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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MORRIS GLEN HARRIS, JR., Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent, PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	S-231489 2nd Dist. No. B264839 (Super. Ct. No. BA408368) REPLY BRIEF ON THE MERITS

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To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

I

THE PROSECUTION'S ARGUMENT THAT *DOE V. HARRIS* IS LIMITED TO CASES THAT DO NOT INVOLVE MATERIAL CHANGES TO A PLEA AGREEMENT IS BASED UPON AN ARGUMENT THIS COURT HAS ALREADY CONSIDERED AND REJECTED

When this court decided *Doe v. Harris* (2013) 57 Cal.4th 64 the issue was phrased 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?" (*Doe v. Harris* at p. 66.) The Ninth Circuit Court of Appeals asked this court to address this issue because it perceived inconsistencies between decisions from California courts interpreting the impact of legislation upon existing plea bargains.

This court's answer was very clear. "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 (*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 has intended to apply to them." (*Doe v. Harris* at p. 66.)

This court distinguished its earlier decision in *Swenson v. File* (1970) 3 Cal.3d 389, which did not apply a change of the law to an existing commercial contract. *Swenson* was distinguished because unlike the law in *Doe v. Harris* (and also unlike the law applicable in petitioner Morris Harris's case) the change in the law was not intended to apply retroactively. (*Doe v. Harris* at p. 69.)

Instead, this court relied upon *People v. Gipson, supra*, which responded to a claim that the terms of a plea agreement could not be altered through retroactive legislation. *Gipson*, at p. 1070, had held that when "persons enter into a contract or transaction creating a relationship infused with a substantial public interest, subject to plenary control

by the state, such contract or transaction 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 ... ." This court further said:

> "*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. 70.)

This court examined other cases which raised the issue of whether, despite the general rules, the facts and circumstances of a particular plea agreement could give rise to an implicit promise that the plea agreement would be unaffected by a change in the law. This court explained that indeed the parties could make such an agreement but "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.)

Finally, this court concluded that retroactive changes in the law *require* the parties' compliance and do not violate terms of the plea agreement.

> "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.)

The prosecution, along with the Court of Appeal, believes that *Doe v. Harris* does not control. The prosecution argues that *Doe v. Harris* is limited to situations where the change in the law affected only statutory terms adhering to a criminal conviction.[1]/ The prosecution argues that *Doe* does not apply when the law changes a material term of the plea agreement such as the length of the agreed-upon sentence. According to the prosecution, *Doe v. Harris* is inapplicable because "*Doe* did not involve a material term of a plea agreement." (Answer, p. 30.) "*Doe* is distinguishable because . . . *Doe* did not involve a material term of the plea agreement." (Answer, p. 26.) Because Proposition 47 affects the sentence, an explicit term of the plea agreement, *Doe* is inapplicable and instead the issue is controlled by *People v. Collins* (1978) 21 Cal.3d 208 and *People v.*

1/ It must be noted that the prosecution repeatedly and improperly conflates the issue presented here, a change in the law impacting a plea bargain, with the issue of a trial court unilaterally acting to change the terms of a plea agreement. (See, for example, Answer pp. 15, 23-26.) Although these issues are related in that they both deal with plea bargains, the legal arguments are different. Trial judges generally cannot unilaterally change the terms of a plea agreement but the Legislature (and the voters) can. Because cases are not authority for propositions not considered (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10), cases that deal with a trial court unilaterally changing a plea bargain are of minimal or no assistance to the prosecution.

Segura (2008) 44 Cal.4th 921. (Answer, p. 33.)

The prosecution's argument that changes in the law do not override plea bargains when the change affects a material term is not a new argument. That argument has been made before, considered, and rejected by this court. That occurred in the very case at issue – *Doe v. Harris.*

Doe v. Harris was a 6-1 decision. Justice Kennard dissented. What the prosecution has done is to adopt and expand upon Justice Kennard's dissent, without attribution to her and without mentioning the fact that the argument they make has already been rejected.

The prosecution argues that *Doe v. Harris* is limited to situations where the change in the law does not affect a material term of the plea agreement. Justice Kennard dissented because she recognized that the majority opinion did exactly that – it held that changes in the law apply even to material terms of a plea bargain. She would have rule differently.

> "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. I do not share the majority's view. I would hold that only if the new legislation does *not materially* affect the plea agreement's terms can the parties be required to comply with the new law. Put differently, a legislative change in the applicable law binds the parties unless the new law so alters the plea agreement that, had the parties known of it at the time of the plea, one or both would not have entered into the agreement. Because I would answer the Ninth Circuit's question differently than the majority, I dissent." (*Doe v. Harris* at p. 74, emphasis original.)

Just as the prosecution relied at least in part upon *People v. Segura,* so did Justice Kennard. (*Doe v. Harris* at p. 75.) Justice Kennard rejected the analysis of *Swenson v. File* advanced by the majority. She wrote that a term in a plea agreement is material if it is essential to a party's decision to enter into an agreement and she would not have allowed a material term to be altered by a change in the law. Justice Kennard would have allowed rescission when there is some significant change in a material term. (*Doe v. Harris* at p. 77.) "I would therefore answer the Ninth Circuit's question by saying that a change in the law binds the parties to a plea agreement unless the change is so significant that, had the parties known of it at the time of the plea, one or both parties would not have entered into the agreement." (*Doe v. Harris* at p. 78.)

It is fair to say that pretty much everything the prosecution now argues should be the law was suggested by Justice Kennard in her dissent, yet those positions were rejected by this court's majority. There is nothing really new in the prosecution's Answer that has not already been considered by this court.

Proposition 47 changed the law and by its very terms is retroactive. (Pen. Code § 1170.18.) Although Justice Kennard suggested rescission, which is the prosecution's bottom line, this court's majority did not. Instead, this court explained that compliance with changes in the law made retroactive is "required." (*Doe v. Harris* at pp. 73-74.)

Doe v. Harris is indeed controlling and it establishes that allowing the prosecution to withdraw from the plea agreement and reinstate the original charge was error.

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II

THE PROSECUTION'S INTERPRETATION OF THE LAW WOULD EVISCERATE PROPOSITION 47 AND PROPOSITION 36 (THE THREE-STRIKES SENTENCING LAW) AND IS CONTRARY TO THE INTENT OF THE VOTERS

As one reads through the prosecution's Answer, their endgame soon become apparent: that this court implement a rule that states that a change in the law can *never* alter the terms of a plea agreement, unless it benefits the prosecution.

The prosecution starts its argument within the confines of the facts of this case, but then immediately broadens the scope of the remedy it seeks. The prosecution argues that it did not get the benefit of its bargain (a plea to a grand theft person instead of a robbery for 6 years in prison) because of Proposition 47. Therefore, the prosecution is entitled to withdraw from the plea agreement and reinstate the dismissed robbery charge. The prosecution states that when "a specific sentence is an express, negotiated term, it is part of the plea agreement, and not subject to *any* unilateral change." (Answer, p. 19, emphasis original.)

The prosecution then goes on to posit that when a plea bargain only involves one count, there would be no "other count" to reinstate. They add that some cases have only Proposition 47-eligible charges, so there would be no felony charges to reinstate. But they then add a footnote in which they suggest that in a case where there were numerous charges but the prosecution agreed to a plea to only one, and now all of the

charges are Proposition 47 misdemeanors, that the prosecution could ask for rescission of the plea agreement and reinstatement of all of the now-misdemeanor, previously dismissed counts. (Answer, p. 40 and footnote 17.)

The prosecution then finally reveals the end game strategy: for this court to disapprove *T.W. v. Superior Court* (2015) 236 Cal.App.4th 646 and hold that Penal Code section 1170.18 may not alter convictions by plea that are already final. This "suggestion" is actually written as a thinly veiled threat. (Answer, p. 43.)

The prosecution has fully closed the circle. No plea bargain may be altered by any change in the law. If charges were dismissed, then the charges are reinstated once the crime of conviction is reduced to a misdemeanor pursuant to Proposition 47. If all the originally charged crimes are Proposition 47 misdemeanors, than any dismissed crimes would be reinstated. And no plea-bargained case that is final may be altered by Proposition 47.

The prosecution helpfully suggests that petitioner is not without a remedy. He can simply finish his sentence and, when his case is completely final, file an application for reduction to a misdemeanor. The prosecution even thoughtfully notes that if petitioner's case is not final before the November 4, 2017, Proposition 47 deadline, the trial court should find good cause and allow his application to be filed. (Answer pp. 41-42.) If, however, this court were to follow the prosecution's "suggestion" quoted above and hold that Penal Code section 1170.18 may not alter convictions by plea that are final (Answer, p. 43), then petitioner would not be able to file an application and obtain any Proposition

47 relief at all. And neither would anybody else who has a case that is final where the underlying conviction was obtained through a plea agreement.

What, then, is left of Proposition 47's Penal Code section 1170.18? Defendants who went to trial could presumably get Proposition 47 relief, but of course that would be a relative handful of cases in comparison to the 95 per cent of criminal cases that are resolved by 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 May 18, 2016.) Persons who plead "open" to a court could get Proposition 47 relief, but again that is a relative few in comparison to the huge number of cases that resolve pursuant to plea agreements.

It is a key principle of statutory construction that courts should construe statutes to implement the intent of the Legislature and the voters. "Our role in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law. In the end, we must adopt the construction that is most consistent with the apparent legislative purpose and avoids absurd consequences." (*People v. Barker* (2004) 34 Cal.4th 345, 357, internal citations and quotation marks omitted.) The same rules apply to voter initiatives and the task of a reviewing courts "is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.)

Proposition 47's intent is very clear from the language of the initiative, which

contains a statement of purpose and intent. Among the primary purposes is to save money and redirect it to education and other programs by diverting non-violent defendants out of California's prisons. Additionally, the initiative states a purpose is to "Authorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors." (Proposition 47, uncodified Section 3, subd. 4.) The initiative specifically states that the petition and application procedures found in Penal Code section 1170.18 apply regardless of whether the conviction was obtained by trial or *plea.* (Penal Code § 1170.18, subds. (a) and (f).)

The prosecution seeks to have this court ignore the very clear intent and deny qualifying defendants Proposition 47's benefits. The prosecution wants this court to carve out an exception for plea bargains that will render Proposition 47's promise illusory, cruel even. There is no tenet of statutory construction which would allow this court to gut Proposition 47 as the prosecution urges.

A ruling that benefits the prosecution in this case would also eviscerate the resentencing provisions of Proposition 36, the three-strikes resentencing initiative. Proposition 36's resentencing statute, Penal Code section 1170.126, is remarkably similar to Proposition 47's section 1170.18. The intent of Proposition 36 was to allow certain persons serving life sentences to be resentenced to determinate terms. Just as with Proposition 47, Proposition 36 applies to cases where the conviction was obtained by trial or *plea.* (Pen. Code § 1170.126, subd. (b).) The late Justice Richard Mosk noted in his dissent in this very case that a ruling favoring the prosecution would be likely to seriously

harm Proposition 36.

It is another tenet of statutory construction that the voters are aware of existing law at the time an initiative is adopted. This is a presumption, not a binding conclusion. It is also the case that qualitative and quantitative differences exist between the state of knowledge of informed voters and that of elected members of the Legislature. (*Santos v. Brown* (2015) 238 Cal.App.4th 398, 410.)

It is quite the fiction to believe that the voters were aware that when they enacted Proposition 47 the existing law actually precluded application of the initiative to around 95 per cent of the potential cases because those cases were obtained by plea bargains. It is quite the fiction to believe that the voters were aware of the 1978 case *People v. Collins, supra*, 21 Cal.3d 208, which is so obscure that it was not even mentioned by the Ninth Circuit or this court in *Doe v. Harris*. If the voters were going to be aware of anything, they would have been aware of *Doe v. Harris,* which was decided just a little more than one year before the 2014 election.

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It is completely unreasonable to believe that the voters understood and considered that the law was or is as explained by the prosecution. It is also completely unreasonable to believe that the voters actually intended that Proposition 47 really did not apply to convictions obtained by plea bargains.[2]/

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2/ The prosecution also argues in its Answer that if this court allows the original charges to be reinstated, the original potential maximum sentence must also be reinstated. (Answer pp. 46-48.) Petitioner has already argued in the opening brief that reinstatement of the original potential sentence is barred by *People v. Collins, supra*, 21 Cal.3d 208, 216-217 and *United States v. Goodwin* (1982) 457 U.S. 368, 372. Petitioner will not restate that argument here but wishes to add that this court has continually held that California's constitutional double jeopardy provision prohibits an increased sentence after a successful appeal. (*People v. Hanson* (2000) 23 Cal.4th 355, Cal. Const. Art. I, Section 15.) In addition, Proposition 47 itself states that "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).)

CONCLUSION

Petitioner respectfully requests this court reverse the 2-1 decision of the Second District Court of Appeal and hold that Proposition 47 fully applies to plea agreements, that trial courts have no jurisdiction to vacate pleas and reinstate charges, and that Proposition 47 did not authorize that power.

Respectfully submitted,

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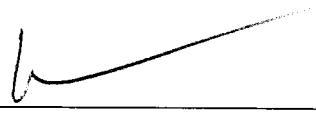
By: 

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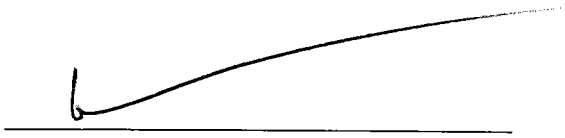
CERTIFICATE OF WORD COUNT

Counsel of record certifies, pursuant to California Rules of Court, rule 8.520(c)(1), Reply Brief On The Merits in this action contains 3,328 words, including footnotes. Counsel has relied on the word count of the word processing program used to prepare this brief.

DATED: May 19, 2016



MARK HARVIS

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 May 19, 2016, I served the within **REPLY BRIEF ON THE MERITS**, MORRIS GLEN HARRIS, JR., 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 County of Los Angeles, addressed as follows:

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

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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 19, 2016 at Los Angeles, California.

ROSE TRENADO