement.

There is nothing unfair about this result, because Harris holds the key to his own fate. He can avoid reinstatement of the robbery charge and original allegations by withdrawing his petition for resentencing, and completing his agreed-upon sentence. If he insists on resentencing, then there should be no limit to his exposure if he is convicted of robbery at trial. Of course, if he is acquitted outright, then he will have no sentence at all.

The trial court also cited section 1170.18, subdivision (e), which states: "Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence." This subdivision seems analogous to the rule that a court may not impose a harsher sentence after a successful appeal. (See *People v. Henderson* (1963) 60 Cal.2d 482, 497.) However, this subdivision addresses the immediate effect of the section 1170.18 resentencing itself, not what happens if the defendant is convicted of *other* counts after application of existing law on plea agreements. The People agree that Harris could not be given a longer sentence after resentencing on his *grand theft* count (which is now petty theft). But that is not the end of the proceedings. Subdivision (e) simply has no bearing on the issue presented here.

CONCLUSION

For the reasons set forth, the ruling of the trial court granting the People's motion to withdraw from the plea and reinstate the original charge and allegations was proper. Furthermore, the Court of Appeal was correct to reinstate the status quo prior to the plea agreement, with no limits

on the sentence that can be imposed on the reinstated charge and allegations. The decision of the Court of Appeal should be affirmed in all respects.

Respectfully submitted,

JACKIE LACEY
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By 

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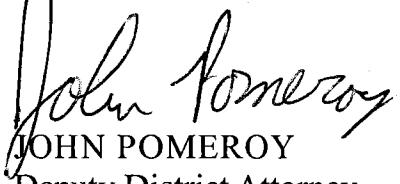

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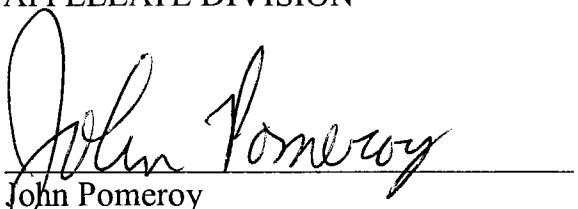
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rules 8.204(b) and 8.520(c)(1) of the California Rules of Court, the enclosed Answer Brief on the Merits is produced using 13-point Roman type including footnotes and contains approximately 13,017 words, which is fewer than the 14,000 words permitted by Rule 8.520(c)(1). Counsel relies on the word count of the computer program used to prepare this brief.

Dated: This 4th day of May, 2016.

LOS ANGELES COUNTY
DISTRICT ATTORNEY'S OFFICE
APPELLATE DIVISION



John Pomeroy
Deputy District Attorney
Plaintiff and Attorney for Real Party In Interest

DECLARATION OF SERVICE BY MAIL

The undersigned declares under the penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County with offices at 320 West Temple Street, Suite 540, Los Angeles, California 90012. On the date of execution hereof I served the attached **Answer Brief on the Merits** by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the County of Los Angeles, California, addressed as follows:

HONORABLE HENRY J. HALL
Department 111
210 West Temple Street
Los Angeles, CA 90012

Office of the Attorney General
300 S Spring Street
Los Angeles, CA 90013-1230

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

MARK HARVIS, Deputy Public Defender
320 West Temple Street, Room 590
Los Angeles, CA 90012-3266

Executed on May 4, 2016, at Los Angeles, California.

LAURA VEGA