In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. William Stamps, Defendant and Appellant.	Case No. S255843 Alameda County Superior Court No. 17CR010629

First Appellate District, Division Four, Case No. A154091
Alameda County Superior Court, Case No. 17CR01629
The Honorable James P. Cramer, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

JONATHAN SOGLIN
Executive Director

JAMES S. DONNELLY- SAALFIELD
(Bar No. 267297)
First District Appellate Project
475 Fourteenth Street, Suite 650
Oakland, CA 94612
Telephone: (415) 495-3119
Email: james_donnelly@fdap.org
Attorneys for Appellant,
William Stamps

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ISSUE FOR REVIEW

Is a certificate of probable cause required to seek, on direct appeal, the benefits of an ameliorative, retroactive amendment that modifies the terms of a plea agreement?

INTRODUCTION

As part of a negotiated disposition, in which other charges and allegations were dismissed, appellant agreed to a 9-year state prison sentence, which consisted of four years for stealing two camping chairs from a carport (Pen. Code, § 459)[1] and five years for a prior serious felony (§ 667.5, subd. (a)). The five-year prior serious felony enhancement had been mandatory at that time. However, approximately 11 months after the plea agreement was entered into, and 9 months after the sentence was imposed, the Legislature signed into law Senate Bill 1393 (SB 1393), which restored trial courts' discretion to strike the enhancement. In passing the bill, the Legislature recognized that the mandatory nature of the enhancement had been unjust, had unnecessarily cost the state many millions of dollars, had substantially contributed to the state's problem of over-incarceration, had exacerbated racial disparities in incarceration, and had had no appreciable impact on crime prevention or deterrence.

For the reasons discussed below, the Legislature intended to apply to SB 1393 retroactively to all nonfinal cases, including those involving plea agreements with stipulated sentences. The established rule in California—endorsed by this Court in two recent cases—is that plea agreements are deemed to incorporate future changes in law that the Legislature intended to

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

apply to the parties. Moreover, Assembly Bill 1618 (AB 1618) clarifies that in enacting recent ameliorative sentencing reforms like SB 1393 the Legislature did intend to use its inherent authority to retroactively modify the terms of plea agreements to defendants' benefit and that the unknowing waiver of such future benefits is void as against public policy. Therefore, an appeal seeking the benefits of retroactive, ameliorative legislation like SB 1393 does not constitute an attack upon the validity of a plea such that a certificate of probable cause is required.

Additionally, respondent's belated claim in its opening brief on the merits that appellant's general appellate waiver precludes review of this issue, which directly contradicts its position in its petition for review, is both procedurally barred and unsupported by either the law or facts. This Court should therefore affirm the Court of Appeal's decision below, which found SB 1393 retroactive to the judgment in appellant's case and remanded the matter to the trial court for it to exercise its discretion whether to dismiss the five-year prior serious felony enhancement.

STATEMENT OF THE CASE

The prosecution charged appellant with three counts of first degree residential burglary (§ 459) and alleged two prior strikes (§§ 667, subd. (e)(2), 1170.12, subd. (a)), two prior serious felony convictions (§§ 667, subd. (a)(1), 1170.12, subd. (c)(2)), and three one-year prison priors (§§ 667.5, subd. (b)). (CT 1-5.)

On November 7, 2017 appellant entered a plea of no contest to Count 2 (§ 459) and admitted a prior serious felony. (1 CT 24-25, 27-28.) The parties agreed to a term of 9 years in state prison, consisting of a low term of two years for Count 2, doubled pursuant to sections 1170.12, subdivision (c)(2) and 667, subdivision (e)(2), and a five-year enhancement

pursuant to section 667, subdivision (a). (1 CT 26, 30-32, 35-36.) On the motion of the prosecutor the trial court dismissed the remaining counts and allegations. (1 CT 25, 36.)

On January 9, 2018 the trial court imposed a sentence of nine years in state prison. (1 CT 52.)

The abstract of judgment was amended on February 23, 2018 and appellant filed a timely notice of appeal on March 29, 2018. (1 CT 53, 55.) He sought and was denied a certificate of probable cause. (1 CT 55-56.)

On September 30, 2018, the Governor signed SB 1393 into law. The bill took effect January 1, 2019 and restored trial courts' discretion to strike or dismiss prior serious felony convictions enhancements. (§§ 667, subd. (a), 1385, subd. (b), as amended by Stats. 2018, ch. 1013, §§ 1, 2.)

On April 9, 2019 the appellate court in this case held that SB 1393 applied retroactively under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) and that appellant was entitled to have his case remanded to the trial court in order for it to consider striking the section 667, subdivision (a) enhancement. (*People v. Stamps* (2019) 34 Cal.App.5th 117, 119-121, rev. granted June 12, 2019, S255843 (*Stamps*).) The Court concluded that a certificate of probable cause was not required because the plea agreement incorporated subsequent changes in the law and therefore did not challenge the validity of the plea agreement. (*Ibid.*)

STATEMENT OF THE FACTS

On February 13, 2017 Oakland Police Department officers responded to 3035 Chapman Street in Oakland and spoke with Michael Wood Stewart who informed them he had called the police because he had realized that two of his camping chairs had gone missing from the garage of the apartment complex where he lived. (2 CT 71.) Stewart reviewed

surveillance footage from the garage and discovered that appellant, who lived in the area, had entered the garage on February 11, 2017 at about 10:00 a.m., had taken the two camping chairs, and had left through the front gate of the apartment complex. (2 CT 71.) Stewart informed the officers that the camping chairs had cost $160. (2 CT 71.)

ARGUMENT

I. THE COURT OF APPEAL'S DECISION SHOULD BE AFFIRMED BECAUSE IT CORRECTLY DETERMINED THAT BY SEEKING ON APPEAL THE RETROACTIVE AMELIORATIVE BENEFIT OF SB 1393, WHICH GRANTS TRIAL COURTS' DISCRETION TO STRIKE FIVE-YEAR PRIOR SERIOUS FELONY ENHANCEMENTS, APPELLANT DID NOT ATTACK THE VALIDITY OF HIS PLEA SUCH THAT A CERTIFICATE OF PROBABLE CAUSE WAS REQUIRED

A. Under *Doe*, Plea Agreements Incorporate Future Legislative Amendments

"[A] negotiated plea is a form of contract and is interpreted according to general contract principles." (*Doe v. Harris* (2013) 57 Cal.4th 64, 70 (*Doe*), citing *People v. Segura* (2008) 44 Cal.4th 921, 930 (*Segura*).) In *Doe* this Court held that "the Legislature, for the public good and in furtherance of public policy, and subject to the limitations imposed by the federal and state Constitutions, has the authority to modify or invalidate the terms of an agreement." (*Doe*, *supra*, at p. 70.) This Court recognized that "as a general rule, . . . requiring the parties' compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement, nor does the failure of a plea agreement to reference the possibility the law might change translate into an implied promise the defendant will be unaffected by a change in the statutory consequences

attending his or her conviction." (*Id.* at pp. 73-74.) That is because "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." (*Id.* at p. 70.) The mere fact 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" and their silence cannot be read as an implied promise that future changes in the law will not alter the terms of the agreement. (*Id.* at pp. 60, 70, citing *People v. Gipson* (2004) 117 Cal.App.4th 1065, 1070 (*Gipson*).) Nonetheless, *Doe* recognized that it is "not impossible the parties to a particular plea bargain might affirmatively agree or implicitly understand the consequences of a plea will remain fixed despite amendments to the relevant law." (*Doe*, *supra*, at p. 71.)

Subsequently, in *Harris v. Superior Court* (2016) 1 Cal.5th 984, 991, 993 (*Harris*), this Court held that Proposition 47 applied retroactively to negotiated pleas with stipulated sentences and that reduction of the admitted offense from a felony to a misdemeanor did not permit the prosecution to rescind the plea agreement and revive dismissed charges and allegations. This Court reached that conclusion because section 1170.18, subdivision (a)'s reference to someone "serving a sentence for a conviction, whether by trial or plea" made it clear that the initiative applied to convictions by pleas. (*Id.* at p. 991.) In addition, given the fact that a large number of cases were resolved by plea agreements, permitting the prosecution to rescind the affected agreements and reinstate dismissed charges would frustrate the initiative's cost-saving purpose and often render

the entire resentencing process "meaningless." (*Id.* at p. 992.) Moreover, nothing in Proposition 47 suggested an intent to disrupt the process of plea agreements and negotiations, which are an "'integral component of the criminal justice system and essential to the expeditious and fair administration of our courts.'" (*Ibid.*, quoting *Segura*, *supra*, 44 Cal.4th at p. 929.) Relying upon *Doe*, *Harris* further concluded that in passing Proposition 47 for the public good the electorate exercised its authority to bind the prosecution "to a unilateral change in a sentence without affording them the option to rescind the plea agreement." (*Harris*, *supra*, at p. 992, quoting *Doe*, *supra*, 57 Cal.4th at p. 70.) Finally, this Court distinguished *People v. Collins* (1978) 21 Cal.3d 208, 212-214 (*Collins*), concluding that its narrow holding that the prosecution was entitled to withdraw from a plea agreement before sentencing only applied when the offense had been completely decriminalized, thereby eviscerating the judgment and the underlying agreement entirely. (*Harris*, *supra*, at p. 993.)

B. Under *Estrada*, Ameliorative Amendments Apply Retroactively to Every Nonfinal Case Unless the Legislature Provides Otherwise

The rule in *Estrada* establishes that an amendment that reduces the possible punishment for an offense applies to all cases in which the judgment was nonfinal before the statute took effect. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303, 308.) "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act." (*Estrada*, *supra*, 63 Cal.2d at p. 745.) "It is an inevitable inference that the Legislature must have intended that the new statute imposing the

new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Ibid.*; see also *People v. Buycks* (2018) 5 Cal.5th 857, 882–883 [an "inference of retroactivity" is "the ordinary presumption long established under the *Estrada* rule"] (*Buycks*).) In other words, "a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.'" (*People v. Conley* (2016) 63 Cal.4th 646, 657 (*Conley*).) In order to avoid this inference of retroactivity, *Estrada* "require[s] that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it." (*Ibid.*; *People v. Nasalga* (1996) 12 Cal.4th 784, 793 [ameliorative legislation applies retroactively unless the Legislature "clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent"]; *People v. DeHoyos* (2018) 4 Cal. 5th 594, 600 [same] (*DeHoyos*).)

C. A Certificate of Probable Cause is Unnecessary Where an Appeal Does Not Challenge the Validity of the Plea

Section 1237.5 provides, in relevant part, that an appeal after a guilty plea shall not be taken except where both of the following conditions have been met: "(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. ¶ (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court." (§ 1237.5, subds. (a)-(b).) The purpose of requiring a certificate of probable cause is "to promote judicial economy by screening out wholly frivolous guilty [and

nolo contendere] plea appeals before time and money is spent preparing the record and the briefs for consideration by the reviewing court." (*People v. Buttram* (2003) 30 Cal.4th 773, 781 (*Buttram*).) Therefore, issues going to the validity of a plea, such as claims that a plea was induced by misrepresentations, was entered when the defendant was incompetent, or was entered without adequate advisement, require a certificate. (*Ibid.*) A certificate is also generally required if a defendant seeks to challenge the imposition of a stipulated sentence. (*People v. Johnson* (2009) 47 Cal.4th 668, 678; *People v. Panizzon* (1996) 13 Cal.4th 68, 74 (*Pannizon*).)

On the other hand, it is well established that "a certificate of probable cause is not required if a defendant is appealing 'issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed.'" (*People v. Puente* (2008) 165 Cal.App.4th 1143, 1152, quoting *Buttram, supra*, 30 Cal.4th at p. 780; Cal. Rules of Ct., rule 8.304(b)(4)(B) [a certificate is unnecessary if the appeal is based upon "[g]rounds that arose after entry of the plea and do not affect the plea's validity"].) In *Buttram, supra*, 30 Cal.4th at p. 790 this Court held that "a certificate of probable cause is not required to challenge the exercise of individualized sentencing discretion within an agreed maximum sentence." "Such an agreement, by its nature, contemplates that the court will choose from among a range of permissible sentences within the maximum, and that abuses of this discretionary sentencing authority will be reviewable on appeal, as they would otherwise be." (*Id.* at pp. 790-791; see also *People v. French* (2008) 43 Cal.4th 36, 44-45 [certificate unnecessary where defendant's Sixth Amendment claim challenged the manner in which the term was calculated] (*French*); *People v. Jones* (2006) 101 Cal.App.4th 220, 226, [certificate not required to seek review of the denial of a section 1385 motion after the entry of a guilty plea], overruled

on other grounds in *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1207; *People v. Lloyd* (1998) 17 Cal.4th 658, 655 [certificate unnecessary where trial court erred in believing that it lacked that authority to strike a prior serious felony] (*Lloyd*); *People v. Miller* (2006) 145 Cal.App.4th 206, 213-214 [certificate unnecessary where trial court misunderstood its sentencing discretion] (*Miller*).)

D. The Appellate Decisions Below

The appellate court in *People v. Hurlic* (2018) 25 Cal.App.5th 50, 53 (*Hurlic*) concluded that a certificate of probable cause is unnecessary in the "narrow circumstances" in which the "defendant's challenge to the agreed-upon sentence [was] based on our Legislature's enactment of a statute that retroactively grants a trial court the discretion to waive a sentencing enhancement that was mandatory at the time it was incorporated into the agreed-upon sentence . . . ." *Hurlic* concluded that under *Doe* and *Harris* the plea agreement in that case was "deemed to incorporate" the subsequent enactment of Senate Bill No. 620, which granted trial courts' discretion to strike firearm enhancements. (*Hurlic*, *supra*, 25 Cal.App.5th at p. 57.) This was because the defendant's plea agreement did not contain an explicit term incorporating only the law in existence at the time of the plea and because the application of SB 620 would not "eviscerate" the plea bargain. (*Ibid.*) *Hurlic* next concluded that requiring a certificate of probable cause under the circumstances presented in the case would actually frustrate section 1237.5's purpose of encouraging plea agreements because defendants would be discouraged from entering into plea agreements if they knew that they would not benefit from future changes in the law that applied retroactively. (*Id.* at pp. 57-58.) In addition, since the defendant's entitlement to SB 620's retroactive application was undisputed, his appeal

was neither "frivolous" nor "vexatious." (*Id.* at p. 58.) Finally, the Court concluded that SB 620 trumped section 1237.5 under the normal rules of statutory construction because SB 620 was the later and more specific law. (*Ibid.*)

Addressing a similar issue, the Court of Appeal in *People v. Baldivia* (2018) 28 Cal.App.5th 1071, 1078 (*Baldivia*) concluded that *Hurlic* was "dispositive" on the question of whether a certificate of probable cause was necessary where the defendant sought a remand for the trial court to striking a section 12022.53 firearm enhancement that the defendant had admitted. *Baldivia* concluded that *Hurlic*'s holding that a certificate of probable cause was unnecessary in such circumstances followed directly from *Doe* and *Harris* and that there was "no reason why" an amendment's impact upon plea agreements should be any different when the Legislature relied upon the general "inference of retroactivity" under *Estrada* versus statutes like section 1170.18 which expressly applied to plea agreements. (*People v. Baldivia, supra*, 28 Cal.App.5th at pp. 1077-1079.) "If the electorate or the Legislature expressly or implicitly contemplated that a change in the law related to the consequences of criminal offenses would apply retroactively to all nonfinal cases, those changes logically must apply to preexisting plea agreements, since most criminal cases are resolved by plea agreements." (*Id.* at p. 1079.) "It follows that defendant's appellate contentions were not an attack on the validity of his plea and did not require a certificate of probable cause." (*Ibid.*) *Baldivia* therefore remanded the matter for a Proposition 57 transfer hearing and, if necessary, a resentencing hearing for the trial court to consider striking the firearm enhancement. (*Id.* at pp. 1079-1080.)

The Court of Appeal in *People v. Kelly* (2019) 32 Cal.App.5th 1013, 1016-1017 (*Kelly*), subsequently distinguished *Hurlic* on the "narrow

circumstance[]" in which the defendant in *Hurlic* had completed his notice of appeal. In particular, unlike the defendant in *Hurlic*, the defendant in *Kelly* had not requested to avail herself of the new law in her notice of appeal. (*Id.* at p. 1017.) *Kelly* therefore concluded that a certificate was required in that case and that the retroactive application of SB 1393 to a stipulated sentence was a "bounty in excess of that to which [the defendant] is entitled." (*Id.* at pp. 1018-1019.)

Following *Hurlic* and *Baldivia*, the appellate court in this case concluded that appellant did not need a certificate of probable cause in order to have the matter remanded for the trial court to exercise its discretion pursuant to SB 1393 to consider striking the prior serious felony enhancement (§ 667, subd. (a)) which he had admitted as part of a plea agreement with a stipulated sentence. (*Stamps*, *supra*, 34 Cal.App.5th at pp. 121, 124.) The Court rejected respondent's claim that application of SB 1393 would deprive it "of the benefit of its plea bargain" because, unlike *Collins*, the amendment did not entirely decriminalize appellant's offense and, instead, was properly incorporated into the agreement under *Doe* and *Harris*. The Court further found *Kelly*, *supra*, 32 Cal.App.5th at p. 1016 to be unpersuasive because it had failed to consider *Hurlic*'s reasoning, and had failed to cite or consider *Baldivia*, *Doe*, or *Harris*. (*Stamps*, *supra*, 34 Cal.App.5th at pp. 123-124.) Finally, the Court rejected respondent's claim that the trial court's acceptance of the plea demonstrated that it clearly would not have exercised its discretion to strike the enhancement if it had had that discretion. (*Id.* at p. 124.)

After *Stamps* was filed, the majority, in a divided opinion in *People v. Fox* (2019) 34 Cal.App.5th 1124, 1139, rev. granted July 31, 2019, S256298 (*Fox*), concluded that the rule that plea agreements incorporate subsequent legal changes did not absolve the defendant of the necessity of

obtaining a certificate of probable cause. It reached this conclusion for two reasons. First, unlike the defendants in *Stamps*, *Baldivia*, and *Hurlic*, who had all entered their pleas and had been sentenced before the relevant legislation was passed or signed into law, the defendant in *Fox* pled a week after SB 620 had passed the Legislature and his trial counsel's statements at the sentencing hearing revealed that the parties understood that he would not have the benefit of the new law once it became effective. (*Id.* at p. 1135, citing *Doe*, *supra*, 57 Cal.4th at p. 71.) Second, unlike Megan's Law (§ 290.46) at issue in *Doe*, which applied to "every person" required to register as a sex offender, and unlike section 1170.18, subdivision (a) at issue in *Harris*, which applied to eligible convictions obtained "by trial or plea," SB 620 did not explicitly apply retroactively to plea agreements. (*Fox*, *supra*, 34 Cal.App.5th at p. 1136.) Finally, the majority concluded that, notwithstanding SB 620, the trial court was prohibited from unilaterally modifying the plea agreement after it had accepted it.[2] (*Id.* at pp. 1138-1139.)

Two appellate decisions have subsequently followed *Fox* and concluded a certificate of probable cause is required to challenge a negotiated sentence based on a subsequent ameliorative change in the law that applies retroactively under *Estrada*. (See *People v. Galindo* (2019) 35 Cal.App.5th 658, 669, rev. granted Aug. 28, 2019, S256568 (*Galindo*); *People v. Williams* (2019) 37 Cal.App.5th 602, 605, rev. granted Sept. 25,

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[2] While the *Fox* majority found "additional support" for its conclusion in *Kelly*, it questioned the significance of the ground that *Kelly* distinguished *Hurlic*, that is, the manner in which the defendant had completed the notice of appeal. (See *Fox*, *supra*, 34 Cal.App.5th at p. 1138, fn. 7.) Disagreeing with *Kelly* in this respect, it recognized "that when a certificate of probable cause has not been obtained, the key issue is the new law's effect on existing plea agreements, not the defendant's intent. (*Ibid.*)

2019, S257538.)

E. The Legislature Intended SB 1393 to Apply to All Nonfinal Cases, Including those Involving Plea Agreements with Stipulated Sentences

As explained above, the law in California is that the parties to a plea agreement are deemed to understand and accept that the Legislature has the authority to retroactively modify or invalidate the terms of a plea agreement in furtherance of public policy and the public good, unless the plea agreement provides otherwise. For the reasons discussed below, the Legislature intended to apply SB 1393 to all nonfinal cases, including those involving negotiated pleas with stipulated sentences, and there is nothing in the plea agreement here which supports an inference that the parties intended to insulate themselves from such an amendment. Further, AB 1618 clarifies any ambiguity in this respect by providing that the Legislature intended to use its inherent authority to modify the terms of plea agreements in enacting ameliorative amendments like SB 1393 and that the unknowing waiver of such future benefits is void as against public policy. It follows that an appeal, such as appellant's here, which seeks the retroactive, ameliorative benefits of such legislation, does not constitute an attack upon the validity of the plea and that a certificate of probable cause is therefore not required. This Court should therefore affirm the appellate court's decision below.

1. An Express Declaration of Legislative Intent is Unnecessary Where, as Here, the Amendment Applies Retroactively Under *Estrada*

Respondent concedes that SB 1393 applies retroactively under *Estrada* and that such ameliorative amendments are generally incorporated

into plea agreements under *Doe* and *Harris*. (See ROB 21-24.) Nonetheless, relying upon *Fox* and *Galindo*, respondent claims that *Doe* and *Harris* do not support the incorporation of SB 620 and SB 1393 into plea agreements with stipulated sentences because, unlike Megan's Law (§ 290.46) and Proposition 47 (§ 1170.18, subd. (a)) at issue in *Doe* and *Harris*, respectively, SB 620 and 1393 were not made "expressly applicable" to plea agreements with stipulated sentences. (ROB 21-24, citing *Fox*, *supra*, 34 Cal.App.5th at p. 1135; *Galindo*, *supra*, 35 Cal.App.5th at p. 671.) According to respondent, "*Doe* and *Harris* make clear that the general rule that plea agreements incorporate subsequent changes in the law pertains only to changes the Legislature or Electorate 'intended to apply to' . . . plea agreements—a limitation *Fox* characterized as 'crucial.'" (ROB 34, quoting *Fox*, *supra*, Cal.App.5th at p. 1135.) Quoting *Galindo*, respondent claims that "'nothing in the language or legislative history of [SB] 1393 . . . suggests the Legislature intended to grant trial courts discretion to reduce stipulated sentences to which the prosecution and defense have already agreed in exchange for other promises.'" (ROB 23, quoting *Galindo*, *supra*, 35 Cal.App.5th at p. 671.) "'Neither the words of the statute itself nor the legislative history reference plea bargaining, nor do they express an intent to overrule existing law that once the parties agree to a specific sentence, the trial court is without power to change it unilaterally." (ROB 23, quoting *Galindo*, *supra*, 35 Cal.App.5th at p. 671.) According to respondent, SB 1393 therefore "did not affect" the plea agreement here at all. (ROB 23.)

Respondent's claim is based upon a mistaken and overly restrictive reading of *Doe* and *Harris*. First, the provision of Megan's Law in *Doe* did not "expressly" apply to plea agreements but instead merely applied to "every person" required to register "without regard to when his or her

crimes were committed." (§ 290.46, subd. (m).) In a single sentence in the background portion of the opinion *Doe* observed that this language "made the public notification provisions *retroactive* and thus applicable to Doe's conviction." (*Doe*, *supra*, 57 Cal.4th at p. 67, emphasis added; *Baldivia*, *supra*, 28 Cal.App.5th at p. 1078 [concluding that the change in law in *Doe* was "expressly intended to apply retroactively"].)

Moreover, while *Doe* referred in its introduction to the legislative intent to apply the change in law to the parties to the agreement, it clarified in the body of its opinion that the relevant inquiry was whether the Legislature intended the amendment at issue "to apply retroactively" and reconciled the divergent results in *Gipson*, *supra*, 117 Cal.App.4th at pp. 1068-1070 and *Swenson v. File* (1970) 3 Cal.3d 389, 392-394 on the ground that the former had involved an amendment which the Legislature had intended to apply retroactively while the latter did not. (*Doe*, *supra*, 57 Cal.4th at pp. 66, 70.) Indeed, the provision of the three strikes law at issue in *Gipson* did not expressly apply retroactively to priors which had been admitted as part of plea agreements but instead merely provided that it applied "where a defendant has one prior serious or violent felony conviction . . . ." (§ 667, subd. (e)(1); Stats. 1994, ch. 12, § 1, eff. Mar. 7, 1994.) Nonetheless, this Court relied heavily upon *Gipson* in reaching its ultimate holding in *Doe*, stating that "*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." (*Doe*, *supra*, 57 Cal.4th at p. 70.) Far from supporting respondent's claim that the legislative intent needs to be explicit, *Doe* therefore recognizes that

the relevant legislative intent can be implied.

Estrada's presumption of retroactivity supplies the necessary intent here. As this Court has recently emphasized, when the Legislature reduces a penalty for an offense, it "'must have intended that the new statute imposing the new lighter penalty . . . should apply to every case to which it constitutionally could apply.'" (*DeHoyos*, *supra*, 4 Cal.5th at p. 600, quoting *Estrada*, *supra*, 63 Cal.2d at p. 745; *People v. Nasalga*, *supra*, 12 Cal.4th at p. 795.) Relying upon this Court's decision in *Lara*, *supra*, 4 Cal.5th at pp. 303, 304 that Proposition 57 applies retroactively under *Estrada*, *Baldivia* recognized that there was "no reason why [the] distinction [between explicit and implicit legislative intent in this context] should alter the impact on plea agreements." (*Baldivia*, *supra*, 28 Cal.App.5th at p. 1079.) "If the electorate or the Legislature expressly or implicitly contemplated that a change in the law related to the consequences of criminal offenses would apply retroactively to all nonfinal cases, those changes logically must apply to preexisting plea agreements, since most criminal cases are resolved by plea agreements." (*Ibid.*) The dissent in *Fox* also pointed out that, under the *Fox* majority's reasoning, this Court's decision in "*Lara* should have excluded from its holding those juvenile offenders convicted under a plea agreement because Proposition 57 is equally silent as to whether negotiated pleas should be affected by the new requirements [of a transfer hearing prior to a minor being charged as an adult]." (*Fox*, *supra*, 34 Cal.App.5th at p. 1150, dis. opn. of Sanchez, J.) The dissent therefore concluded: "The majority has incorrectly flipped the presumption of legislative intent that ordinarily attaches under *Estrada* . . . ." (*Ibid.*) Likewise, by claiming that the legislative intent here had to be explicit, respondent effectively turns *Estrada* on its head and ignores *Doe*'s implicit recognition that the necessary legislative intent can be inferred.

Harris also does not support respondent's contention that the relevant legislative intent must be explicit. While this Court in *Harris* first relied upon section 1170.18's explicit application to convictions "by trial or by plea," it also relied heavily upon the electorate's intent to achieve substantial cost-saving, which implicitly supported the initiative's application to plea agreements. (*Harris*, *supra*, 1 Cal.5th at p. 992.) More significantly, this Court recognized that *Doe* provided a separate and distinct ground for concluding that the initiative applied to plea agreements. (*Id.* at pp. 992-993.) Since *Doe* implicitly recognizes that the relevant legislative intent can be inferred and explicitly approved of *Gipson*, as explained above, *Harris* therefore also does not support respondent's claim. Additionally, much like Proposition 47 in *Harris* (see *id* at p. 992) and as explained more fully below, the Legislature's intent in enacting SB 1393 to achieve substantial cost-saving and reduction in the prison population strongly supports an inference that the Legislature intended the bill to apply to plea agreements. This Court should therefore conclude that the Legislature did not intend to insulate plea agreements from SB 1393's operation.

Resisting this conclusion, respondent claims that "*Estrada* retroactivity does not overrule this Court's precedent that once the trial court accepts the terms of the negotiated plea bargain, "'[it] lacks jurisdiction to alter the terms of the plea bargain so that it becomes more favorable to a defendant unless, of course, the parties agree.'" (ROB 25, quoting *Segura*, *supra*, 44 Cal.4th at pp. 929-930.) Respondent further claims that *Estrada* does not permit "courts to disregard longstanding principles of plea negotiation . . ." and that modification of a stipulated sentence pursuant to the retroactive effect of an ameliorative sentencing law would "violate[] the terms of the plea." (ROB 27.) According to

respondent, rather than infer an intent to modify stipulated sentences "from the Legislature's silence, it is sound policy to require the Legislature to state its intent explicitly, as it did with respect to the statute at issue in *Doe* and as the electorate did in *Harris*." (ROB 27.)

Respondent misapprehends the issue in several respects. First, it is not the trial courts which have modified the terms of plea agreements under ameliorative amendments like SB 1393 but rather the Legislature, which has inherent authority to do so. A trial court's exercise of discretion pursuant to such a legislative amendment therefore does not violate the agreement but rather is something that the parties are deemed to have anticipated and accepted, barring some expression of contrary intent. Additionally, while *Estrada* does not directly permit the retroactive modification of plea agreements, *Doe* certainly does and, as explained above, *Estrada* supplies the retroactive intent that *Doe* requires.

Nothing in the language or logic of *Doe* or *Estrada* supports respondent's contention that stipulated sentences are somehow exempt from the operation of retroactive legislative reforms. The operation of such reforms does not run counter to "longstanding principles of plea negotiation," as respondent claims, but rather is entirely consistent with *Doe*'s recognition that the parties "are deemed to know and understand that the state . . . has the authority to modify or invalidate the terms of an agreement . . . ." (*Doe*, *supra*, 57 Cal.4th at p. 70.) Further, SB 1393's modification of the plea agreement here does not violate any constitutional right held by the prosecution (see *Gipson*, *supra*, 117 Cal.App.4th at p. 1070), which respondent effectively concedes by not asserting the contrary (see *People v. Bouzas* (1991) 53 Cal.3d 467, 480). Nor does this modification decriminalize the admitted offense entirely, as required for the prosecution to be able to rescind the agreement. (*Harris*, *supra*, 1 Cal.5th

at p. 993.) It is therefore not "sound policy" to require an explicit statement of legislative intent where, as here, *Estrada* and the legislative intent in enacting the law for the public good provides a solid basis for inferring one. Just as the judiciary should not dictate the manner in which the Legislature must express its intent to limit the application of *Estrada* (see, e.g., *Conley*, *supra*, 63 Cal.4th at p. 656, quoting *In re Pedro T.* (1994) 8 Cal.4th 1041, 1048-1049), so too, it should not infer such a limitation where none exists. To conclude otherwise would effectively defeat *Estrada*'s requirement that a penalty reduction "should apply to every case to which it constitutionally could apply." (*DeHoyos*, *supra*, 4 Cal.5th at p. 600.)

Further seeking to restrict *Estrada*'s application, respondent relies upon this Court's decisions in *Conley* and *Dehoyos* in order to assert that not all defendants are "automatically entitled to the benefit of new, ameliorative legislation . . . . ." (ROB 24, citing *Conley*, *supra*, 63 Cal.4th at p. 661.) Respondent claims that, in the Proposition 47 context in particular, those "convicted by plea" could file section 1170.18 petitions but "could not obtain relief by filing an *appeal* challenging the legality of their sentence'" (ROB 22, quoting *Dehoyos*, *supra*, 4 Cal.5th at p. 597, emphasis in original). Respondent's reliance upon *Conley* and *Dehoyos* is misplaced. First, both of those cases involved statutes with functional equivalents of express savings clauses whereas SB 1393's retroactive application under *Estrada* is unencumbered by such limitations. (See *Conley*, *supra*, 63 Cal.4th at p. 661; *Dehoyos*, *supra*, 4 Cal.5th at p. 597.) Moreover, while *Deyohos* held that *Estrada* did not apply to the "narrow class" of offenders seeking relief under section 1170.18, subdivision (a), this Court subsequently clarified that subdivision (k) has independent retroactive effect under *Estrada* and that relief is available under the initiative to those who have nonfinal judgments that do not fall within

subdivision (a)'s purview. (*People v. Buycks*, *supra*, 5 Cal.5th at pp. 883, 894-895, & fn. 14; *People v. Lara* (2018) 6 Cal.5th 1128, 1131, 1134; see also *People v. Valenzuela* (2019) 7 Cal.5th 415, 428.) Indeed, *Buycks* specifically concluded that subdivision (k) applied retroactively under *Estrada* because "there is nothing in subdivision (k) that would have signaled to an informed voter that the well-established *Estrada* rule would not apply." (*Buycks*, *supra*, 5 Cal.5th at pp. 877-878, 883.) Again, respondent's attempt to flip *Estrada*'s presumption should be rejected.

Citing the general principle that "'a case is authority only for a proposition actually considered and decided therein . . . ,'" respondent also claims that *Hurlic*'s reliance upon *Doe* and *Harris* "is fatal to its reasoning" because neither case addressed the certificate requirement. (ROB 21, quoting *In re Chavez* (2003) 30 Cal.4th 643, 656 (*Chavez*).) While it is true that *Doe*, *supra*, 57 Cal.4th at p. 71 does not explicitly address section 1237.5, it broadly held that plea agreements incorporate subsequent retroactive legislative amendments and that such retroactive incorporation generally does not invalidate the agreement. It therefore follows logically from *Doe* that the incorporation of SB 1393 into the plea agreement here does not constitute an attack upon the validity of the plea such that a certificate is required. (See *Buttram*, *supra*, 30 Cal.4th at p. 787 [a certificate is not required where the defendant "seeks only to raise [an] issue[] reserved by the plea agreement, and as to which he did not expressly waive the right to appeal"]; *People v. Cuevas* (2008) 44 Cal.4th 374, 381 (*Cuevas*) [same].) This conclusion finds additional support from decisions holding that a certificate is not required where a trial court does not understand its sentencing discretion (see *Lloyd*, *supra*, 17 Cal.4th at p. 655; *French*, *supra*, 43 Cal.4th at pp. 44-45; *Miller*, *supra*, 145 Cal.App.4th at pp. 213-214), which, of course, is the rationale for remanding for

resentencing pursuant to retroactive ameliorative amendments unless the record "clearly" demonstrates the court would not have exercised such discretion (see *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428).

Hurlic's resolution of the issue is also entirely consistent with the contractual principles underlying both *Doe* and this Court's decisions interpreting section 1237.5. As explained above, *Doe*'s holding rests in large part upon a recognition that the parties to the agreement are deemed to anticipate and accept that the Legislature can enact laws which modify the terms of the agreement in furtherance of public policy. In addition, while this Court had originally concluded that it was "clear that [section 1237.5] was intended to apply only to a situation in which a defendant claims that his plea of guilty was invalid" (*People v. Ward* (1967) 66 Cal.2d 571, 574), its subsequent expansion of the certificate requirement was based largely upon contract principles (see *Pannizzon*, *supra*, 13 Cal.4th at pp. 77-78; *People v. Shelton* (2006) 37 Cal.4th 759, 767-769 (*Shelton*); *People v. Cuevas* (2008) 44 Cal.4th 374, 380-382 (*Cuevas*)). Critically, in concluding that a certificate was required to challenge a term that was "part and parcel" of the agreement, *Pannizon*, *supra*, 13 Cal.4th at pp. 77-78 relied heavily upon the contract analysis of *People v. McNight* (1985) 171 Cal.App.3d 620, 624, which in turn, relied principally upon the conclusion of *Collins*, *supra*, 21 Cal.3d at p. 215 that a defendant's "escape from vulnerability to sentence . . . fundamentally alters the character of the bargain." Thereafter, *Shelton*, *supra*, 37 Cal.4th at pp. 767-767 relied upon contract analysis, particularly the surrounding circumstances in which the plea agreement was made and the matter to which it related (Civ. Code, § 1647), in concluding that a challenge to the court's authority to impose the maximum sentence contemplated by the plea agreement constituted an

attack on the validity of the plea agreement.

Given the contractual basis of this Court's interpretation of the certificate requirement, there is no reason to believe that *Doe*'s conclusion that the parties to an agreement are deemed to anticipate and accept that the Legislature can modify the terms of the agreement should not apply in the certificate context here. *Hurlic*'s resolution of the narrow issue presented in such circumstances therefore follows logically from *Doe* and is entirely consistent with contractual analysis underlying this Court's decisions interpreting the certificate requirement. Respondent's claim to the contrary must therefore be rejected.

In support of its claim that the application of SB 1393 would violate the terms of the agreement here, respondent relies upon two appellate decisions which held that defendants who agreed to stipulated sentences were not entitled to remands under the retroactive application of *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530, which held that under the three strikes law trial courts retained their discretion to strike prior strikes pursuant to section 1385. (ROB 25-27, citing *People v. Cunningham* (1996) 49 Cal.App.4th 1044, 1047-1048; *People v. Cepeda* (1996) 49 Cal.App.4th 1235, 1238-1240, disapproved on other grounds in *People v. Mendez* (1999)19 Cal.4th 1084, 1098; see also *People v. Smith* (1997) 59 Cal.App.4th 46, 51 [remanding pursuant to *Romero* where defendant admitted prior strike but did not agree to a stipulated sentence].) These decisions concluded that since plea agreements were essentially contracts, remands pursuant to *Romero* would violate the terms of the agreements and therefore were barred. (*People v. Cunningham*, *supra*, 49 Cal.App.4th at pp. 1047-1048; *People v. Cepeda*, *supra*, 49 Cal.App.4th at pp. 1238-1240.) According to respondent, these decisions "lend support to the conclusion that a challenge to a stipulated sentence based upon

ameliorative change in the applicable law—or *interpretation* of that law—is nevertheless a challenge to the validity of the plea." (ROB 27, emphasis added.)

The defect in respondent's analysis is self-evident. *Romero* involved the resolution of a question of law posed by statutes that were already on the books at the time that the plea agreements were entered into and over which the appellate courts had been divided prior to *Romero*'s resolution of the issue. *Estrada* and the principle later clarified in *Doe*, both of which only concern legislative amendments, therefore had no reason to come into play in either of the decisions. The mere fact that this Court made *Romero* fully retroactive therefore does make the circumstances of these decision in any way analogous to the circumstances here. Moreover, as explained below, AB 1618 appears to have abrogated *Cunningham* and *Cepeda* by providing that even "appellate decisions" apply retroactively to plea agreements and that defendants cannot waive future benefits flowing from such decisions that are unknown at the time of the execution of the agreement. (§ 1016.8, subds. (a)(4), (b), as added by Stats. 2019, ch. 586, § 1; see also *Fox*, *supra*, 34 Cal.App.5th at p. 1151, dis. opn. of Sanchez, J. [concluding that *Cunningham* was of "limited [precedential] value" because it did not have the benefit of this Court's holding in *Doe* that requiring the parties' compliance with chances in the law made retroactive to them does not violate the terms of the plea agreement].) Respondent's reliance upon these two post-*Romero* decisions is therefore misplaced and must be rejected.

2. SB 1393's Legislative History Supports its Retroactive Application to Plea Agreements with Stipulated Sentences

As explained above, this Court in *Harris, supra*, 1 Cal.5th at p. 992

inferred that the voters had intended to apply Proposition 47 retroactively to plea agreements based upon the electorate's intent to save money and reduce the number of non-violent offenders in prison. This Court concluded that permitting the prosecution to withdraw from a plea agreement and reinstate the original charges in response to a successful petition would frustrate the voter's intent and expectations, eliminate much of the initiative's anticipated financial and social benefits, and disrupt the plea negotiation process. (*Ibid.*) This Court therefore held, consistent with *Doe*, that the parties were bound to the amendment and that the withdrawal remedy permitted by *Collins* was limited to circumstances in which the amendment occurred before sentencing and entirely decriminalized the defendant's admitted offense, thereby eviscerating the judgment. (*Id.* at pp. 992-993.) This conclusion is consistent with this Court's other decisions which have interpreted Proposition 47 broadly in order to effectuate the voter's intent to reduce costs and cut the prison population of non-violent offenders. (See, e.g., *People v. Page* (2017) 3 Cal.5th 1175, 1187; *People v. Gonzales* (2017) 2 Cal.5th 858, 870-871; *People v. Romanowski* (2017) 2 Cal.5th 903, 909-910; *Buycks*, *supra*, 5 Cal.5th at pp. 883, 887-891.)

Similarly, the Legislature's intent in enacting SB 1393 supports a strong inference that the Legislature intended to apply the bill retroactively to all nonfinal convictions, including those reached by plea agreements with stipulated sentences. The Senate Committee on Public Safety's analysis of the bill states that its purpose was to allow a trial court, in the interest of justice, to strike or dismiss a prior serious felony conviction which otherwise adds an enhancement of five years. (Assembly Comm. Pub. Safety, analysis of SB 1393 (2017-2018, Reg. Sess.) as amended May 9, 2018, p. 2.) The author explained that restoring judges' pre-1986 discretion to the strike the enhancement was consistent with other sentence

enhancement laws and that the lack of discretion existing from 1986 through SB 1393's passage "resulted in mandatory additional terms for thousands of individuals incarcerated throughout California's prisons" and that this "rigid and arbitrary system has meted out punishments that are disproportionate to the offense, which does not serve the interests of justice, public safety, or communities." (*Id.* at p. 2.) In support of this contention, the analysis cited pre-1986 judicial decisions, which had concluded that "'[s]ection 1385 has long been recognized as an essential tool to enable a trial court to properly individualize the treatment of the offender' (*People v. Tanner* (1979) 24 Cal.3d 514, 530, internal quotations omitted) . . . ," which was "'designed to alleviate 'mandatory, arbitrary or rigid sentencing procedures [which] invariably lead to unjust results.' (*People v. Dorsey* (1972) 28 Cal.App.3d 15, 18.)" (Assembly Comm. Pub. Safety, Analysis of SB 1393, *supra*, at p. 2.) The analysis then quoted *People v. Williams*: "'Society receives maximum protection when the penalty, treatment or disposition of the offender is tailored to the individual case.'" (*Id.* at p. 2, quoting *People v. Williams* (1970) 30 Cal.3d 470, 482.)

The analysis further noted that California prisons had been found to be unconstitutionally overcrowded and that, according to a Public Policy Institute of California (PPIC) publication, as of September 2016, 79.9% of prisoners had some type of enhancement and 25.5% had three or more. (Assembly Comm. Pub. Safety, Analysis of SB 1393, *supra*, at p. 4.) The analysis also cited CDCR statistics that, as of December 1, 2017, 19,677 sentences included the five-year enhancement and that experts had concluded that enhancements had "little to no impact on either crime rates or recidivism" but had disproportionately increased racial disparities in imprisonment. (*Id.* at pp. 3, 4.) The Assembly Committee on Appropriations concluded that the bill had significant potential for savings

given the fact that 1,700 inmates with enhancements were admitted per year and estimated that even "if only" 100 defendants annually had the 5-year enhancement struck, this would result in a savings of approximately $15 million in five years. (Assembly App. Comm., Analysis of SB 1393 (2017-2018, Reg. Sess.) as amended, at p. 1.)

The legislative history therefore demonstrates that the Legislature's intent in enacting SB 1393 was to reduce prison overcrowding, save money, and achieve a more just, individualized sentencing scheme. As a practical matter and as the dissent in *Fox* concluded with respect to SB 620, "it is difficult to conceive that the Legislature would undermine the law's effect by excluding plea agreements from a trial court's sentencing discretion . . . ," particularly given the fact that judgements based upon plea agreements ''represent the vast majority of felony and misdemeanor dispositions in criminal cases . . . .'" (*Fox*, *supra*, 34 Cal.App.5th at p. 1149, quoting *Chavez*, *supra*, 30 Cal.4th at p. 654, fn. 5; *Lafler v. Cooper* (2012) 132 S.Ct. 1376, 1388 ["criminal justice today is for the most part a system of pleas, not a system of trials"]; *Missouri v. Frye* (2012) 132 S.Ct. 1399, 1407 ["ninety-four percent of state convictions are the result of guilty pleas"].) Moreover, nothing in the legislative history would support an inference that the Legislature intended to exempt plea agreements from SB 1393's retroactive application under *Estrada* or from *Doe*'s general principal that such amendments are deemed to be incorporated into plea agreements. Additionally, the bill analyses' repeated reference to section 1385 and judicial decisions interpreting it signaled the Legislature's awareness of the provision's interpretation, including that it applied to nonfinal judgements (*People v. Chavez* (2018) 4 Cal.5th 771, 781; *People v. Kim* (2012) 212 Cal.App.4th 117, 122), which, of course, is consistent with *Estrada*'s retroactive scope. As in *Harris*, *supra*, 1 Cal.5th at p. 992

the Legislative intent in enacting SB 1393, as well as the wider historical circumstances surrounding its enactment, supports a strong inference that the Legislature intended to apply the bill to plea agreements. (See *In re Dannenberg* (2005) 34 Cal.4th 1061, 1082 [in seeking to divine legislative intent, a reviewing court may not only consider a bill's "internal written expressions of the bill's meaning and purpose, but also the wider historical circumstances of [its] enactment"]; *Mejia v. Reed* (2003) 31 Cal.4th 657, 663 [same].)

3. The Legislature Impliedly Approved of *Hurlic* When it Enacted SB 1393

"It is a well-established principle of statutory construction that when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction." (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 727-728 (*Kelly Broadcasting*).) In other words, "'[w]here a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it.'" (*In re Michael G.* (1988) 44 Cal.3d 283, 292, quoting *Wilkoff* v. *Superior Court* (1985) 38 Cal.3d 345, 353.)

Hurlic was filed on July 8, 2018, respondent did not seek review, and SB 1393 was signed by the governor and chaptered by the secretary of state on September 30, 2018.[3] If the Legislature had intended to disapprove of *Hurlic*'s conclusion that ameliorative amendments like SB 1393 apply retroactively to plea agreements, it would have done so. (See *In re C.B.*

[3] Notably, respondent also did not seek review in *Baldivia*.

(2018) 6 Cal.5th 118, 129; *Kelly Broadcasting*, *supra*, 48 Cal.3d at pp. 727-728.) The Legislature therefore should be deemed to have approved of *Hurlic*'s interpretation and intended for SB 1393 to modify the terms of the plea agreement here. (*Estate of McGill* (1975) 14 Cal.3d 831, 839.)

4. AB 1618 Clarifies that SB 1393 Applies to Plea Agreements, Including Those With Stipulated Sentences

As explained above, respondent, relying upon *Galindo*, claims that "'neither the words of the statute nor the legislative history reference plea bargaining, nor do they express an intent to overrule existing law that once the parties agree to a specific sentence, the trial court is without power to change it unilaterally.'" (ROB 23, quoting *Galindo*, *supra*, 35 Cal.App.5th at p. 671.) Likewise, the *Fox* majority concluded that SB 620 did not apply retroactively to plea agreements with stipulated sentences because the bill did not evince an explicit intent to do so. (*Fox*, *supra*, 34 Cal.5th at pp. 1137, 1138.)

AB 1618 supplies the explicit legislative intent that respondent and *Galindo* had found lacking. Effective January 1, 2020, AB 1618 enacts section 1016.8, which declares that, under *Doe*, plea agreements are deemed to incorporate subsequent legislative amendments and that the parties are not insulated from future changes in law that the Legislature intends to apply to them.[4] (§ 1016.8, subd. (a)(1).) The provision further provides that, under *Boykin v. Alabama* (1969) 395 U.S. 238, guilty pleas must be knowing, intelligent, and voluntary, and that a plea agreement that

[4] Since this Court's decision will be filed after January 1, 2020, the issue will be ripe for resolution even though AB 1618 is not yet effective. (See *People v. Watts* (2018) 22 Cal.App.5th 102, 119; *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999 (*Hunt*).)

requires a defendant to waive future benefits of legislative enactments, initiatives, appellate decisions, or other changes in the law that apply retroactively after the date of the plea is not knowing and intelligent, and that such a waiver is thus "void against public policy." (§ 1016.8, subds. (a)(2), (3), & (b).) The plain language of the bill therefore demonstrates that the legislature intended for ameliorative retroactive changes in law to apply plea agreements.

The legislative history further supports this legislative intent and demonstrates that the Legislature does not consider a defendant's attempt to avail herself of future ameliorative benefits under such amendments to be an attack upon the validity of the plea. After explaining that recent ameliorative legislation had been enacted in part to comply with federally mandated prison population reduction, the Senate Rules Committee's Floor Analysis states that the waiver of benefits from future ameliorative amendments "circumvents the legislative process and the will of the voters." (Sen. Rules Comm., Off. of Sen. Floor Analyses, 3d reading of analysis of AB 1618 (2019-2020, Reg. Sess.) as amended July 5, 2019, p. 5.) It also explains: "When changes in state law resulted in increased penalties for individuals after they entered plea agreements prosecutors did not feel the need to pre-empt future legislation, and only appear willing to do so now that voters and the Legislature have begun to focus on reforming our criminal justice system." (*Ibid.*)

The Senate Committee on Public Safety analysis notes the split of authority between *People v. Wright* (2019) 31 Cal.App.5th 749, 755 (*Wright*), which had held, consistent with *Doe*, that an appellate waiver of a

stipulated sentence did not bar SB 180[5] relief where the admitted prior no longer qualified for an enhancement under Health and Safety Code, section 11370.2, and *People v. Barton* (2019) 32 Cal.App.5th 1088, 1095-1096 (rev. granted June 19, 2019, S255214) (*Barton*), which had relied upon *Pannizon* to reach the opposite result. (Sen. Pub. Safety Comm., Off. of Sen. Floor Analyses, analysis of AB 1618 (2019-2020, Reg. Sess.) p. 4-5.) The analysis then quotes a San Diego Tribune article which noted that after *Wright* had left open the possibility that the parties could expressly insulate the plea agreement from future amendments, the San Diego District Attorney's Office had done just that in at least two cases. (*Id.* at p. 6.) The analysis then explicitly states: "This bill would make such provisions in plea bargains void as against public policy . . . ." (*Id.*, at p. 7.)

The Senate Rules Committee Analysis and the Committee on Public Safety Analysis also both expressly provide that the bill's purpose was to "clarify" the law in this context. Likewise, the Assembly Floor Analysis states that "[i]n 2013 [this Court in *Doe*] settled the issue of pre-emptive agreements in plea bargains by stating clearly that parties entering a plea agreement are not insulated from any future legislation" and that "AB 1618 simply re-states and clarifies the Legislature's authority to affect the terms of a plea agreement." (Assembly Floor Analysis of AB 1618 (2019-2020, Reg. Sess.) as amended July 5, 2019, p. 2.) "The voters, the Governor, and the Legislature have shown time and time again that there is a desire to ensure that our justice system reflects our values of fairness and justice, and that includes ensuring that the law applies equally to individuals that have entered into a plea agreement." (*Ibid.*)

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[5] SB 180 (Stats. 2017, ch. 677, § 1) removed most of the prior convictions from the list of prior convictions that qualify a defendant for the imposition of an enhancement under section 11370.2, subdivision (c).

The language and legislative history of AB 1618 thus demonstrates that the Legislature intended for ameliorative amendments like SB 1393 to apply retroactively to plea agreements, including those with stipulated sentences. The Legislature's express reference to *Doe* and its authority to affect public policy also makes clear that it intended to use this authority to modify the terms of plea agreements to defendants' benefit. Moreover, while the specific impetus for the bill had been express waivers of future ameliorative benefits, this Court made clear in *Cuevas* and *Buttram* that the certificate and waiver analyses are closely intertwined and that the ultimate question in the certificate context "is whether defendant 'seeks only to raise [an] issue[] reserved by the plea agreement, and as to which he did not expressly waive the right to appeal.'" (*Cuevas*, *supra*, 44 Cal.4th 4th at p. 731, quoting *Buttram*, *supra*, 30 Cal.4th at pp. 782-783.) Additionally, *Pannizon*, *supra*, 13 Cal.4th at pp. 78-79, 84 resolved the certificate and waiver issues on essentially the same ground, that is, that the defendant had bargained for a particular stipulated sentence and could not challenge it on appeal. Since AB 1618 makes clear that appellate waivers that interfere with a defendant's potential benefits from future legislation are void as against public policy, an appeal that asserts the retroactive incorporation of a change of law into a plea agreement necessarily cannot be considered an attack on the validity of the plea. It follows that, under AB 1618's command, a certificate is not required to seek the benefits of an ameliorative retroactive change in law.

There is also nothing in the language or legislative history of AB 1618 that expresses an intent to exclude plea agreements with stipulated sentences from its application. To the contrary, since the term plea agreement is all-inclusive, if the Legislature had intended to exclude plea agreements involving stipulated sentences, it would have explicitly done so,

particularly given the fact that *Harris*, *supra*, 1 Cal.5th at pp. 991, 988 applied the phrase "by . . . plea" to the defendant's stipulated sentence of six years. (See *Estate of McDill*, *supra*, 14 Cal.3d at p. 839.)

AB 1618 constitutes a clarification of existing law which itself applies to nonfinal cases involving the interpretation and application of prior ameliorative amendments such as SB 1393. "A statute that merely clarifies, rather than changes, existing law is properly applied to transactions predating its enactment." (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922 (*Carter*).) Indeed, even "[m]aterial changes in language . . . may simply indicate an effort to clarify the statute's true meaning." (*Carter*, *supra*, 38 Cal.4th at pp. 922-929.) "Such a legislative act has no retrospective effect because the true meaning of the statute remains the same." (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243 (*Western Security*).)

"[I]f the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what an earlier Legislature intended is entitled to [due] consideration." (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 473.) "Whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question for the legislative body enacting the statute." (*Western Security*, *supra*, 15 Cal.4th at p. 243.) "Thus, where a statute provides that it clarifies or declares existing law, '[i]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment.'" (*Id.* at p. 244, internal quotations & citations omitted.)

If the Legislature "promptly reacts to the emergence of a novel question of statutory interpretation . . . [or] to correct a perceived problem with a judicial construction of a statute, the courts generally give the

Legislature's action its intended effect." (*Western Security*, *supra*, 15 Cal.4th at pp. 243, 246.) In *Carter*, for example, this Court concluded that the amendment in question was a clarification of existing law because it was introduced less than two months after a contrary appellate decision had been filed and because an uncodified section provided that it clarified existing law. (See *Carter*, *supra*, 38 Cal.4th at pp. 923, 930; *Hunt*, *supra*, 21 Cal.4th at pp. 1006-1008.)

Similarly, AB 1618 was enacted in prompt response to the uncertainty regarding ameliorative amendments' retroactive application to plea agreements with stipulated sentences and the Legislature expressly provided in its analyses that the bill clarified existing law dating back to this Court's decision in *Doe*. (See § 1016, subd. (a)(1); Assembly Floor Analysis of AB 1618, *supra*, at p. 2.) Further, the appellate courts were split on both the certificate and waiver issues in the context of retroactive ameliorative changes in law and this Court had not "finally and definitively" decided either issue. (See *Carter*, *supra*, 38 Cal.4th at p. 922.) It is also well established that the Legislature need not separately amend preexisting statues like SB 1393, SB 620, and SB 180 but instead can enact a separate statute like section 1016.8, which modifies and clarifies the prior amendments. (See *Hunt*, *supra*, 21 Cal.4th at p. 1009.) AB 1618 is therefore properly understood as a clarification of the interpretation and application of prior ameliorative amendments such as AB 1393, SB 620, and SB 180 and, thus, properly applies to plea agreements preceding its enactment. (See *ibid.*; *Carter*, *supra*, 38 Cal.4th at p. 930; *Western Security*, *supra*, 15 Cal.4th at pp. 253-254.) Since AB 1618 clarifies that the Legislature intended for SB 1393 and other similar reforms to be incorporated into plea agreements with stipulated sentences and for defendants to be able to avail themselves of the benefits of such

ameliorative legislation through direct appeal, this Court should conclude that the appeal here does not constitute an attack on the validity of the plea and that a certificate is therefore not required in such circumstances.

5. Dispensing with the Certificate Requirement and Permitting Relief on Direct Appeal Better Effectuates the Legislative Intent Behind SB 1393 and Section 1237.5 than Respondent's Proposed Alternative

"A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions.'" (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805.) In doing so, the reviewing court should also "consider the impact of an interpretation on public policy, for where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation." (*In re Dannenberg*, *supra*, 34 Cal.4th at p. 1082, internal quotations & citations omitted; *People v. Smith* (2004) 32 Cal.4th 792, 797-798.)

In concluding that a certificate was unnecessary here, the appellate court below appropriately harmonized the intent behind both SB 1393 and section 1237.5 and avoided the negative repercussions that a contrary conclusion would have had on public policy. (See *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192-193; *People v. Smith*, *supra*, 32 Cal.4th at pp. 797-798.) The appellate court's decision was not only consistent with the cost-saving purpose of both SB 1393 and section 1237.5 but also effectuated latter's purpose of weeding out frivolous appeals and, to the greatest extent possible, equalized the treatment of those who entered into plea agreements before and after SB 1393's enactment.

In seeking to avoid this conclusion, respondent claims that, "'[s]trict adherence' to the certificate requirement is 'vital' because judgments

entered upon pleas of guilty or no contest 'represent the vast majority of felony and misdemeanor dispositions in criminal cases.'" (ROB 15, quoting *Chavez*, *supra*, 30 Cal.4th at p. 654, fn. 5.) According to respondent, permitting noncertificate appeals to seek an exercise of judicial sentencing discretion pursuant to retroactive ameliorative sentencing reforms would impose a substantial financial burden on the state's criminal justice system. (See ROB 14-15.)

Contrary to respondent's claim, dispensing with the certificate requirement and permitting courts to exercise their discretion pursuant to SB 1393 would likely result in substantial savings to the state's general fund. As explained above, the Legislature anticipated that restoring trial court's discretion to strike prior serious felonies pursuant to section 1385 would ultimately save the state millions of dollars per year and extending this discretion to nonfinal cases involving plea agreements with stipulated sentences would result in substantial savings even if trial courts only exercised their discretion to strike the enhancements in a small number of cases. Dispensing with the certificate requirement in these circumstances is also entirely consistent with section 1237.5's purposes of saving money and weeding out frivolous appeals. By concluding that the appeal here did not constitute an attack upon the validity of the plea, the decision below therefore appropriately harmonizes the relevant laws and effectuates both the legislative intent and public policy at issue.

In contrast, respondent's proposed remedy would obviously frustrate SB 1393's purpose and prevent many eligible defendants from obtaining relief under the bill. Although respondent concedes that appellant has a meritorious claim and elsewhere claims that requiring "strict compliance with section 1237.5 . . . [will] not impose an undue hardship on [such] defendants . . . ," the remedy respondent later proposes would impose an

undue hardship on eligible defendants, preclude relief for many, if not most, of them, and frustrate SB 1393's purpose of saving money and reducing the prison population. (See ROB 16, 32-33.) According to respondent, those who are still within the time limits of rules 8.304(b) and 8.308(a) would have to: 1) obtain a certificate of probable cause from the trial court; 2) challenge the validity of their plea on direct appeal; 3) request that the trial court set aside the plea agreement or obtain "'the People's agreement'" to modify the agreement; and 4) then request the trial court to exercise its discretion pursuant to the ameliorative legislation. (ROB 32-33, quoting *Fox*, *supra*, 34 Cal.App.5th at p. 1139.) On the other hand, respondent claims that individuals like appellant who could not possibly comply with the time constraints of rules 8.304(b) and 8.308(a) could file before the date of finality a petition for habeas corpus in the trial court to withdraw their plea in the interests of justice under section 1018.[6] (ROB 33.) Respondent further claims that a habeas that "merely invokes SB 1393 would be denied summarily . . ." and that a noncertificate appeal could not be treated as a habeas but also would have to be "summarily dismissed." (ROB 34-35, citing *Chavez*, *supra*, 30 Cal.4th at p. 651.)

Respondent's insistence that defendants who entered into plea agreements can only obtain relief under retroactive ameliorative legislation like SB 1393 by seeking to withdraw their pleas or by obtaining the prosecution's consent to modify the plea agreement ignores *Doe*'s holding that the Legislature can unilaterally modify the terms of the agreement to

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[6] Section 1018 provides: "On application of the defendant at any time before judgment or within six months after an order granting probation is made if entry of judgment is suspended, the court may, and in case of a defendant who appeared without counsel at the time of the plea the court shall, for good cause shown, permit the plea of guilty to be withdrawn and a plea of guilty substituted."

one party's benefit and the other's detriment. As *Harris*, *supra*, 1 Cal.5th at p. 993 makes clear, respondent's proposed remedy is only available where the retroactive application of a change in law decriminalizes the admitted offense entirely, thereby eviscerating the judgment. Moreover, any lingering doubt that could have remained in this regard was laid to rest by AB 1618, which expressly provides that plea agreements incorporate subsequent ameliorative legislation, and that the waiver of future benefits conferred by such legislation is void as against public policy.

Respondent's proposed remedy would also frustrate SB 1393's purpose of saving costs and reducing prison populations. As this Court concluded in *Harris*, *supra*, 1 Cal.5th at p. 992, permitting the prosecution to withdraw from plea agreements and revive dismissed counts in response to otherwise successful section 1170.18, subdivision (a) petitions would frustrate the initiative's cost saving purpose. The same is true with respect to the retroactive application of SB 1393 to plea agreements here. As explained above, since plea agreements resolve the vast majority of criminal cases, respondent's proposed remedy would thwart the bill's purpose to save money and reduce prison populations. Respondent's implicit assumption that plea agreements with stipulated sentences are somehow immune from retroactive ameliorative legislation flies in the face of AB 1618's language and import. There is also nothing in the relevant legislation or decisional law that supports respondent's suggestion that eligible defendants must meet the requirements of section 1018, which by its terms is only available when probation is granted. This would preclude relief to those who were not granted probation, would add another obstacle to the small class who were, is contrary to legislative intent behind both SB 1393 and AB 1618, and serves neither section 1237.5's cost saving purpose nor its purpose of weeding out frivolous appeals.

Respondent also contradictorily argues that the appellate court's decision below would both require a trial court to exercise its discretion pursuant to SB 1393 if the plea agreement had been reached after SB 1393 became effective and authorize "more beneficial treatment" for those who entered into plea agreements before SB 1393 became effective. (ROB 24-25, quoting *Fox*, *supra*, 34 Cal.App.5th at p. 1137; see also ROB 35.) Contrary to respondent's claim, individuals who entered into plea agreements after AB 1393's effective date would not be entitled to have the trial court exercise its discretion to strike the enhancement because the bill was already part of the legal landscape at the time of the plea and thus made with full knowledge of the right that they were giving up, which is consistent with section 1016.8. Also, the appellate decision below does not authorize more beneficial treatment for those who entered into plea agreements prior to AB 1393's effective date but, rather, consistent with *Estrada*, levels the playing field between those with nonfinal cases who entered into plea agreements before and after SB 1393's effective date. As AB 1618 recognizes, a guilty plea cannot be knowing and intelligent where, as here, it is made without knowledge that future legislation will retroactively either eliminate a substantial portion of the sentence or grant a trial court discretion to do so.

More importantly, imposing the certificate requirement upon defendants like appellant, *Baldivia*, and *Hurlic*, who entered their pleas and were sentenced before the relevant legislation was passed or signed into law, would effectively require their clairvoyance in predicting the amendment. Indeed, even if such a defendant were to learn of the pending legislation before filing her request for a certificate, a trial court would reasonably deny the request as being unripe, and an appellate court could not be relied upon to solve the problem by granting a motion to file a late

request for a certificate. Dispensing with the certificate requirement in such circumstances therefore ensures the fair treatment of such defendants.

Respondent also ignores the substantial amount of leverage and bargaining power that mandatory enhancements like section 667, subdivision (a) conferred upon prosecutors seeking to obtain longer sentences.[7] Given this leverage, prosecutors would undoubtedly have generally obtained longer stipulated sentences before SB 1393's enactment than after it. By retroactively conferring discretion on trial courts to consider striking such enhancements, and permitting them, in this context, to consider whether doing so would be incompatible with the terms of the agreement, the decision below properly balances the competing interests and equalizes the treatment of those with nonfinal cases who entered plea agreements before and after the amendment's effective date. (See *Stamps*, *supra*, 34 Cal.5th at p. 124.) This result is also consistent with the non-discretionary retroactive application of SB 180 to plea agreements with stipulated sentences, which has resulted in the relevant enhancements being stricken in nonfinal cases in the SB 180 context. (See, e.g., *People v. Milan* (2018) 20 Cal.App.5th 450, 452, 455; *People v. Zabala* (2018) 19

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[7] That is particularly true where, as here, other enhancements that were charged by the prosecution have been subsequently abrogated by Legislature. In this case, for example, the prosecution charged three one-year prison priors (§ 667.5, subd. (b)). (CT 1-5.) Effective January 1, 2020 Senate Bill 136 abrogates these enhancements for cases not involving the current charge of a sexually violent offense. (See § 667.5, subd (b), as amended by SB 136, Stats. 2019, ch. 590, § 1.) Since this bill applies retroactively under *Estrada*, it is clear that much of the bargaining power that the prosecution had in securing appellant's agreement to the 9 year prison term has subsequently been eliminated. *Stamps* properly permits the trial court to consider these and other factors in determining whether to strike the admitted five-year serious felony enhancement. (See *Stamps*, *supra*, 34 Cal.5th at p. 124.)

Cal.App.5th 335, 339, 344.) While the application of *Estrada* will inevitably result in some unevenness, the appellate decision below reduces it, appropriately harmonizes the relevant laws, and achieves a just resolution of the competing interests at stake.

Finally, respondent claims that its position is more conducive to plea bargaining than the result reached by the appellate court below. (See ROB 29-30.) Relying upon *Galindo*, respondent claims that "'the incentive for both parties to agree to a bargain for a specified number of years is reduced by a rule allowing the trial court to unilaterally modify that bargain at some point in the future without the parties consent.'" (ROB 29, quoting *Galindo*, *supra*, 35 Cal.App.5th at p. 672.) According to respondent, the possibility "that a statute may be enacted sometime in the future providing for the possibility of a reduced punishment is simply one of many eventualities that, had they been known to the defendant at the time, might have discouraged him from accepting the terms of the plea bargain." (ROB 30.) Respondent further asserts that although the decision to plead guilty "'frequently present[s] imponderable questions for which there are no certain answers . . .' (*Brady v. United States* (1970) 397 U.S. 742, 756-757) . . . , that is not a reason to permit an attack on the validity of the plea where the Legislature has not clearly authorized one . . . ." (ROB 30.)

As explained above, this Court rejected a nearly identical claim in *Harris* and concluded that permitting the prosecution to withdraw from a plea agreement and reinstate dismissed charges in response to a successful section 1170.18, subdivision (a) petition would "disrupt [the plea negotiation] process," thereby undermining an "'integral component'" of the expeditious and fair administration of the criminal justice system. (*Harris*, *supra*, 1 Cal.5th at p. 992, quoting *Segura*, *supra*, 44 Cal.4th at p. 929.) In any case, AB 1618 again definitely resolves the issue in

appellant's favor by unequivocally establishing that the Legislature has exercised its power to modify plea agreements by enacting ameliorative bills such as SB 1393. To the extent that there are "imponderable questions" posed by plea negotiations and agreements, this is not one of them. This Court should therefore conclude that the Legislature intended to apply SB 1393 to all nonfinal cases, including those involving plea agreements with stipulated sentences.

F. Nothing in the Plea Agreement Here Supports an Inference that Parties Intended to Insulate Themselves From Future Changes in the Law

As explained above, the *Fox* majority concluded that *Doe*'s rule that plea agreements incorporate subsequent changes in the law did not apply in that case in part because Fox entered his plea a week after SB 620 passed the Legislature and his trial counsel's comments at sentencing demonstrated that "the parties understood that Fox would *not* have the benefit of the new law once it went into effect." (*Fox*, *supra*, 34 Cal.App.5th at p. 1135, emphasis in original, fn. omitted.)

In contrast, appellant entered his plea on November 7, 2017 and was sentenced on January 9, 2018, which was 9 months before SB 1393 was signed into law and over month before it was even introduced. (1 CT 24-25, 27-28, 52.) Unlike the situation in *Fox*, SB 1393 therefore was not "part of the legal landscape" at the time of plea and appellant could not possibility know about its existence, let alone, eventual passage. Imposing the certificate requirement under such circumstances would therefore be particularly unreasonable. Moreover, as respondent effectively concedes, there is no evidence that the parties intended to incorporate only the law in existence at the time of the plea. Since appellant therefore "seeks only to

raise [an] issue[] reserved by the plea agreement, and as to which he did not expressly waive the right to appeal . . . ," his appeal does not constitute an attack upon the validity of the appeal such that a certificate is required. (See *Buttram*, *supra*, 30 Cal.4th at p. 787; *Cuevas*, *supra*, 44 Cal.4th at p. 381.) In any case, as explained above, AB 1618 clarifies that such a waiver would be "void as against public policy" with respect to SB 1393 or any other retroactive ameliorative change of law. Further, the trial "court's acceptance of the negotiated sentence . . . does not clearly establish that the court would not have exercised discretion to strike the enhancement if it had that discretion . . . ," as required (*Stamps*, *supra*, 34 Cal.App.5th at p. 124; *People v. Billingsley*, *supra*, 22 Cal.App.5th at p. 1081), and respondent does not claim otherwise.

G. Conclusion

For the forgoing reasons, appellant's appeal seeking retroactive benefits of SB 1393 does not constitute an attack upon the validity of the plea such that a certificate is required. The appellate court's decision should therefore be affirmed.

II. RESPONDENT'S BELATED CLAIM THAT THIS APPEAL IS WAIVED IS PROCEDURALLY BARRED AND FAILS ON THE MERITS

Respondent belatedly claims in a footnote in its opening brief on the merits that appellant waived his right to raise the SB 1393 issue on appeal because he executed a general appellate waiver as part of his plea agreement. (ROB 11, fn. 3; *Stamps*, *supra*, 34 Cal.App.5th at p. 120, fn. 3.) This waiver provided: "I hereby give up my right to appeal from this conviction, including an appeal from the denial of any pretrial motions."

(CT 28.) As respondent acknowledges, the appellate court below concluded in a footnote that appellant's waiver constituted "a general waiver of his appellate rights that did not preclude review of his sentence." (*Stamps*, *supra*, 34 Cal.App.5th at p. 120, fn. 3.) Respondent nonetheless now asserts that, "in light of recent case authority . . . ," namely, *Barton*, it disagrees with the appellate court's conclusion in this regard. (ROB 11, fn. 3.) It cites *Barton* for the proposition that "[i]f a 'defendant agrees to a bargain which includes a specific or indicated sentence, and if that is the sentence actually imposed, the defendant's waiver will foreclose appellate review of the sentence.'" (ROB 11, fn. 3, *Barton*, *supra*, 32 Cal.App.5th at p. 1095.)

Having failed to raise this argument in the appellate court or in its petition for review, respondent cannot now ask this Court to hear that issue in the first instance. "As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." (Cal. Rules of Ct., Rule 8.500, (C)(1).) This Court has repeatedly invoked this rule in refusing to entertain arguments or variations of arguments never raised in the Court of Appeal. (See, e.g., *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1265; *People v. Camacho* (2000) 23 Cal.4th 824, 837 fn. 4; *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1012-1013.) It should do the same here.

Respondent's proffered reason for belatedly raising the claim, that is, that *Barton* is "recent case authority" that undermines *Stamps*' resolution of the waiver issue, is misleading and particularly uncompelling given the procedural history here. (See ROB 11, fn. 3.) First, *Barton* was filed a month before the appellate court issued its opinion below and respondent neither filed a supplemental brief raising the waiver issue nor filed a

petition for rehearing after *Stamps* distinguished *Barton*. Second, and more importantly, respondent not only failed to seek this Court's review of the waiver issue but explicitly conceded the waiver issue in its petition for review, distinguishing *Barton* on the same ground that *Stamps* did, namely, that the appellate waiver here was a general one whereas the *Barton* waiver had applied specifically to the defendant's stipulated sentence. (PFR 3, fn. 3, citing *Pannizon, supra*, 13 Cal.4th at p. 85, fn. 11; *People v. Mumm* (2002) 98 Cal.App.4th 812, 815.)

Since respondent thus explicitly conceded the waiver issue in its petition for review, it cannot now change its position in its opening brief on the merits. (See *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986; *People v. Castillo* (2010) 49 Cal.4th 145, 155; *People v. Burnett* (1999) 71 Cal.App.4th 151, 173.) It is well established that "[o]ne may not alter one's appellate argument as the chameleon does his color, to suit whatever terrain one inhabits at the moment" (*Aerojet-General Corp. v. Superior Court* (1989) 211 Cal.App.3d 216, 238) and that the government, in particular, "cannot be accused of taking advantage of contradictory positions . . . ," in this way (see *Brown et Al. v. United States* (1973) 411 U.S. 223, 229; *People v. Turner* (1986) 42 Cal.3d 711, 722, fn. 7).

In any case, notwithstanding "this vice of prosecutorial self-contradiction" (see *Brown et Al. v. United States, supra*, 411 U.S. 223, 229), respondent's claim fails on the merits (see *In re Joshua S.* (2007) 41 Cal.4th 261, 273; *People v. Randle* (2005) 35 Cal.4th 987, 1002). While a plea bargain may include an explicit waiver of the right to appeal (*Panizzon, supra*, 13 Cal.4th at p. 85), this presupposes "an actual and demonstrable knowledge" of the right being waived and the "burden is on the party claiming the existence of the waiver to prove it by evidence that does not leave the matter to speculation . . ." (*People v. Vargas* (1993) 13

Cal.App.4th 1653, 1662). If the defendant agrees to a bargain which includes a specific or indicated sentence and explicitly waives review of that sentence, any challenge to the sentence will be deemed a challenge to an integral component of the bargain and appellate review will be foreclosed. (See *Panizzon, supra,* 13 Cal.4th at pp. 78-79, 85-86.) On the other hand, "[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." (*People v. Mumm, supra,* 98 Cal.App.4th at p. 815; *In re Uriah R.* (1999) 70 Cal.App.4th 1152, 1157; *People v. Sherrick* (1993) 19 Cal.App.4th 657, 659.) In other words, a "possible future error" regarding issues "left unresolved by the particular plea agreements involved" is not impliedly waived by the existence of a plea agreement. (*Panizzon, supra,* 13 Cal.4th at p. 85, emphasis in original.) Thus, so long as the issue to be raised was left "open or unaddressed by the deal," the waiver will not preclude the issue from being raised on appeal. (*Id.* at p. 86.)

Applying these principles, *Wright, supra,* 31 Cal.App.5th at pp. 755-756 concluded that the defendant's execution of a specific waiver of his stipulated sentence did not preclude him from asserting on direct appeal that a three-year enhancement under Health and Safety Code section 11370.2, subdivision (a) was unauthorized under the retroactive application of SB 180. *Wright* reached this conclusion because, under *Doe*, the plea agreement did not insulate the parties from subsequent amendments and instead was deemed to incorporate SB 180. (*Ibid.*) *Wright* further concluded that the defendant's waiver of his right to appeal his stipulated sentence could not be read to apply to a legislative amendment which he had no notice of when he signed the agreement. (*Ibid.*)

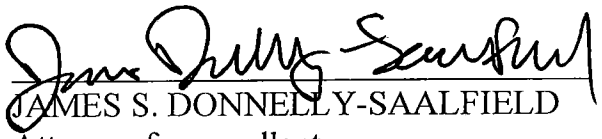
Similarly, the plea agreement here did not insulate the parties from SB 1393's retroactive amendment. Moreover, unlike *Barton*, *supra*, 32 Cal.App.5th at p. 1095, the waiver here was a general one, which, as respondent appropriately conceded in its petition for review, did not contemplate the future application of SB 1393 to the agreed upon sentence. (PFR 3, fn. 3; CT 28.)

Finally, to the extent that there could be any question on this issue, AB 1618 resolves it in appellant's favor. As explained above, section 1016.8 provides that plea bargain that requires a defendant to generally waive future benefits of legislative enactments, initiatives, appellate decisions, or other changes in the law that may occur after the date of the plea is not knowing and intelligent and therefore is "void as against public policy." If such an explicit waiver is void as against public policy, a mere general waiver cannot be read to preclude appellate review of such an issue. Moreover, for the reasons discussed above, AB 1618 represents a clarification of the law in this respect and therefore properly applies to the plea agreement in this case. (See *Carter*, *supra*, 38 Cal.4th at p. 930.) For these reasons, appellant's general waiver does not preclude him from raising the SB 1393 issue on appeal and respondent's belated claim to the contrary must be rejected.

CONCLUSION

For the forgoing reasons, the judgment of the Court of Appeal should be affirmed.

Dated: November 8, 2019



JAMES S. DONNELLY-SAALFIELD
Attorney for appellant,
William Stamps

WORD COUNT CERTIFICATION

DECLARATION OF JAMES S. DONNELLY-SAALFIELD

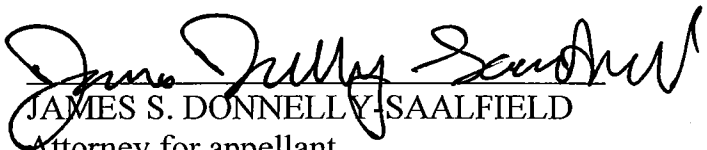
I, James S. Donnelly-Saalfield, hereby declare as follows:

1. I am an attorney licensed to practice in the State of California.

2. I have been appointed by this court to represent appellant, William Stamps, in this matter.

3. I have utilized the software program entitled Microsoft WORD to determine the word count of this brief. The word count of this brief is 13,997.

I declare under the penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this declaration was signed on November 8, 2019 Oakland, California.



JAMES S. DONNELLY-SAALFIELD
Attorney for appellant,
William Stamps

DECLARATION OF SERVICE BY MAIL AND ELECTRONIC SERVICE BY TRUEFILING

Re: *People v. Williams Stamps* **Case No.: S255843**

Related Court of Appeal Case No. A154091

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of Alameda, State of California. My business address is 475 Fourteenth Street, Suite 650, Oakland, CA 94612. My electronic service address is eservice@fdap.org. On Novmeber 8, 2019, I served a true copy of the attached **Appellant's Answer Brief on the Merits** on each of the following, by placing same in an envelope(s) addressed as follows:

Clerk of the Court
Alameda County Superior Court
1225 Fallon Street, Room 209
Oakland, CA 94612

Lindsay Horstman
Alameda County Public Defender's Office
1401 Lakeside Drive, Suite 400
Oakland, CA 94612

William Stamps
(Appellant)

Each said envelope was sealed and the postage thereon fully prepaid. I am familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice each envelope would be deposited with the United States Postal Service in Oakland, California, on that same day in the ordinary course of business.

On Novmeber 8, 2019, I transmitted a PDF version of this document by TrueFiling to the following:

Xavier Becerra, Attorney General
Office of the Attorney General
(sfagdocketing@doj.ca.gov)
(Respondent)

Elizabeth Hereford
Deputy Attorney General
(Elizabeth.Hereford@doj.ca.gov)
(Respondent)

Court of Appeal, First Appellate District

Alameda County District Attorney
(ACDAdocket@acgov.org)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on Novmeber 8, 2019, at Oakland, California.

Bonnie L. Palmer, Clerk