S255843

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

WILLIAM L. STAMPS,

Defendant and Appellant.

Case No. S_____

First Appellate District, Division Four, Case No. A154091
Alameda County Superior Court, Case No. 17CR010629
The Honorable James P. Cramer, Judge

PETITION FOR REVIEW

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The People respectfully petition for review of the decision of the California Court of Appeal for the First Appellate District, Division Four. The opinion, attached as Exhibit A (Typed Opn.), is reported at 34 Cal.App.5th 117. The opinion was filed on April 9, 2019. Neither party sought rehearing. This petition is timely. (Cal. Rules of Court, rules 8.366(b)(1), 8.500(e)(1).)

ISSUE PRESENTED

Whether a certificate of probable cause is required to appeal on the ground that intervening legislation retroactively revives individualized judicial sentencing discretion eliminated by a plea agreement. (See Pen. Code, § 1237.5.)

STATEMENT

In a negotiated disposition, appellant pleaded no contest to first-degree burglary (Pen. Code, § 459)[1], and he admitted a prior conviction as a serious felony and a strike (§§ 667, subds. (a)(1) & (e)(2), 1170.12, subd. (a)). (CT 3-5, 24-36.) The parties agreed to a nine-year prison term and to the dismissal of two other burglary charges, a second-strike allegation, a second prior serious felony conviction allegation, and three prior prison-term allegations. (*Ibid*.) "The court sentenced defendant to the stipulated prison term, which consisted of the low term of two years for the burglary doubled pursuant to sections 1170.12, subdivision (c)(1) and 667, subdivision (e)(1) and a five-year enhancement pursuant to section 667, subdivision (a)(1)." (Typed Opn., p. 1.)

Appellant did not waive the right to appeal. (Typed Opn., p. 2, fn. 3.) He timely noticed an appeal "based on the sentence or other matters occurring after the plea that do not affect the validity of the plea," and he

[1] Further undesignated statutory citations are to the Penal Code.

requested a certificate of probable cause on these grounds: "'My base term was 2 years for a 1st degree burglary residential, which was a serious non-violent crime, where no forced entry was made. I only went into a carport garage (walk through) that was attached to an apartment complex. Besides the 2-year base term, I was also given 7 years of enhancements which made it 9 years 80%. . . . I truly believed I was unfairly sentenced." (Typed Opn., p. 1, fn. 1.) The trial court denied a certificate of probable cause. (Typed Opn., p. 1.)

About six months after the notice of appeal, the Governor on September 30, 2018 "signed Senate Bill No. 1393 that, effective January 1, 2019, amended section 1385 to delete former subdivision (b) and give trial courts the discretion to dismiss five-year sentence enhancements under section 667, subdivision (a). (See Legis. Counsel's Dig., Sen. Bill No. 1393 ['This bill would delete the restriction prohibiting a judge from striking a prior serious felony conviction in connection with imposition of [a] 5-year enhancement . . . .'].)" (Typed Opn., p. 2.) Respondent acknowledged below that the legislation applies retroactively to nonfinal judgments, but not that it is intended to allow all defendants to retain the benefit of their bargains and nevertheless seek reductions of agreed sentences. (See *ibid.*, citing *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.)

The Court of Appeal reversed and "remanded to permit the court to determine whether to strike the enhancement under Penal Code section 667, subdivision (a) and to resentence defendant accordingly," and in all other respects affirmed. (Typed Opn., p. 8.) The court held that "the matter must be remanded so that the trial court may exercise its discretion to strike the five-year serious felony conviction enhancement pursuant to recently enacted Senate Bill No. 1393. (Legis. Counsel's Dig., Sen. Bill No. 1393 (2017-2018 Reg. Sess.) Stats. 2018, ch. 1013, §§ 1, 2.)" (Typed Opn., p.

1.) The court followed *People v. Hurlic* (2018) 25 Cal.App.5th 50 to hold that Penal Code section 1237.5 "does not apply when the challenge is based on a retroactive change in the law." (Typed Opn., p. 3.) The court found *People v. Kelly* (2019) 32 Cal.App.5th 1013 (petn. for review pending, petn. filed Apr. 9, 2019, S255145) was poorly reasoned contrary authority and rejected it. (Typed Opn., p. 7.)

REASONS FOR GRANTING THE PETITION

REVIEW IS NEEDED TO RESOLVE A SPLIT AMONG THE COURTS OF APPEAL REGARDING THE NEED FOR A CERTIFICATE OF PROBABLE CAUSE TO CHALLENGE AN AGREED SENTENCE BASED ON AMELIORATIVE PENAL LEGISLATION

Review is necessary to resolve a deep and widening conflict on the question above. This question represents an important issue of law because it directly impacts plea bargaining. Clarity is needed because plea bargaining "'is not some adjunct to the criminal justice system; it *is* the criminal justice system.'" (*Missouri v. Frye* (2012) 566 U.S. 134, 144, quoting Scott & Stuntz, Plea Bargaining as Contract (1992) 101 Yale L. J. 1909, 1912.)

Section 1237.5 provides that a defendant cannot appeal after pleading guilty or no contest unless "[t]he defendant has filed with the trial court a written statement . . . showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings" and "[t]he trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court." Two decades ago this court held that section 1237.5 should be "applied in a strict manner," that it "established a mechanism that did not invite consideration of the peculiar facts of the individual appeal," and that it "is not an authorization for 'ad hoc dispensations' from such a command by courts." (*People v. Mendez* (1999) 19 Cal.4th 1084, 1098.) "In determining whether section 1237.5 applies to a challenge of a sentence

imposed after a plea of guilty or no contest, courts must look to the substance of the appeal . . . . [T]he critical inquiry is whether a challenge to the sentence is in substance a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5." (*People v. Panizzon* (1996) 13 Cal.4th 68, 76.)

There is an exception to the certificate requirement where the appeal is limited to "postplea claims, including sentencing issues that do not challenge the validity of the plea." (*People v. Cuevas* (2008) 44 Cal.4th 374, 379.) The notice of appeal here purportedly based the appeal on the sentence or other matters occurring after the sentence that do not affect the validity of the plea. (CT 55-56.) *Panizzon* held this exception did not apply under section 1237.5 to a defendant who purportedly did not contest the validity of the negotiated plea, while "in fact challenging the very sentence to which he agreed as part of the plea." (13 Cal.4th at p. 73.) The defendant in *Pannizon* claimed that the agreed sentence negotiated by the parties was disproportionate based on the sentences that were imposed on codefendants after the no contest plea was entered, and that "such error represents the 'archetypal instance' of post-plea error for which a probable cause certificate is not required." (*Id*. at pp. 74, 78.) Citing decisions inconsistent with that argument, this court stated: "That the events supposedly giving rise to defendant's disproportionality claim occurred afterwards . . . is of no consequence. Rather, 'the crucial issue is what the defendant is challenging.' [Citation.] Here, by contesting the constitutionality of the very sentence he negotiated as part of the plea bargain, defendant is, in substance, attacking the validity of the plea." (*Id*. at p. 78.)

A deep and widening division now exists in the Court of Appeal on whether the certificate requirement applies where the defendant bases the appeal on postplea amendatory sentencing legislation. The issue is whether

the court's *Mendez/Panizzon* jurisprudence excepts from section 1237.5 a claim that individualized judicial sentencing discretion removed by an agreed sentence is superseded by intervening legislation that potentially lessens punishment in nonfinal cases such that a defendant may, without a certificate, seek a remand for resentencing on appeal and otherwise keep the benefits of the plea agreement.

In *People v. Enlow* (1998) 64 Cal.App.4th 850, the defendant pleaded guilty in 1996 to an automobile theft committed and admitted a prior auto theft conviction within the meaning of the three strikes law. (*Id*. at pp. 852-853.) In exchange for the plea, the prosecutor dismissed numerous other counts and prison-term enhancements. (*Id*. at p. 853.) As agreed, the trial court sentenced the defendant to an eight-year term consisting of the middle term of four years for the auto theft conviction and doubled due to the prior strike. (*Ibid*.) On appeal, the defendant sought a two-year sentence reduction based on a statutory amendment that effective January 1, 1997, reduced punishment for recidivist auto theft. (*Ibid*.) The defendant argued a certificate of probable cause was not required as he challenged only the sentence, not the validity of the plea. (*Id*. at p. 854.) The Fourth District, Division One, disagreed, citing *Panizzon*, *supra*, 13 Cal.4th at page 78, where, as discussed above, this court rejected the claim that section 1237.5 does not apply to an agreed term that is challenged by the defendant as disproportionate punishment. (*Enlow*, *supra*, at pp. 853-854 & fn 1.)

A nonfinal decision by Division One of the First Appellate District, in *People v. Fox* (May 3, 2019, A153133) ___ Cal.App.5th ___, 2019 WL 1967716 is consistent with *Panizzon* and *Enrow*. Fox pleaded guilty to robbery and agreed to a 15-year prison sentence, including 10 years for a firearm enhancement, and later after being denied leave to file a late request for a certificate claimed no certificate is required for a remand not to withdraw a plea but to move to strike the 10-year term under Senate Bill

No. 620 (2017-2018 Reg. Sess.) (Senate Bill No. 620), which became effective after sentencing. (*Id*. at pp. *1-3.) Fox conceded the sentence was an integral term of the plea but argued no certificate was needed under *Stamps*, *People v. Baldivia* (2018) 28 Cal.App.5th 1071 (Sixth District)[2] and *People v. Hurlic* (2018) 25 Cal.App.5th 50 (Second District, Division Two). *Hurlic*'s reasoning was the essential basis for the defendant's argument: first, that because a postplea change in law is deemed to have been incorporated into the terms of that plea, the defendant's attempt to enforce the change in law is not an attack on the plea (*Hurlic*, *supra*, 25 Cal.App.5th at p. 57, citing *Harris v. Superior Court* (2016) 1 Cal.5th 984, 991); second, "dispensing with the certificate of probable cause requirement" would "better implement[] the intent behind that requirement." (*id.* at pp. 57-58); and third, a "conflict" between the retroactive application of such legislation to nonfinal cases and the section 1237.5 certificate requirement should be resolved in favor of the more specific and later-enacted statute (*id*. at p. 58). Over a dissent, the court in *Fox* underook an exhaustive analysis and agreed with respondent that all three decisions "are not convincing." (*Fox*, 2019 WL 1967716, p. *5.)

The court in *Fox* found support in various cases that included *Kelly*, *supra*, 32 Cal.App.5th 1013 (Second District, Division Six), in which, as

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[2] *Baldivia* is distinguishable. There, respondent conceded that the lack of a certificate of probable cause did not forestall an appeal that raised the retroactivity of Proposition 57 and whether defendant was entitled to a remand to allow the sentencing court to consider striking firearm enhancements. (*Baldivia*, *supra*, 28 Cal.App.5th at pp. 1075-1076.) The appellate history in *Baldivia* included a stay of the initial appeal while defendant petitioned the trial court for Proposition 57 relief and a transfer hearing. (*Id.* at p. 1075.) When the trial court denied Proposition 57 relief, Baldivia filed a notice of appeal, and the trial court granted a certificate of probable cause, which Baldivia sought in order to challenge the "validity of the plea or admission." (*Id.* at pp. 1075-1076.)

noted above, this court is considering a petition for review. The defendant in *Kelly* "sought a remand for resentencing under Senate Bill No. 1393, and *Kelly* concluded that her failure to obtain a certificate of probable cause required dismissal of her appeal, because she effectively sought to challenge an integral part of the plea agreement by seeking a remand for possible dismissal of the five-year enhancements. (*Id*. at pp. 1015-1016.) Relying on the principle that a sentencing court cannot modify the terms of an accepted plea bargain, the Court of Appeal noted that even if it 'were to remand for resentencing, the trial court would still be bound by the terms of the plea agreement which provides a floor and ceiling of 18 years state prison.' (*Id*. at p. 1017.)" (*Fox*, at p. *8, fn. omitted.) *Fox* ultimately held that a certificate is required to invoke Senate Bill No. 620 on appeal to seek resentencing on an agreed sentence that includes firearm enhancements. The court dismissed the appeal explaining that the appropriate remedy is for defendants to seek to withdraw their pleas and appeal only if they obtain a certificate, adding: "[T]his will weed out appeals in which the trial court is not inclined to exercise its discretion to strike a firearm enhancement. And even if a defendant is able to procure a certificate and successfully seeks a remand, he or she will not be entitled to have the trial court exercise that discretion unless the plea agreement is set aside, or is modified with the People's agreement." (*Id*. at p. *9.)

The split among the Courts of Appeal is a measure of the significant issues at stake in these cases. Carving an ad hoc exception into section 1237.5 to permit noncertificate appeals for an exercise of judicial sentencing discretion that is removed by the stipulated sentence provisions of countless felony plea bargains will impose significant and unnecessary burdens on the state's criminal justice system.

That cost is particularly unwarranted when considered in the context of plea bargains for specified sentences that by their terms have necessarily

eliminated any exercise of discretion and which have already been approved by the court. Generally, the court cannot sentence contrary to the terms of the plea agreement, it can only reject the bargain: "Although a plea agreement does not divest the court of its inherent sentencing discretion, a judge who has accepted a plea bargain is bound to impose a sentence within the limits of that bargain. . . . Should the court consider the plea bargain to be unacceptable, its remedy is to reject it, not to violate it, directly or indirectly." (*People v. Segura* (2010) 48 Cal.4th 426, 931, brackets and internal quotation marks omitted; see also § 1192.5 ["Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, . . . the court may not proceed as to the plea other than as specified in the plea"].) But in cases like this one, the Court of Appeal removes the trial court's usual discretion to reject the bargain; the judgment is affirmed in all respects save resentencing. (Typed Opn., p. 8.) Under the terms of the appellate court's remand, the trial court has only the option to enforce the original agreement it accepted or else dismiss the prior serious felony enhancement employing a sentencing discretion that the parties not only never contemplated, but undertook to eliminate.

Given the importance of the issue and the breadth of the deepening split in published authority among the Courts of Appeal, review is warranted so this court can resolve the conflict.

CONCLUSION

Accordingly, respondent requests review.

Dated: May 16, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 2399 words.

Dated: May 16, 2019

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EXHIBIT A

Filed 4/9/19

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM STAMPS, Defendant and Appellant.	A154091 (Alameda County Super. Ct. No. 17CR010629)

In exchange for a stipulated nine-year sentence and the dismissal of other counts, defendant William Stamps plead no contest to one count of residential burglary (Pen. Code,[1] § 459) and admitted a prior serious felony conviction (§ 667, subds. (a)(1)). The court sentenced defendant to the stipulated prison term, which consisted of the low term of two years for the burglary doubled pursuant to sections 1170.12, subdivision (c)(1) and 667, subdivision (e)(1) and a five-year enhancement pursuant to section 667, subdivision (a)(1). On appeal, defendant contends the matter must be remanded so that the trial court may exercise its discretion to strike the five-year serious felony conviction enhancement pursuant to recently enacted Senate Bill No. 1393. (Legis. Counsel's Dig., Sen. Bill No. 1393 (2017-2018 Reg. Sess.) Stats. 2018, ch. 1013, §§ 1, 2.) We agree and, accordingly, remand for a new sentencing hearing to decide whether to exercise that discretion.

[1] All statutory references are to the Penal Code unless otherwise noted.

Background

Defendant was sentenced on January 10, 2018. On March 29, 2018, defendant timely filed a notice of appeal. His request for a certificate of probable cause was denied.[2]

At the time of defendant's sentencing, the trial court did not have discretion to strike an enhancement imposed under section 667, subdivision (a)(1). (Pen. Code, former § 1385, subd. (b); Stats. 2014, ch. 137, § 1, eff. Jan. 1, 2015 ["This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667."].) On September 30, 2018, the Governor signed Senate Bill No. 1393 that, effective January 1, 2019, amended section 1385 to delete former subdivision (b) and give trial courts the discretion to dismiss five-year sentence enhancements under section 667, subdivision (a). (See Legis. Counsel's Dig., Sen. Bill No. 1393 ["This bill would delete the restriction prohibiting a judge from striking a prior serious felony conviction in connection with imposition of [a] 5-year enhancement . . . ."].)

Discussion

Defendant contends that because his case is not yet final and the recent amendment applies retroactively, the judgment should be reversed and the matter remanded for resentencing to allow the trial court an opportunity to exercise its discretion to strike the enhancement. The Attorney General agrees that the Senate Bill No. 1393 amendment applies retroactively (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973), but insists that defendant is not entitled to the requested relief because his plea bargain

[2] Defendant requested a certificate of probable cause on the following grounds: "My base term was 2 years for a 1st degree burglary residential, which was a serious non-violent crime, where no forced entry was made. I only went into a carport garage (walk through) that was attached to an apartment complex. Besides the 2-year base term, I was also given 7 years of enhancements which made it 9 years 80%. . . . I truly believed I was unfairly sentenced."

contained a stipulated sentence of nine years and he was sentenced in conformity with the negotiated plea.[3]

Initially, the Attorney General argues that the appeal should be dismissed because defendant did not obtain a certificate of probable cause. (§ 1237.5.) While ordinarily the failure to obtain a certificate of probable cause would preclude a challenge to a negotiated sentence, in *People v. Hurlic* (2018) 25 Cal.App.5th 50 (*Hurlic*), the court held that the ordinary rule does not apply when the challenge is based on a retroactive change in the law. In its well-reasoned decision, the court gave three reasons for applying "the law governing the retroactivity of new criminal statutes" (*id.* at p. 56) rather than "the law interpreting the certificate of probable cause requirement in section 1237.5" (*id.* at p. 55). First, absent an explicit provision in a plea agreement to the contrary, the plea must be deemed to incorporate the subsequently enacted legislation. (*Id.* at p. 57.) Second, the purpose of the certificate of probable cause requirement is to weed out frivolous appeals and that purpose would not be served where "the defendant's entitlement to a new law's

[3] We note briefly that there is no contention here that defendant waived his right to appeal the issue before us. Recent authority is in conflict as to whether a waiver of appellate rights that includes reference to a stipulated sentence bars relief under a postjudgment change of law. (Compare *People v. Wright* (2019) 31 Cal.App.5th 749 [plea agreement that includes a specified prison term and a waiver of the right to appeal the sentence did not waive future sentencing error based on a change in the law of which defendant was unaware at the time the plea was entered] with *People v. Barton* (2019) 32 Cal.App.5th 1088 [plea agreement that includes a specified prison term and a waiver of the right to appeal the sentence precludes future challenges to the legality of the agreed-upon period of confinement].) In this case, however, defendant entered a general waiver of his appellate rights that did not preclude review of his sentence. The waiver read, "I hereby give up my right to appeal from this conviction, including an appeal from the denial of any pretrial motions." A "waiver that is nonspecific, e.g., 'I waive my appeal rights' or 'I waive my right to appeal any ruling in this case,' " is considered a general waiver. (*People v. Panizzon* (1996) 13 Cal.4th 68, 85, fn. 11.) "A broad or general waiver of appeal rights ordinarily includes error occurring before but not after the waiver because the defendant could not knowingly and intelligently waive the right to appeal any unforeseen or unknown future error. [Citation.] Thus, a waiver of appeal rights does not apply to ' "possible future error" [that] is outside the defendant's contemplation and knowledge at the time the waiver is made.' " (*People v. Mumm* (2002) 98 Cal.App.4th 812, 815.)

retroactive application is undisputed" and therefore "an appeal seeking such application is neither 'frivolous' nor 'vexatious.' " (*Id.* at p. 58.) Third, under the rules of statutory construction, "[w]here two statutes conflict, courts give precedence to the later-enacted statute and precedence to the more specific statute." (*Ibid.*; see also *People v. Baldivia* (2018) 28 Cal.App.5th 1071, 1077 (*Baldivia*) [following *Hurlic*].) Contrary to the Attorney General's argument, *Hurlic* is not based on the rationale that the defendant in that case did not check the box on his notice of appeal indicating he was challenging the validity of his plea but was seeking to avail himself of the new legislation. All of the reasons for the decision explained in *Hurlic* are fully applicable in the present case.

The Attorney General places heavy reliance on *People v. Enlow* (1998) 64 Cal.App.4th 850, in which the court rejected (for failure to obtain a certificate of probable cause and on the merits) a defendant's attempt to reduce an agreed upon sentence based on the expiration of the statute that had temporarily increased the penalty to which the defendant had agreed. As the *Hurlic* court explained, *Enlow* is "distinguishable because the statutory change in *Enlow* was not truly a 'new law'; the statute's anticipated sunset was already on the books (and thus part of the legal landscape) at the time the plea agreement was negotiated, such that the parties' agreement to a specific sentence that did not account for the sunset was 'part of the deal' and thus his attack on that sentence went to the validity of the plea itself." (*Hurlic, supra,* 25 Cal.App.5th at p. 58; see also *Baldivia, supra,* 28 Cal.App.5th at p. 1079 ["defendant's appellate contentions were not an attack on the validity of his plea and did not require a certificate of probable cause"].)[4] Like the statutory change in *Hurlic,* the amendment in the present case was not on the books or anticipated when defendant entered his plea agreement, so that his present appeal is not a challenge to the validity of the plea itself.

[4] *Hurlic* also regarded *Enlow* as unpersuasive because it did "not make any effort to reconcile section 1237.5 with the second line of authority involving retroactive application of new laws ameliorating criminal sentences." (*Hurlic, supra,* 25 Cal.App.5th at p. 59.)

The Attorney General argues further that retroactive application of new law in this case would deprive the prosecution of the benefit of its plea bargain. Both *Hurlic, supra,* 25 Cal.App.5th at page 57 and *Baldivia*, *supra*, 28 Cal.App.5th at pages 1077-1078 rejected this argument. As the court explained in *Hurlic*, "Unless a plea agreement contains a term requiring the parties to apply only the law in existence at the time the agreement is made, . . . '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.' " ' " (*Hurlic, supra,* 25 Cal.App.5th at p. 57; *Baldivia, supra,* at p. 1077, citing *Doe v. Harris* (2013) 57 Cal.4th 64, 66 (*Doe*); see also *People v. Wright, supra,* 31 Cal.App.5th at p. 755 ["Although the parties and the trial court may not unilaterally alter the terms of a plea bargain [citation], the *Doe* court concluded that subsequent statutory enactments or amendments may alter the terms of the plea bargain."].)

In *Doe*, *supra*, 57 Cal.4th at pages 66-67, the California Supreme Court held that amendments to the sex offender registration law, which allowed for publication of certain information about registered sex offenders, could be applied to Doe, who had entered into a plea agreement at a time when the law prohibited such public access. The court explained, "[T]he 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." (*Id*. at p. 70.) Thereafter, in *Harris v. Superior Court* (2016) 1 Cal.5th 984, 991 (*Harris*), the California Supreme Court applied *Doe* to a plea agreement that had been entered into prior to the enactment of Proposition 47, which permitted courts to resentence prior felony convictions as misdemeanors. The court held that defendant was entitled to have his grand theft conviction resentenced as a misdemeanor and that the change in law did not permit the prosecution to withdraw from the plea agreement and reinstate the original charges.

(*Harris,* at pp. 989-991.) The court explained, "The electorate exercised that authority in enacting Proposition 47. It adopted a public policy respecting the appropriate term of incarceration for persons convicted of certain crimes, including grand theft from the person. The policy applies retroactively to all persons who meet the qualifying criteria and are serving a prison sentence for one of those convictions, whether the conviction was by trial or plea. The electorate may bind the People to a unilateral change in a sentence without affording them the option to rescind the plea agreement. The electorate did so when it enacted Proposition 47." (*Harris*, at p. 992.)

The court in *Harris, supra*, 1 Cal.5th at page 993, distinguished *People v. Collins* (1978) 21 Cal.3d 208, in which the court held that when an intervening act of the Legislature decriminalizes the conduct for which a defendant was convicted, the state is substantially deprived of the benefits for which it agreed to enter the bargain and thus, it may restore the charges that were dismissed as part of the negotiated plea. The *Harris* court explained that in *Collins* "we allowed the People to withdraw from a plea agreement before sentencing where a change in the law had decriminalized the offense to which the defendant had pled. The change eviscerated the judgment and the underlying plea bargain entirely, and it did so before the judgment. That is not the case here. Thus, while the rule of *Doe, supra*, 57 Cal.4th 64, governs this case, we believe *Doe* and *Collins* can be harmonized." (*Harris, supra*, 1 Cal.5th at p. 993.)

Because the Senate Bill No. 1393 amendment was intended to apply retroactively, defendant is entitled to seek relief under the new law. (See *Doe, supra*, 57 Cal.4th at pp. 73-74 ["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."]; *People v. Wright, supra,* 31 Cal.App.5th at p. 756 ["If parties to a plea agreement want to insulate

the agreement from future changes in the law they should specify that the consequences of the plea will remain fixed despite amendments to the relevant law."].)

The Attorney General's arguments on appeal are supported by the recent decision in *People v. Kelly* (2019) 32 Cal.App.5th 1013, in which the court considered the retroactive application of a new law to a stipulated sentence a " 'bounty in excess of that to which [the defendant] is entitled.' " (*Id.* at p. 1018.) We are not persuaded by *Kelly* because, among other reasons, it failed to consider the reasoning on which *Hurlic* is based,[5] and it failed to cite or consider *Baldivia*, *supra*, 28 Cal.App.5th 1071, *Doe, supra*, 57 Cal.4th 64, or *Harris, supra,* 1 Cal.5th 984.

Finally, the Attorney General argues that remand for resentencing is unwarranted because the trial court indicated, by accepting the plea, it would not have dismissed the enhancement if it had the discretion to do so. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081 [remand is required when "the record does not 'clearly indicate' the court would not have exercised discretion to strike the firearm allegations had the court known it had that discretion"]; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [remand is not required if "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement"].) The court's acceptance of the negotiated sentence, however, does not clearly establish that the court would not have exercised discretion to strike the enhancement if it had that discretion.

Accordingly, we must remand for the purpose of allowing the trial court to consider whether to strike the section 667, subdivision (a) enhancement. In exercising its discretion, the trial court is not precluded from considering whether doing so would be incompatible with the agreement on which defendant's plea was based. If the trial court strikes the enhancement, it shall resentence defendant. In selecting an appropriate

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[5] The court in *Kelly,* like the Attorney General here, asserted that *Hurlic* is based on the "narrow circumstance" of the manner in which the defendant completed his notice of appeal. (*People v. Kelly*, *supra,* 32 Cal.App.5th at p. 1016.) As explained in text, *ante*, that is not the rationale on which *Hurlic* is based.

sentence, the court retains its full sentencing discretion except that it may not impose a term in excess of the negotiated nine years without providing defendant the opportunity to withdraw his plea. (*People v. Wright, supra*, 31 Cal.App.5th at p. 756 ["On remand the trial court is to resentence [defendant] in accordance with the applicable statutes and rules, provided that the aggregate term does not exceed the stipulated sentence."].) If the trial court does not strike the enhancement, it shall reinstate the sentence.

Disposition

The judgment is reversed and the matter is remanded to permit the court to determine whether to strike the enhancement under Penal Code section 667, subdivision (a) and to resentence defendant accordingly. In all other respects the judgment is affirmed.

POLLAK, P. J.

WE CONCUR:

STREETER, J.
BROWN, J.

Trial court:	Alameda County Superior Court
Trial judge:	Honorable James Cramer
Counsel for plaintiff and appellant:	Xavier Becerra, Attorney General, Gerald A. Engler Chief Assistant Attorney General, Jeffrey M. Laurence, Senior Assistant Attorney General, René A. Chacón, Supervising Deputy Attorney General
Counsel for defendant and appellant:	James S. Donnelly-Saalfield by appointment of the Court of Appeal

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: ***People v. William L. Stamps*** No.: S_____

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On May 16, 2019, I electronically served the attached **PETITION FOR REVIEW** by transmitting a true copy via this Court's TrueFiling system.

James S. Donnelly-Saalfield
Attorney at Law
jamesdonnelly71@gmail.com

The Honorable Nancy O'Malley
District Attorney, Alameda County
District Attorney's Office
ACDAdocket@acgov.org

First District Appellate Project
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Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on May 16, 2019, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

County of Alameda
Criminal Division - Rene C. Davidson
Courthouse
Superior Court of California
1225 Fallon Street, Room 107
Oakland, CA 94612-4293

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 16, 2019, at San Francisco, California.

M. T. Otanes
Declarant

/s/ M. T. Otanes
Signature

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