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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

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Deputy

IN THE MATTER OF C. H. Minor and Petitioner	No. _____
PEOPLE OF THE STATE CALIFORNIA, Plaintiff and Respondent v. C. H. Defendant and Petitioner	(Court of Appeal Case No. A146120; Contra Costa County Superior Court No. J11-00679)

PETITION FOR REVIEW

After Decision of the First Appellate District, Division ~~Two~~ Three, Filed August 30, 2016.

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By Appointment of the Court
Under the First District Appellate Project Independent Case System

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Authority

Statutory Authority

Secondary Authority

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF C. H. Minor and Petitioner	)	No. _____
PEOPLE OF THE STATE CALIFORNIA, Plaintiff and Respondent v. C. H. Defendant and Petitioner	)	(Court of Appeal Case No. A146120; Contra Costa County Superior Court No. J11-00679)

PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE TANI G. CANTIL-SAKAUYE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, C. H., respectfully petitions this Court to grant review in this case pursuant to California Rules of Court, rule 8.500, subdivision (b) (1). A copy of the opinion of the Court of Appeal, First Appellate District, Division Three, (per Siggins, J.), filed August 30, 2016, affirming the juvenile court's order denying petitioner's request to expunge his DNA sample pursuant to Penal Code section 1170.18[1] is attached to this petition as Appendix A.

[1] Further statutory references are to the Penal Code unless otherwise specified.

ISSUES PRESENTED FOR REVIEW

1. Do the reclassification procedures of Proposition 47[2] alter a crime's status as a felony to a misdemeanor offense, thereby requiring the expungement of a reclassified misdemeanant's DNA sample or do Proposition 69's[3] specific DNA provisions control and require the retention of a reclassified misdemeanant's DNA sample based on the original felony finding/plea?

2. Does the recently enacted Assembly Bill 1492 ["AB 1492"], adding section 1170.18 to section 299, subdivision (f) to the list of those who may not be relieved of the requirement to provide DNA where the qualifying charge is reduced under another law, preclude DNA expungement where the original qualifying felony offense is reclassified as a misdemeanor under section 1170.18 and if so, is AB 1492 an unconstitutional amendment of Proposition 47?

3. Is the denial of a request pursuant to section 1170.18 to expunge DNA a violation of the equal protection clause of the California and federal Constitutions?

WHY REVIEW SHOULD BE GRANTED
(Cal. Rules of Court, rule 8.500.)

This petition for review is presented to settle an important question of law and to secure uniformity of decisions. (Cal. Rules of Court, rule 8.500, subd. (b) (1).)

A misdemeanant, after serving a sentence, suffers no further obligation, disability,

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[2] Proposition 47 is the Safe Neighborhoods and Schools Act enacted by voters in 2014 and is found at section 1170.18.

[3] Proposition 69 is the DNA Fingerprint, Unsolved Crime and Innocence Protection Act ["DNA Act"] passed by voters in the 2004 general election. See sections 295-302.2 for the codified version.

or loss of civil rights. (*People v. Moreno* (2014) 231 Cal.App.4th 934, 942.) This is not so for the typical felon: convicted felons are "uniquely burdened by a collection of statutorily imposed disabilities" such as the loss of the right to vote and the right to own/possess firearms. (Cal. Const., art. II, sec. 4 [right to vote]; sec. 29800, subd. (a) (1) [gun ownership]; *People v. Moreno*, *supra*, 231 Cal.App.4th at p. 942, citing *In re Valenti* (1986) 178 Cal.App.3d 470, 475.) DNA collection and retention is an additional disability which felons experience due to their status as a felon. (*People v. Travis* (2006) 139 Cal.App.4th 1271, 1295; sec. 296.) For juveniles the collection of DNA is applicable for a felony offense or for those juveniles who are subject to registration for the commission of a sex or arson offense. (Sec. 296, subds. (a) (1) and (3).) Thus, the collection of DNA samples is not authorized based solely on the commission of a misdemeanor. (*Alejandro N. v. Superior Court (San Diego)*(2015) 238 Cal.App.4th 1209, 1226-1227 (pet. rev. den. 10/14/2015) ["*Alejandro N.*"].)

Here, C. H. took a pair of $46.00 jeans from a store and now stands guilty of a misdemeanor petty theft, section 490.2, as a result of a petition filed pursuant to section 1170.18. The collection and retention of his DNA sample stems not from this misdemeanor offense but from C.H.'s provision of a DNA sample resulting from his felony offense prior to its reclassification.

With the passage of Proposition 47 the electorate determined that petitioner's behavior in this case was a low-level crime that merited misdemeanor treatment and reduced punishment. While the collection of a DNA sample is not penal in nature, it is a disability resulting from the felony treatment of petitioner's offense which will follow

petitioner throughout his adult life absent expungement. Retention of petitioner's DNA sample under these circumstances is an unwarranted disability for a misdemeanor, including reclassified misdemeanors, under section 1170.18.

In the case at bar the Court of Appeal found that the redesignation of a felony offense as a misdemeanor pursuant to section 1170.18 had no effect on previously obtained DNA. The Court reasoned that the original felony status of the offense with its required DNA submission did not change when the felony was reclassified as a misdemeanor "for all purposes" pursuant to section 1170.18, subdivision (k). (Opinion of the Court, pp. 1-2, 4, 8.) Further, the Court held that the DNA expungement provisions of the DNA Act controlled over the more general provisions of Proposition 47. (Opinion of the Court, pp. 2, 8.) The Court concluded that the retention of petitioner's DNA sample after redesignation as a misdemeanor supported the purpose of both Proposition 47 and 69 to protect public safety. (Opinion of the Court, pp. 2, 8-10.) The Court also held there was no equal protection violation stemming from the retention of petitioner's DNA. (Opinion of the Court, pp. 10-12.)

The Court of Appeal agreed with the holding in *In re J.C.* (2016) 246 Cal.App.4th 1462 (pet. rev. den. 8/10/2016) on the DNA expungement issue [affirming juvenile court order denying expungement of DNA following reclassification pursuant to Proposition 47 and relying on the recent amendment to section 299, subdivision (f) prohibiting the juvenile court from relieving the requirement to submit DNA]. The Court of Appeal disagreed with *Alejandro N. v. Superior Court (San Diego)*, *supra*, 238 Cal.App.4th 1209 [finding redesignation of a felony as a misdemeanor under section 1170.18 requires

expungement of an offender's DNA and profile from the state database]. (Opinion of the Court, p. 10.)

See also *In re C. B.* (August 30, 2016, A146277) ___ Cal.App.4th ___ (WL 4529208) (Jenkins, J.) an Opinion of the First District Court of Appeal, Division Three, following *In re J.C., supra*, 246 Cal.App.4th 1462.

The Court's Opinion in this case is in conflict with the decision of the Fourth District Court of Appeal, Division One, in *Alejandro N. v. Superior Court (San Diego), supra,* 238 Cal.App.4th 1209 and with Justice Pollak's Dissent in *In re C. B., supra,* ___ Cal.App.4th ___, supporting DNA expungement and citing with approval *Alejandro N. v. Superior Court (San Diego), supra,* 238 Cal.App.4th 1209.

Petitioner's case is just one example of the confusion and inconsistent decisions that have issued in the California trial courts and courts of appeal on the important question of law whether a juvenile with a qualifying offense for DNA submission under Proposition 69 which is redesignated as a misdemeanor pursuant to Proposition 47 is entitled to have his DNA expunged.

Thus, this Court now has before it a case which presents for resolution the type of question which will permit the Court to secure uniformity of decisions and to settle an important question of law. (Cal. Rules of Court, rule 8.500, subd. (b) (1).)

STATEMENT OF THE CASE

On April 19, 2011, Clayton H., petitioner here, was charged with a second degree robbery (sec. 211/212.5, subd. (c)) and an assault by force likely to produce great bodily injury (sec. 245, subd. (a)). (CT 1-3.) On July 15, 2011, petitioner admitted committing

an amended count three, felony grand theft. (Sec. 487, subd. (c).) (CT 22.)

The disposition hearing took place on August 19, 2011. (CT 25-27.) Wardship was declared with no termination date. (CT 25.) A $500.00 restitution fine was imposed. (CT 26.) Pursuant to section 296.1 petitioner was required to submit to the collection of specimens, samples and print impressions. (CT 26.)

On June 5, 2015 petitioner filed a petition for modification pursuant to Welfare and Institutions Code section 778 based on the voter initiative Proposition 47, now part of the Penal Code at section 1170.18. The petition sought reduction of petitioner's felony grand theft offense (sec. 487, subd. (c)) to a misdemeanor petty theft where the loss amounted to less than $950.00. (Sec. 490.2) (CT 100-101.)

Petitioner requested recalculation of his confinement time to six months, his fine to an amount in accordance with the misdemeanor offense, and expungement of his DNA from the state database. (CT 100-101.)

The court granted petitioner's petition in all respects except the DNA expungement request. Petitioner's offense was reduced to a misdemeanor petty theft (sec. 490.2), his fine reduced to $50.00 and his maximum time recalculated to six months. (CT 104; RT pp. 2-4.)

The parties stipulated that the briefing, argument and the court's decision from the Santino-B-W matter, J13-01068, heard by the court on June 4, 2015, would be incorporated into the decision in petitioner's case.[4] (CT 105, RT 4.) The court denied

[4] Petitioner's request for judicial notice of the briefing in the Santino B-W case was granted. (Opinion of the Court, p. 2, n. 3.)

petitioner's DNA request on the basis of the arguments and decision made in the Santino B-W. case. (RT 4; RT 6/4/2015 pp. 1-21 [hearing on petition in Santino-B-W matter, J13-01068].)

On August 14, 2015, petitioner filed a motion for reconsideration of the court's denial of his DNA request based on the recent case, *Alejandro N. v. Superior Court (San Diego)*, *supra*, 238 Cal.App.4th 1209. (CT 117-118.) The parties again agreed to submit petitioner's request on the pleadings and arguments presented in another juvenile case heard by the court, the Lamont P. case, J12-00947, including the prosecution brief in the matter of Jaelonda C., J12-00416. (RT 8; CT 124-126 [Jaelonda C. brief].) On August 25, 2015, the court denied petitioner's reconsideration request without prejudice. (CT 121; RT 8-9; RT 8/25/2015 pp. 1-11 [hearing on reconsideration request on DNA denial in Lamont P. case, J12-00947].)

A timely notice of appeal was filed on August 27, 2015. (CT 129-130.) On August 30, 2016, the Court of Appeal filed its Opinion in this case in which it affirmed the juvenile court's denial of petitioner's request to expunge his DNA sample. (Appendix A, Opinion of the Court at pp. 1-2, 10.)

STATEMENT OF FACTS

On January 26, 2011, petitioner and two friends went into the Kohl's Department Store in Brentwood, California. According to the loss prevention officer, Michael Pardini, the boys left Kohl's with merchandise that was not paid for. Clayton selected a pair of $46.00 jeans, went into a dressing room, then left the store through a different exit wearing the jeans. (CT 31.)

A fight ensued between petitioner's two friends and a loss prevention officer who tried to stop the boys outside Kohl's. (CT 31, 32, 33.) During the fight Clayton approached wearing the jeans. Clayton kicked Pardini in the forehead. All three boys rode away on their bicycles. (CT 32, 34.)

Clayton was arrested a few weeks later. (CT 32.) He said that his sister worked at Kohl's and he planned to put a pair of jeans on hold at the register so his sister could buy the jeans with her employee discount. (CT 34.) While in the dressing room Clayton got a call from one of his friends saying a loss prevention officer had stopped him outside. Clayton panicked and accidentally left the store wearing the jeans. (CT 34.)

Neither Kohl's nor Mr. Pardini sought restitution in this matter. (CT 33.)

ARGUMENT

I. THE RECLASSIFICATION PROCEDURES OF PROPOSITION 47 ALTER A CRIME'S STATUS AS A FELONY TO A MISDEMEANOR OFFENSE, THEREBY REQUIRING THE EXPUNGEMENT OF A RECLASSIFIED MISDEMEANANT'S DNA SAMPLE.

A. Background And Standard Of Review.

The original basis for DNA collection in petitioner's case was Penal Code 296, subdivision (a), due to a felony adjudication for grand theft. That felony adjudication no longer exists – it has been re-designated as a misdemeanor "for all purposes." (Sec. 1170.18, subd. (k).) If petitioner were adjudicated today, Penal Code 296, subdivision (a) would not apply. (Sec. 296.)

Proposition 47 does not contain an exception to the DNA collection and retention rules for offenders whose offense has been reclassified as a misdemeanor under its provisions. Therefore lawful authority no longer exists to collect or retain petitioner's DNA sample. When petitioner's offense was reclassified as a misdemeanor, the juvenile court was also required to order petitioner's sample expunged. It was error for the Court of Appeal to affirm the juvenile court's order denying expungement.

This is a question of statutory interpretation and so this Court reviews the decision of the juvenile court de novo. (*People v. Taylor* (1992) 6 Cal.App.4th 1084, 1090-1091.)

B. Petitioner's Reclassified Offense Is Now A Misdemeanor For All Purposes Thereby Requiring The Expungement Of His DNA Sample.

The Court's Opinion in petitioner's case is flawed. The collection of DNA samples is not authorized based solely on the commission of a misdemeanor, including petty theft. (Sec. 296; *Alejandro N. v. Superior Court (San Diego)*, *supra*, 238 Cal.App.4th at pp. 1226-1227, *Coffey v. Superior Court* (2005) 129 Cal.App.4th 809, 818; *In re J.C.*, *supra*, 246 Cal.App.4th at p. 1470.)

Alejandro N. held that section 1170.18, subdivision (k) provided that once reclassified, the affected offense shall be treated exactly like any other misdemeanor offense. Pursuant to section 1170.18 the offense is deemed a misdemeanor for all purposes except for firearms restrictions, and so the Court found Alejandro N. was entitled to an order expunging his DNA. The Court found that because only the firearm restriction was included as an exception to the misdemeanor reclassification, "the enactors effectively directed the courts not to carve out other exceptions to the misdemeanor treatment of the reclassified offense absent some reasoned statutory or constitutional basis for doing so." (*Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at p. 1227.)

Instead, the Court of Appeal in petitioner's case added an additional exception, that petitioner's DNA should be retained, to the reclassified misdemeanor treatment of his offense. (Opinion of the Court, p. 10.)

In concluding that section 1170.18 did not require DNA expungement for reclassified misdemeanors the Court of Appeal initially observed that "[a]ll of

Proposition 47, including section 1170.18, is silent on whether the redesignation of a felony as a misdemeanor requires that a defendant's DNA be expunged" (Opinion of the Court, p. 4.)

The Legislature presumably was aware of the then-existing DNA expungement provisions of the Penal Code and enacted Proposition 47 in light of this knowledge. The Court in *In re C. B., supra*, ___ Cal.App.4th ___ recognized that "[w]e decline to read any significance into the Legislature's silence on [another] matter. (See *People v. Harrison* (1989) 48 Cal.3d 321, 329 ['The Legislature . . . is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof.']" (*In re C. B., supra*, ___ Cal.App.4th ___ at p. 15, n. 7.)[5] Likewise, it is not possible to determine the significance of legislative silence on the issue of DNA expungement in Proposition 47.

1. Section 17 And Section 1170.18 Are Not Analogous.

The Court of Appeal disagreed with *Alejandro N.'s* interpretation of the statutory language "for all purposes". The Court analogized to section 17, subdivision (b) which employs similar language in finding that the phrase "a misdemeanor for all purposes" has "a well-defined meaning that does not relate back to alter a crime's original status for events occurring before the crime was reduced to a misdemeanor." (Opinion of the Court, p. 4.)

The Court of Appeal reasoned that

[5] The citations to *In re C. B.* are to the 17 page Opinion of the Court and 13 page Dissenting Opinion by Justice Pollak.

> because Proposition 47 and section 17 both address the effect to be given the redesignation of a felony (or a wobbler that starts out as a felony) as a misdemeanor, we are presumptively obligated to construe the phrase 'misdemeanor for all purposes' under Proposition 47 to mean the same as it does under section 17-namely, that a felony offense redesignated as a misdemeanor under Proposition 47 retains its character as a felony prior to its designation, and is treated as a misdemeanor only after the time of designation.

(Opinion of the Court, pp. 5-6.)

The Court thus held that the reclassification to a misdemeanor offense under Proposition 47 precluded expungement of petitioner's DNA sample. (Opinion of the Court, pp. 5-6.)

While the two code sections employ similar language, "for all purposes", the effect of the language is not the same. Under section 17, subdivision (b), when an offense is reduced from a felony to a misdemeanor, the offense is thereafter deemed a misdemeanor offense. The original offense remains a felony offense. (*People v. Park* (2013) 56 Cal.4th 782, 795.) When a felony offense is reclassified under section 1170.18 the nature of the offense is changed from a felony to a misdemeanor.

The Court explained in *Alejandro N.* that the reclassification of a felony offense under section 1170.18 removes the offense from the felony category permanently. It is as though the felony offense never occurred making DNA collection and retention unavailable. (*Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at p. 1230.

Justice Pollak, Dissenting in *In re C. B., supra*, ___ Cal.App.4th ___ agreed with *Alejandro N.* Justice Pollak pointed out that, under section 17, reduction of a wobbler offense to a misdemeanor offense requires a court to exercise discretion in determining

that the circumstances of a particular case justify treatment of the offense as less serious than a felony. (*Id.* at p. 6.) However, the plea or finding remains a felony offense. (*Ibid.*) In contrast, under section 1170.18, upon reclassification of a felony offense to a misdemeanor, the nature of the offense changes and the offense is removed from the felony category. (*Id.* at pp. 6-7, citing *Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at p. 1230.)

The Court of Appeal in petitioner's case observed that the language "for all purposes" should be accorded the same interpretation when used in statutes that "cover the same or an analogous subject matter." (Opinion of the Court, p. 5.) However, section 17 and Proposition 47 do not cover the same or analogous subject matters. Section 17 directs the court to exercise its discretion to determine if a particular offender and offense merit reduction of a felony to a misdemeanor. With Proposition 47 the voters enacted a statutory scheme where less serious felony crimes were determined to merit misdemeanor treatment and penalties were reduced accordingly. Assuming the offender qualified, the reclassification under section 1170.18 is automatic as it was in petitioner's case. (Sec. 1170.18, subds. (f), (g).)

Moreover, the language of section 1170.18, subdivision (k) is not completely identical to the language used in section 17 to describe the effect of a judicial declaration that a wobbler offense-which is punishable as a felony until designated a misdemeanor-is to be considered a misdemeanor. (See sec. 17, subds. (b) [where a crime is a wobbler, "it is a *misdemeanor for all purposes*...(b) (1) after judgment . . . .(b) (2) When the court, upon committing the defendant to the Division of Juvenile Justice, designates the offense

to be a misdemeanor (b) (3) When the court grants probation to a defendant . . . and declares the offense to be a misdemeanor]; and sec. 1170.18, subd. (k) ["[a]ny felony conviction that is . . . designated as a misdemeanor under subdivision (g) *shall be considered a misdemeanor for all purposes*" except firearms restrictions on resentencing.])

In section 1170.18, subdivision (k) the word "shall" makes the misdemeanor designation "for all purposes" mandatory. The word "shall" does not appear in section 17 because it is a discretionary choice made by the trial court.

2. Redesignation Under Section 1170.18 Does Not Relate Back To Change The Nature Of The Plea Or Conviction At The Time It Occurred.

The Court of Appeal here stated that the "triggering event for the obligation to provide a sample for the state's DNA database is a conviction or plea. . . .Because the obligation to contribute DNA arises from a conviction or plea, the substance of an application for expungement under section 1170.18 must be predicated on the theory that redesignation as a misdemeanor relates back to change the nature of a previous plea or felony conviction *when it occurred.*" (Opinion of the Court, p. 6; italics in original.)

The analysis by the Court is erroneous. The application for expungement under section 1170.18 is not predicated on the theory that redesignation relates back to change the nature of a previous plea or felony conviction at the time it occurred.

Petitioner's request seeks ongoing misdemeanor treatment of his reclassified offense. Petitioner' request for expungement does not challenge his earlier plea to a felony offense or the validity of the order requiring him to provide his DNA sample.

Petitioner does not seek to retroactively change his felony plea or to invalidate an order correctly entered. Justice Pollak, Dissenting in *In re C. B.,* explains:

> [The minor] contends that although he was correctly ordered to provide the sample, now that his offense has been reclassified as a misdemeanor pursuant to section 1170.18 he no longer has been convicted of a qualifying offense and therefore he is entitled to have his specimen removed from the database. He does not seek retroactive application of section 1170.18 but prospective application to his request for expungement. The distinction parallels the distinction that has been made in interpreting section 17. The "for all purposes" phrase in section 17 does not mean that an enhancement in another case based upon the defendant having previously been convicted of a wobbler charged as a felony should be set aside when the wobbler offense is later sentenced under section 17 as a misdemeanor. (*People v. Park, supra,* 56 Cal.4th at p. 802. . . . However, the "for all purposes" requirement does mean that the offense cannot be used prospectively to impose a new enhancement based on the offense having previously been designated as a felony. (*Park*, p. 804. . . . That is the same distinction that has been recognized in recent cases applying section 1170.18, rejecting applications to set aside enhancements previously imposed based on an offense that was formerly but is no longer classified as a felony, [footnote omitted] but holding that prospectively offenses reclassified under section 1170.18 cannot be treated as a felony to impose new enhancements. (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 747 . . . .) Similarly, in the present case minor seeks only prospective application of section 1170.18.

(In re C. B., supra, ___ Cal.App.4th ___ dis. opn. of Pollak, J., at pp. 10-11.)

The Court of Appeal noted that the appeal of a redesignated offense lies with the Court of Appeal precisely because the redesignation "does not retroactively convert the offense to a misdemeanor at the time of charging, which is the relevant point in time for determining where an appeal lies. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1110-1111; *People v. Rivera* [(2015) 233 Cal.App.4th 1085] at pp. 1096-1097, 1099-1100." (Opinion of the Court, p. 6.) However as Justice Pollak demonstrates, the request for redesignation to a misdemeanor seeks prospective misdemeanor treatment of a

reclassified offense. The nature of a previous plea or felony conviction is unchanged. Thus, an appeal may lie in the Court of Appeal.

Proposition 47 requires the expungement of a reclassified misdemeanant's DNA sample. Accordingly, the Court of Appeal erred in affirming the juvenile court's order denying DNA expungement in petitioner's case. Petitioner respectfully requests that his Petition for Review be granted

C. Proposition 69's Specific DNA Provisions Do Not Require The Retention Of A Reclassified Misdemeanant's DNA Sample.

The Court of Appeal held that Proposition 47 can be harmonized with Proposition 69, California's DNA Act, codified at sections 295-302.2, but if there is a conflict between the two, Proposition 69's more specific measures control. (Opinion of the Court, pp. 1-2, 7-8.)

The Court of Appeal is in error when it states the two propositions can be harmonized. Propositions 69 [the DNA Act focused on identifying criminals and crime-solving] and 47 [the Safe Neighborhoods Act focused on reducing punishment for low level theft and drug offenses] do not address the same subject matter. Although both are part of the Penal Code, section 299 is found at Part 1 "Of Crimes and Punishment" and section 1170.18 is found at Part 2 "Of Criminal Procedure". The intent of the voters, the goals of the respective Propositions and the subjects addressed by the Propositions are different. The statutes cannot be harmonized.

It makes no sense to suggest that Proposition 69's more specific provisions on a different subject matter - DNA expungement/retention - override or control the general

provisions of Proposition 47 which clearly states the voters' intent to reduce punishment for low-level crimes.

"An interpretation which is repugnant to the purpose of the initiative would permit the very 'mischief' the initiative was designed to prevent. [Citation.] Such a view conflicts with the basic principle of statutory interpretation, . . . that provisions of statutes are to be interpreted to effectuate the purpose of the law." [Citation omitted.] (*McLaughlin v. Santa Barbara Board of Education* (1993) 75 Cal App.4th 196, 223.) Hence, the Court of Appeal is incorrect.

1. Section 299, Subdivisions (a) and (b).

In support of its argument that the specific provisions of Proposition 69 control over the general provisions of Proposition 47 the Court of Appeal cites section 299, subdivisions (a) and (b)[6] of the DNA Act. Subdivision (b) describes the circumstances

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[6] Section 299 states:
(a) A person whose DNA profile has been included in the databank pursuant to this chapter shall have his or her DNA specimen and sample destroyed and searchable database profile expunged from the databank program pursuant to the procedures set forth in subdivision (b) if the person has no past or present offense or pending charge which qualifies that person for inclusion within the state's DNA and Forensic Identification Database and Databank Program and there otherwise is no legal basis for retaining the specimen or sample or searchable profile. [¶] (b) Pursuant to subdivision (a), a person who has no past or present qualifying offense, and for whom there otherwise is no legal basis for retaining the specimen or sample or searchable profile, may make a written request to have his or her specimen and sample destroyed and searchable database profile expunged from the databank program if any of the following apply: [¶] (1) Following arrest, no accusatory pleading has been filed within the applicable period allowed by law, charging the person with a qualifying offense as set forth in subdivision (a) of Section 296 or if the charges which served as the basis for including the DNA profile in the state's DNA and Forensic Identification Database and Databank Program have been dismissed prior to adjudication by a trier of fact; [¶] (2) The underlying conviction or disposition serving as the basis for including the DNA profile has been reversed and the case dismissed; [¶] (3) The person has been found factually innocent of the underlying offense pursuant to Section 851.8, or Section 781.5 of the Welfare and Institutions Code; or [¶] (4) The defendant has been found not guilty or the defendant has been acquitted of the underlying offense.

under which DNA may be expunged, but the Court observed that petitioner did not fall within any of the circumstances set forth. (Opinion of the Court, pp. 6-7.) While this is true, the circumstances resulting from the enactment of Proposition 47 did not exist at the time section 299, subdivision (b) was promulgated.

Justice Pollak observed:

> Section 299, subdivision (a) provides that a person has the right to have his or her DNA specimen expunged from the databank pursuant to the procedures specified in subdivision (b) "if the person has no past or present offense or pending charge which qualifies the person for inclusion within" the databank. The reclassification of minor's offense thus brings him or her within the scope of section 299, subdivision (a), even though the circumstances creating the right to expungement are not within those specified in subdivision (b). Both [*Alejandro N.* and *Coffey v. Superior* Court (2005) 129 Cal.App.4th 809] recognize that section 299 does not provide exclusive authority for removing a specimen from the databank that does not belong there. (*Alejandro, supra*, 238 Cal.App.4th at pp. 1228-1229; *Coffey, supra,* 129 Cal.App.4th at p. 817.) When section 299 was originally enacted, the alternatives specified in subdivision (b) were virtually the only possible scenarios by which a person's DNA sample could have been included in the databank even though the person was not convicted of a qualifying offense. By changing what formerly was a qualifying offense into a nonqualifying offense, Proposition 47 has created a new situation in which this is now possible. There is no good reason why a person whose offense, by virtue of Proposition 47, has been determined to be a nonqualifying offense, should not be entitled to expungement in the same manner as those within the categories specified in subdivision (b).

(In re C. B., supra, ___ Cal.App.4th ___ dis. opn. of Pollak, J., at p. 12.)

The Court in *Alejandro N.* also rejected the argument adopted by the Court of Appeal in petitioner's case that expungement was not available to reclassified misdemeanants under Proposition 47 because it is not listed as a ground for DNA expungement in section 299.

> Section 299 provides for DNA expungement when a person "*has no past or present offense or pending charge which qualifies* that person for inclusion within" the DNA databank, and then lists several circumstances that provide the basis for an expungement request. (§ 299, subds. (a), . . . (b), italics added.) . . . In these circumstances, the charged offense retains its qualification for DNA collection, but expungement of the DNA is warranted because the particular defendant is not guilty of that offense. In contrast here, under Proposition 47 *the reclassified misdemeanor offense itself no longer qualifies as an offense permitting DNA collection.* This circumstance is outside the matters contemplated by the Penal Code DNA expungement statute. There is nothing in section 299 that obviates section 1170.18's broad directive that, except for firearm restrictions, redesignated offenses are misdemeanors for all purposes, and they are therefore disqualified for DNA sample retention. (See, e.g., *In re Nancy C.* (2005) 133 Cal.App.4th 508, 510-512. . . .)

(*Alejandro N. v. Superior Court (San Diego)*, *supra*, 238 Cal.App.4th at pp. 1228-1229; italics in original.)

In citing this analysis Justice Pollak stated "I believe the reasoning in *Alejandro* is unassailable." *(In re C. B.*, *supra*, ___ Cal.App.4th ___ dis. opn. of Pollak, J., at pp. 4-5.)

2. Section 299, subdivision (f).

In further support of its opinion that Proposition 69 controls here the Court of Appeal also cites section 299, subdivision (f) which was recently amended by AB 1492. (Opinion of the Court, p. 7) AB 1492 added section 1170.18 to the list of statutes that do not authorize a judge to relieve a person of the duty to provide a DNA sample. Beginning January 1, 2016, section 299, subdivision (f) now states:

> Notwithstanding any other law, including Sections 17, 1170.18, 1203.4, and 1203.4a, a judge is not authorized to relieve a person of the separate administrative duty to provide specimens, samples, or print impressions required by this chapter if a person has been found guilty or was adjudicated a ward of the court by a trier of fact of a qualifying offense as defined in subdivision (a) of Section 296, or was found not guilty by reason of insanity or pleads no contest to a qualifying offense as defined in subdivision (a) of Section 296.

(AB 1492, Sec. 5, subd. (f); sec. 299, subd. (f).)

The language of the amendment does not refer to expungement but to the "duty to provide" a sample. This refers to the situation where a person has yet to submit a DNA sample. The duty to provide a DNA sample described in AB 1492 is *not* the equivalent of DNA expungement or the preclusion thereof.

Justice Pollak concurred stating:

> [i]t is doubtful that this amendment bears upon the right to an expungement. Section 299, subdivision (f) precludes the court from "reliev[ing] a person of the separate administrative duty to *provide*" a specimen if found to have committed a qualifying offense. (Italics added.) Unlike all other subdivisions of section 299, which address the right to have one's "DNA specimen and sample destroyed and searchable database profile expunged from the databank program" (sec. 299, subds. (a), (b), (c)(1), (c)(2), (d), (e)), subdivision (f) refers to "provid[ing]" a sample and says nothing about expungement.

(In re C. B., supra, ___ Cal.App.4th ___ dis. opn. of Pollak, J., at pp. 7-8.)

Justice Pollak also notes that *In re J.C., supra,* 246 Cal.App.4th 1462 recognized this distinction:

> The opinion in *J.C.* acknowledges that the language of section 299, subdivision (f) "standing alone, appears to prohibit courts only from preventing the provision of a DNA sample, rather than prohibiting expungement of the record of a sample already provided." (*J.C., supra,* 246 Cal.App.4th at p. 1472.) However, the opinion then concludes that the provision was also intended to preclude expungement based on the inclusion in subdivision (f) of reference to sections 17, 1203.4 and 1203.4a that relate to offenses which in all events would require providing a DNA sample to the databank. Whatever the logic of this inference, there is no suggestion that the language of subdivision (f) is ambiguous. "Providing" a DNA specimen obviously is not the same as "destroying" or "expunging" a specimen. In construing a statute, "[w]e look first to the words of the statute, 'because the statutory language is generally the most reliable indicator of legislative intent.'" (*Klein v. United States of America* (2010) 50 Cal.4th 68, 77.) "If the statutory language is unambiguous, 'we presume the Legislature meant what it said, and the plain meaning of the statute governs.' " (*People v. Toney* (2004) 32 Cal.4th 228, 232.) *J.C.* impermissibly rewrites the words of subdivision (f).

(*In re C. B.*, *supra*, ___ Cal.App.4th ___ dis. opn. of Pollak, J. at p. 8, n. 7.)

Further, the provisions of section 299 which regulate who may request DNA expungement or which describe when expungement is prohibited were not amended by AB 1492. (AB 1492, sec. 5; sec. 299, subds. (b) and (e).) Accordingly, the Court of Appeal is incorrect. The amendment to section 299, subdivision (f) relating to DNA collection does not change the court's duty to order expungement after a successful reclassification of an offense to a misdemeanor under section 1170.18.

The Court of Appeal found it "odd at best" that Proposition 47's "general directive that a redesignated felony is 'a misdemeanor for all purposes' compels expungement of DNA originally obtained as a result of a qualifying conviction or plea" pursuant to the provisions of Proposition 69. (Opinion of the Court, p. 7.) Even so, the Court recognized that section 299 does not provide exclusive authority for removing DNA that does not belong in the database. (Opinion of the Court, p. 7, n. 5, citing *Coffey v. Superior Court*, *supra*, 129 Cal.App.4th at p. 817; and see *In re C. B.*, *supra*, ___ Cal.App.4th ___ dis. opn. of Pollak, J., at p. 12.)

The Court of Appeal conclusion that after construing the two statutes, the more specific laws addressing DNA collection and expungement, sections 296 and 299, "trump section 1170.18" is erroneous. (Opinion of the Court, p. 8.) The reclassification procedure under Proposition 47 results in a misdemeanor offense that does not qualify as an offense permitting DNA collection. This circumstance is outside the matters contemplated by Proposition 69. See *Alejandro N.*, *supra*, 238 Cal.App.4th at p. 1229; and see *In re C. B.*, *supra*, ___ Cal.App.4th ___ dis. opn. of Pollak, J., at p. 5.

Based on the foregoing, petitioner respectfully requests that his Petition for Review be granted.

D. Interpreting AB 1492 to Preclude DNA Expungement for Reclassified Offenses Unconstitutionally Amends Proposition 47 and is Inconsistent With the Intent of the Initiative.

In light if its interpretation of Propositions 47 and 69 the Court of Appeal did not consider whether AB 1492 is a change or clarification of existing law, is impermissibly retroactive or is an unconstitutional amendment of Proposition 47. (Opinion of the Court, p. 7, n. 4 and p. 10, n. 6.) Although the Court of Appeal did not consider this issue petitioner contends that AB 1492 unconstitutionally amends Proposition 47. AB 1492 substantially changed the legal consequences of the reclassification provisions of Proposition 47 and upset voter expectations by drafting an additional "exception" to prohibit DNA expungement for crimes reclassified as misdemeanors pursuant to Proposition 47.

The amendment to section 299, subdivision (f) postdates the reclassification petition and order in this case. Thus, the amendment may not be applied to require retention of petitioner's DNA.

The California Constitution limits the Legislature's power to amend an initiative statute. (Cal. Const. art. II, sec. 10, subd. (c).) "When a statute enacted by the initiative process is involved, the Legislature may amend it only if the voters specifically gave the Legislature that power, and then only upon whatever conditions the voters attached to the Legislature's amendatory powers." (*Proposition 103 Enforcement Project v. Charles Quackenbush* (1998) 64 Cal.App.4th 1473, 1483-1484.)

Proposition 47 allows amendment by a two-thirds vote of the members of each house of the Legislature and signed by the Governor, "so long as the amendments are *consistent with and further* the intent of this act." (Prop. 47, sec.15. Italics added.)

Adding an exception to the misdemeanor treatment of reclassified offenses is an amendment to Proposition 47. An amendment has been described as "a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision." (*People v. Cooper* (2002) 27 Cal.4th 38, 44; *People v. Kelly* (2010) 47 Cal.4th 1008, 1027.) An amendment does not have to be literally called an amendment or directly alter the Proposition itself in order to have that effect. (See *People v. Armogeda* (2015) 233 Cal.App.4th 428, 435 and see *People v. Kelly, supra,* 47 Cal.4th at p. 1014.)

In deciding whether a particular provision amends Proposition 47, "we simply need to ask whether it prohibits what the initiative authorizes or authorizes what the initiative prohibits." (*People v. Superior Court* (*Pearson*) 48 Cal.4th 564, 571.)

If DNA expungement is precluded by the amended section 299, subdivision (f), the amendment prohibits what Proposition 47 authorizes – the treatment of reclassified offenses as misdemeanors for all purposes except firearms restrictions. (Sec. 1170.18, subd. (k).) Further, the amendment to section 299, subdivision (f) authorizes the retention of DNA samples from reclassified offenders – something Proposition 47 prohibits. (*Ibid.*) It effectively adds another exception to the treatment of reclassified offenses which changes the scope and effect of Proposition 47. Thus, it "prohibits what the initiative

authorizes or authorizes what the initiative prohibits." (*People v. Superior Court (Pearson), supra*, 48 Cal.4th at p. 571.)

To construe section 299, subdivision (f) to prohibit expungement of reclassified offenses is unmistakably against the intent of the initiative enactors. Proposition 47 changed portions of the Penal Code and Health and Safety Code to reduce various drug possession and theft-related offenses from felonies (or wobblers) to misdemeanors, unless committed by certain eligible offenders. (*Alejandro N., supra,* 238 Cal.App.4th at p. 1222; *People v. Rivera, supra*, 233 Cal.App.4th 1085, 1091.)

To ensure the intent of the initiative was carried out the voters required resentencing for those previously convicted of reclassified crimes and provided a procedure for applying to the court for reclassification. (See Prop. 47, sec. 14, adding sec. 1170.18 to the Penal Code.) Thus the voters' broad directive was to reduce the severity of the treatment and consequences for these crimes. Therefore, retaining felony level treatment by allowing retention of DNA samples for crimes that will not be felonies in the future does not comply with the will of the voters.

If interpreted to prohibit expungement AB 1492 will amend Proposition 47 by modifying the directive that reclassified offenses be treated as misdemeanors for all purposes except firearms restrictions. The voters determined that collection and retention of DNA for these less serious crimes was not warranted and did not include it as part of the initiative. The omission of DNA retention as an exception to the treatment of reclassified offenses as misdemeanors was intentional. (See *Alejandro N., supra,* 238 Cal.App.4th at pp. 1227-1228.) The *Alejandro N.* court correctly held that DNA

expungement for reclassified offenses was permissible and warranted under the law. AB1492 does not affect that holding.

Justice Pollak agreed with this analysis:

> Although section 1170.18, subdivision (k)-part of Proposition 47-provides that offenses reclassified as a misdemeanor pursuant to section 1170.18 shall be treated as a misdemeanor for all purposes, the amendment to section 299, so construed, would treat a reclassified offense as a felony precluding expungement rather than as a misdemeanor entitling the defendant to expungement. . . . If the amendment to section 299 is construed to treat a reclassified offense as a felony rather than as a misdemeanor for the purpose of determining the right to expungement, the amendment would be inconsistent with the intent of Proposition 47, and therefore invalid.
>
> In *J.C.* the court found no inconsistency between this understanding of the amendment and the initiative, reasoning that Proposition 47 "does not clearly either require or prohibit expungement of the records of previously provided DNA samples." (*J.C., supra,* 246 Cal.App.4th at p. 1483.) However, section 1170.18, subdivision (k) provides that the redesignated offense shall be treated as a misdemeanor "for all purposes" and one such purpose clearly is determining whether the offender is entitled to have his or her DNA sample expunged from the databank. The initiative explicitly excepted from "all purposes" the application of firearm restrictions but contains no such exception for application of the DNA sampling provisions. For those purposes, therefore, Proposition 47 requires the offense to be treated as a misdemeanor, requiring expungement. If the amendment to section 299, subdivision (f) is construed to prohibit expungement, the section would prohibit what Proposition 47 authorizes. So construed, the amendment therefore would be invalid. (*People v. Superior Court* (*Pearson*), *supra*, 48 Cal.4th at p. 571.)

(In re C. B., supra, ___ Cal.App.4th ___ dis. opn. of Pollak, J., at pp. 8-9 and see footnotes therein.)

At two points the electorate indicated that Proposition 47 was to be "broadly" and "liberally" construed to accomplish and effectuate its purposes. (Proposition 47, secs. 15, 18.) There is nothing in the ballot summaries or arguments suggesting that the voters did

not intend that the plain language of subdivision (k) was subject to the qualification now found by the Court of Appeal.

As an initiative, Proposition 47 is to be construed to effectuate its purpose to reduce punishment for low-level offenders, not to conform to the unwritten intent the Court of Appeal gives to it to retain the original felony status for purposes of DNA retention. (See *People v. Arroyo* (2016) 62 Cal.4th 589, 597; *People v. Superior Court (Pearson)*, *supra*, 48 Cal.4th 564, 571.)

All doubts must be resolved in favor of the initiative. (See *Legislature v. Eu* (1991) 54 Cal.3d 492, 512.) " '[W]e may not properly interpret [Proposition 47] in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.' " (*People v. Park*, *supra*, 56 Cal.4th 782, 796.)

Review is respectfully requested.

E. Expungement Of DNA For Reclassified Misdemeanants Supports Public Policy.

The Court of Appeal found that its interpretation of the two propositions "was faithful to the public policy and purposes expressed in and supporting both initiative measures." (Opinion of the Court, p. 8.) The Court of Appeal is incorrect.

Justice Pollak points out the relevant public policy here is that Proposition 69, a crime solving and identification initiative, intended the state database to include DNA samples from persons who committed felonies and only certain misdemeanors. (Sec. 295, et seq.) Proposition 69 did not intend to include persons convicted of any misdemeanor. (See sec. 296.) Justice Pollak explains:

> [T]he interest in crime solving, the reason for the DNA databank, provides no support for retaining the DNA of a person whose offense has been reduced to a misdemeanor under Proposition 47. Given the dichotomy drawn by the databank statute between felonies and (most) misdemeanors, the implementation of the policy choice made by the Legislature dictates removal from the databank of a DNA sample from a person who has committed what has now been classified as a (non-sex or arson) misdemeanor. The databank statute reflects the policy determination that persons convicted of less serious offenses-most misdemeanors-need not have their DNA sample included in the databank, and Proposition 47 has established that certain offenses previously classified as felonies are less serious and are now misdemeanors for all purposes. No reason has been suggested why in light of these policies, DNA from persons convicted of a nonqualifying misdemeanor in the future should be excluded from the databank, but DNA from persons previously convicted of the same offense should be retained in the databank. Whatever ambiguity there may be in the meaning of section 299, subdivision (f), or uncertainty concerning the validity of the amendment to that provision, should be resolved in favor of upholding the policy decisions reflected in the databank statute and in Proposition 47.

(In re C. B., supra, ___ Cal.App.4th ___ dis. opn. of Pollak, J., at pp. 12-13.)

Therefore, denying petitioner's request to expunge his DNA after reclassification pursuant to section 1170.18 does not support the public policy goals expressed in both Proposition 47 and 69. A grant of review is requested.

II. RETENTION OF PETITIONER'S DNA SAMPLE WILL VIOLATE THE EQUAL PROTECTION CLAUSES OF THE CALIFORNIA AND FEDERAL CONSTITUTIONS.

Section 1170.18, subdivision (a), the mechanism which provides for the application of Proposition 47, puts offenders who committed their crimes prior to November 5, 2014, in the same position as offenders who commit the same crimes after the initiative's passage. (Sec. 1170.18, subd. (a).) Petitioner would not have been required to submit a DNA sample if Proposition 47 was in effect at the time he committed his offense. Removal of his DNA from the state database is required in order to effectuate the

mandate that he be treated similarly to an offender who committed the same crime after passage, and that the new misdemeanor adjudication be considered a misdemeanor for all purposes except firearms possession.

Allowing petitioner's DNA sample to remain in the state database violates the equal protection clauses of the state and federal constitutions. (Cal. Const., art. I, sec. 7, subd. (a); U.S. Const., Fourteenth Amend.)

The Court of Appeal disagreed. The Court held there was no equal protection violation because there is a rational basis supporting the retention of DNA from offenders convicted of felonies before Proposition 47 whose crimes have been reduced to misdemeanors. (Opinion of the Court, pp. 11-12.) The Court held that "[p]reserving the integrity and vitality of the state's DNA database system provides a rational basis to retain the DNA and profiles of offenders who were convicted before enactment of [P]roposition 47, even if they would not be required to provide DNA if convicted after its effective date. It is reasonable to conclude that a more comprehensive database, with samples from more offenders, is a more effective and utilitarian database." (Opinion of the Court, pp. 11-12.)

This is not correct. Proposition 69 never envisioned collecting, much less retaining, DNA samples from misdemeanants. The policy upholding the DNA law reflects the determination that persons convicted of less serious offenses-most misdemeanors-do not have to provide DNA samples. Proposition 47 established that certain less serious behavior did not warrant felony treatment and instead warranted misdemeanor treatment for all purposes. It makes no sense to find, as did the Court of

Appeal here, that nonqualifying misdemeanants in the future should be excluded from providing DNA samples, but DNA from persons previously convicted of the same offense should be retained in the DNA database. See *In re C. B.*, *supra*, ___ Cal.App.4th ___ dis. opn. of Pollak, J., at p. 13.

Review is respectfully requested.

CONCLUSION

When petitioner's offense was reduced to a misdemeanor under section 1170.18, the offense was designated a misdemeanor "for all purposes" except for firearms restrictions. (Sec. 1170.18, subd. (k).) Accordingly, the juvenile court was required to order petitioner's DNA sample expunged. See *Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th 1209 and *In re C. B.*, *supra*, ___ Cal.App.4th ___, dis. opn. of Pollak, J., at p. 13. Therefore the Court of Appeal erred in affirming the juvenile court order denying expungement of petitioner's DNA sample. Based on the foregoing, petitioner respectfully requests that this Court grant review.

Respectfully submitted,

DATED: October 11, 2016.

/s/ Patricia Cooney
Patricia Cooney
Attorney for Petitioner, C. H.

PROOF OF SERVICE

I, Patricia N. Cooney, declare that I am over 18 years of age, and am not a party to the action described in the document attached. My business address is 1108 Fresno Avenue, Berkeley, California, 94707. I am employed in Alameda County.

On October 11, 2016, I served a true copy of the attached PETITION FOR REVIEW

on the following via the TrueFiling system

Court of Appeal
First Appellate District, Division Three
350 McAllister Street
San Francisco, CA. 94102

Kamala D. Harris
Attorney General
455 Golden Gate Avenue, Ste. 11000
San Francisco, CA. 94102

First District Appellate Project
730 Harrison Street, Ste. 201
San Francisco, CA. 94107

and on the following via the USPS

District Attorney
Contra Costa County
725 Court Street, 4th Fl. Room 402
Martinez, CA. 94553

Contra Costa County Superior Court
725 Court Street
Martinez, CA. 94553
Attn.: Hon. Thomas M. Maddock

Karen Moghtader, Deputy Public Defender
Office of the Public Defender
800 Ferry Street
Martinez, CA. 94553

Clayton H.

by placing same in a sealed envelope, addressed as indicated, with first class postage thereon, and then depositing same in the U.S. mail at Berkeley, California.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 11, 2016

/s/ Patricia Cooney
Patricia Cooney

WORD COUNT CERTIFICATE

I hereby certify, under penalty of perjury, that the attached PETITION FOR REVIEW contains 8, 137 words, as determined by the computer program used to prepare this document.

Respectfully submitted,

Dated: October 11, 2016

/s/ Patricia Cooney
Patricia Cooney
Attorney for Petitioner

APPENDIX A

Filed 8/30/16

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re C.H., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. C.H., Defendant and Appellant.	A146120 (Contra Costa County Super. Ct. No. J11-00679)

C.H. argues that following the reduction of his 2011 felony to a misdemeanor, the trial court was obligated to expunge a DNA sample he originally provided pursuant to Penal Code section 296.1.[1] His argument is premised upon his interpretation of Proposition 47, the Safe Neighborhoods and Schools Act, enacted by the voters in 2014. Proposition 47 permitted C.H. to petition the court to redesignate his felony as a misdemeanor, and provides that once redesignated his crime is a misdemeanor "for all purposes." (§ 1170.18, subdivision (k).) Because misdemeanants are not required by law to provide a DNA sample for the state database, C.H. says his existing sample should be expunged because he is no longer a felon. We disagree.

Proposition 47's directive to treat a redesignated offense as a misdemeanor "for all purposes" employs words that have a well-defined meaning and have never applied to alter a crime's original status. The provisions of Proposition 47 can be harmonized with

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

our state's DNA collection law, Proposition 69, giving effect to each measure.[2] Moreover, if there is any fatal conflict between the text of the two measures, Proposition 69 controls because it is the more specific law. Finally, our interpretation gives effect to an underlying purpose of both measures to protect public safety. For these reasons, we affirm.

BACKGROUND

C.H. was arrested in early 2011 following his participation in a physical altercation with a loss prevention officer at Kohl's Department Store who tried to detain him and one of his friends for shoplifting. C.H. successfully made off with a $46 pair of jeans. He was charged with second degree robbery and assault with force likely to cause great bodily injury. The robbery and assault charges were dismissed after C.H. admitted a felony violation of section 487, subdivision (c), grand theft from a person.

At the 2014 general election, voters passed Proposition 47, the Safe Neighborhoods and Schools Act. (Statement of Vote (Nov. 4, 2014) <http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf> [as of Aug. 30, 2016].) One of its provisions, section 1170.18, permits offenders adjudicated of felony grand theft to petition the court for redesignation of their crimes as misdemeanors. C.H. sought redesignation pursuant to section 1170.18, subdivision (f), and also expungement of his DNA records.[3] The court redesignated C.H.'s felony as a misdemeanor but denied his request to expunge his DNA sample. C.H. appeals that denial.

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[2] Proposition 69 is the DNA Fingerprint, Unsolved Crime and Innocence Protection Act passed by the voters in the 2004 general election. It is codified in Part 1, Title 9, Chapter 6 of the Penal Code, sections 295 through 302.2.

[3] Appellant's request for judicial notice is granted.

DISCUSSION

A. Statutory Analysis

This case requires us to interpret and apply section 1170.18, part of Proposition 47, which allows offenders who have completed their sentence for certain felonies to apply to the court for designation of those felonies as misdemeanors. (§1170.18 subds. (a), (b) & (f).) Once an offense is designated a misdemeanor, section 1170.18 subdivision (k) requires that the crime "shall be considered a misdemeanor for all purposes" except for the prohibition on ownership of a firearm that applies to felons and offenders convicted of specified misdemeanors. C.H. argues that because only felons and certain misdemeanor sex offenders are required by law to provide DNA under section 296, his DNA sample must be expunged and his profile removed from the state database because his redesignated crime is to "be considered a misdemeanor for all purposes." Because the Penal Code provides a specific scheme for obtaining and expunging DNA, to address this argument we must consider whether section 1170.18 clearly specifies what must happen to an offender's DNA sample and profile when a felony is reduced to a misdemeanor.

The principles for interpreting a proposition enacted by popular vote are the same as those used to interpret a statute enacted by our Legislature. (*People v. Park* (2013) 56 Cal.4th 782, 796 (*Park*).) "Initially, '[a]s in any case of statutory interpretation, our task is to determine afresh the intent of the Legislature by construing in context the language of the statute.' [Citation] In determining such intent, we begin with the language of the statute itself. [Citation] That is, we look first to the words the Legislature used, giving them their usual and ordinary meaning. [Citation] 'If there is no ambiguity in the language of the statute, "then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs." ' [Citation] 'But when the statutory language is ambiguous, "the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes." ' " (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192–193.)

All of Proposition 47, including section 1170.18, is silent on whether the redesignation of a felony as a misdemeanor requires that a defendant's DNA be expunged. C.H. asserts the phrase "shall be considered a misdemeanor for all purposes" in section 1170.18, subdivision (k) compels the conclusion that it does. We disagree, and for several reasons, conclude that redesignation of an offense as a misdemeanor has no effect on previously obtained DNA.

First of all, the phrase "a misdemeanor for all purposes" has a well-defined meaning that does not relate back to alter a crime's original status for events occurring before the crime was reduced to a misdemeanor. This language is identical to the language used in section 17 to describe the effect of a judicial declaration that a wobbler offense—which is punishable as a felony until designated a misdemeanor—is to be considered a misdemeanor. (§ 17, subd. (b)(3) [where a crime is a wobbler, "it is a *misdemeanor for all purposes* . . . when . . . the court declares the offense to be a misdemeanor"], italics added; see also *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1100, (*Rivera*) [noting how Proposition 47 borrowed section 17's language].)

"[W]hen a wobbler is reduced to a misdemeanor [under section 17], the offense *thereafter* is deemed a 'misdemeanor for all purposes.' " (*Park, supra,* 56 Cal.4th at p. 795, italics added; *People v. Banks* (1959) 53 Cal.2d 370, 381–382; *People v. Pryor* (1936) 17 Cal.App.2d 147, 152.) Put differently, redesignation under section 17 makes the wobbler "a misdemeanor from that point on." (*People v. Feyrer* (2010) 48 Cal.4th 426, 439, 442, fn. 8 (*Feyrer*); *People v. Marshall* (1991) 227 Cal.App.3d 502, 504 [redesignated offense is treated as a misdemeanor *after* redesignation]; *Gebremicael v. California Com'n on Teacher Credentialing* (2004) 118 Cal.App.4th 1477, 1482–1483, 1487 [same]; *People v. Camarillo* (2000) 84 Cal.App.4th 1386, 1390, 1394 [same]; *People v. Rowland* (1937) 19 Cal.App.2d 540, 541–542 [same].) Critically, however, this "misdemean[or] status [is] not . . . given retroactive effect." (*People v. Moomey* (2011) 194 Cal.App.4th 850, 857 (*Moomey*); *Feyrer,* at p. 439 ["the offense is [made] a misdemeanor from that point on, *but not retroactively*," italics added].)

In other words, a court's declaration of misdemeanor status renders an offense a

misdemeanor *for all purposes,* not *at all times*. Thus, a declaration that a wobbler is a misdemeanor does not "relate back" and alter that offense's original status as a wobbler that is by definition to be treated as a felony until declared otherwise. For this reason, a court's order declaring a wobbler to be a misdemeanor does not call into question a defendant's burglary conviction for entering a building with intent to commit a felony (*Moomey, supra*, 194 Cal.App.4th at pp. 857–858), a defendant's ineligibility for a diversionary drug sentence due to a prior felony (*People v. Marsh* (1982) 132 Cal.App.3d 809, 812–813), a defendant's conviction for being a felon in possession of a firearm (*People v. Holzer* (1972) 25 Cal.App.3d 456, 460, overruled on other grounds in *People v. Palmer* (2001) 24 Cal.4th 856, 860–862), or the imposition of a sentencing enhancement for a prior felony (See *Park, supra*, 56 Cal.4th at p. 802 ["(t)here is no dispute that . . . defendant would be subject to the section 667(a) enhancement [for 'serious' felonies] had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor"].)

" 'It is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the legislature subsequently undertakes to use these exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts.' " (*California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1424, *citing City of Long Beach v. Payne* (1935) 3 Cal.2d 184, 191.) Because "identical language appearing in separate statutory provisions should receive the same interpretation when the statutes cover the same or an analogous subject matter" (*People v. Cornett* (2012) 53 Cal.4th 1261, 1269, fn. 6; *People v. Lamas* (2007) 42 Cal.4th 516, 525), and because Proposition 47 and section 17 both address the effect to be given the redesignation of a felony (or a wobbler that starts out as a felony) as a misdemeanor, we are presumptively obligated to construe the phrase "misdemeanor for all purposes" under Proposition 47 to mean the same as it does under section 17—namely, that a felony offense redesignated as a misdemeanor under Proposition 47 retains its character as a felony prior to its redesignation, and is treated as a misdemeanor only

after the time of redesignation. This is precisely why the appeal of a redesignated offense under Proposition 47 lies with the Court of Appeal and not the Appellate Division—namely, because the redesignation does not retroactively convert the offense to a misdemeanor at the time of charging, which is the relevant point in time for determining where an appeal lies. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1110–1111; *Rivera, supra,* 233 Cal.App.4th at pp. 1096–1097, 1099–1100.)

Our conclusion is also influenced by Proposition 69, the DNA Fingerprint, Unsolved Crime and Innocence Protection Act. In section 296, subdivision (a)(1), Proposition 69 requires that "[a]ny person, including any juvenile, who is convicted of or pleads guilty or no contest to any felony offense, . . . or any juvenile who is adjudicated under Section 602 of the Welfare and Institutions Code for committing any felony offense" is to provide fingerprints and samples of bodily fluids for DNA profiling purposes. Thus, the triggering event for the obligation to provide a sample for the state's DNA database is a conviction or plea. For this reason we disagree with any notion that an application for expungement filed under section 1170.18 is seeking only prospective relief. Because the obligation to contribute DNA arises from a conviction or plea, the substance of an application for expungement under section 1170.18 must be predicated on the theory that redesignation as a misdemeanor relates back to change the nature of a previous plea or felony conviction *when it occurred.* But that, as explained above, is not the law.

Proposition 69 also specifies the circumstances under which DNA obtained for the database may be expunged. Section 299, subdivision (a)(1) allows expungement when "the person has no past or present offense or pending charge which qualifies that person for inclusion." C.H. argues that, since there is no obligation on misdemeanants other than sex offenders to contribute to the DNA database, his sample should be expunged. But section 299, subdivision (b) permits persons who have "no past or present qualifying offense" to request expungement only if: following arrest no accusatory pleading is filed for prosecution; a qualifying charge is dismissed prior to adjudication; the qualifying conviction has been reversed and the case dismissed; the defendant has been found

factually innocent; or the defendant has been found not guilty or acquitted of the qualifying offense. (§ 299 subd. (b)(1)-(4).) This case does not fall within any of those circumstances.

Moreover, under Proposition 69 offenders may not be relieved of the obligation to provide a sample because the qualifying charge has been reduced under some other law. Section 299 subdivision (f) provides: "Notwithstanding any other law, including Sections 17, 1170.18, 1203.4, and 1203.4a, a judge is not authorized to relieve a person of the separate administrative duty to provide specimens, samples, or print impressions required by this chapter if a person has been found guilty or was adjudicated a ward of the court by a trier of fact of a qualifying offense as defined in subdivision (a) of Section 296, . . . or pleads no contest to a qualifying offense as defined in subdivision (a) of Section 296."[4]

Thus, the specific provisions of Proposition 69 provide that an offender is obligated to provide a DNA specimen as a result of a conviction, guilty plea or no contest plea to a felony or a specified misdemeanor, specify the grounds upon which expungement is permissible; and provide that offenders are not to be relieved of the obligation to provide DNA because a felony is later reduced to a misdemeanor. In light of this specific statutory scheme it seems odd at best to conclude that Proposition 47's general directive that a redesignated felony is "a misdemeanor for all purposes" compels expungement of DNA originally obtained as a result of a qualifying conviction or plea.[5]

To the extent there is any possible tension between section 1170.18 and sections 296 and 299, our job is to harmonize them where reasonably possible, reconciling

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[4] Section 299 was recently amended to add section 1170.18 to the list of statutory offense reduction mechanisms that do not relieve an offender of the obligation to provide DNA. In our view, because section 299, subdivision (f) at all times specified it is to be given effect "notwithstanding any other law," it is unnecessary to consider whether this recent amendment to Proposition 69 is a change or clarification of existing law, or is somehow impermissibly retroactive in operation.

[5] We do not suggest that section 299 provides the exclusive basis to expunge DNA from the database. Obviously, in an appropriate case constitutional concerns may compel such a result. (c.f. *Coffey v. Superior Court* (2005) 129 Cal.App.4th 809, 817.)

inconsistencies and construing them to give force and effect to all of their provisions. (*State Department of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955–956.) Our conclusion today does just that. Section 1170.18 redesignates C.H.'s felony to be a misdemeanor for all future purposes, while at the same time giving force to the mandates of sections 296 and 299 that provide offenders must contribute DNA to the state database upon conviction or plea and set forth the statutory basis for expungement.

But even if sections 1170.18 and 296 and 299 could not be reconciled in this way, we would read Proposition 69's specific provisions to take precedence over Proposition 47's general mandate that a redesignated crime is "a misdemeanor for all purposes." (§ 1170.18, subd. (k).) "The rules we must apply when faced with two irreconcilable statutes are well established. 'If conflicting statutes cannot be reconciled, later enactments supersede earlier ones [citation], and more specific provisions take precedence over more general ones [citation].' [Citation] But when these two rules are in conflict, the rule that specific provisions take precedence over more general ones trumps the rule that later-enacted statutes have precedence. (See *People v. Gilbert* (1969) 1 Cal.3d 475, 479 [' "It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment." ']; see *Nunes Turfgrass, Inc. v. Vaughan–Jacklin Seed Co.* (1988) 200 Cal.App.3d 1518, 1539 [same]; see also Code Civ. Proc., § 1859 ['when a general and particular provision are inconsistent, the latter is paramount to the former'].)" (*State Department of Public Health v. Superior Court, supra*, 60 Cal.4th at pp. 960–961.) Thus, as the more specific laws addressing DNA collection and expungement, sections 296 and 299 trump section 1170.18 even though section1170.18 is the later-enacted statute.

This result is also faithful to the public policy and purposes expressed in and supporting both initiative measures. Proposition 47 was declared by the voters to "[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent

or serious crimes." (Voter Information Pamp., Gen. Elec. (Nov. 4, 2014) Text of Prop. 47, p. 70 <http://vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf> [as of Aug. 30, 2016].) It "[a]uthorize[s] consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors," and makes clear that criminals convicted of violent crimes are not to benefit from its terms. (*Ibid.*) Moreover, the right to resentencing under Proposition 47 is qualified and "[r]equire[s] a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (*Ibid.*) So, although it permits redesignation of certain felonies as misdemeanors, Proposition 47 intends to do so in a way that does not "pose a risk to public safety." But Proposition 47 includes no indication that it was also intended to affect the administrative requirements attendant to a felony conviction. (See *Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1510–1511 [DNA sample collection is an administrative requirement not punishment].) Indeed, such a construction would be difficult to reconcile with Proposition 47's aim to promote public safety while also reducing punishment for less serious offenses.

Proposition 69 is, if anything, even more facially motivated by concerns for public safety. It was enacted in recognition of a "critical and urgent need to provide law enforcement officers and agencies with the latest scientific technology available for accurately and expeditiously identifying, apprehending, arresting, and convicting criminal offenders and exonerating persons wrongly suspected or accused of crime." (Voter Information Pamp., Gen. Elec. (Nov. 2, 2004) Text of Prop. 69, p. 135 <http://vig.cdn.sos.ca.gov/2004/general/english.pdf> [as of Aug. 30, 2016].) Expanding the state's DNA database program was considered "the most reasonable and certain means to accomplish effective crime solving in California, to aid in the identification of missing and unidentified persons, and to exonerate persons wrongly suspected or accused of crime." (*Ibid.*) To that end, the voters did not intend to limit the collection of DNA to only offenders convicted of violent crimes. "The most reasonable and certain means to solve crime as effectively as other states which have found that the majority of violent

criminals have nonviolent criminal prior convictions, and that the majority of cold hits and criminal investigation links are missed if a DNA data base or data bank is limited only to violent crimes." (*Ibid.*)

Thus, a concern of the voters in passing both Propositions 47 and 69 was the preservation and protection of public safety. Proposition 69 sought to enhance public safety by including within its scope non-violent crimes. On the other hand, there is no expressed intent of the voters in Proposition 47 to limit or relieve felonies reclassified as misdemeanors from the obligation to contribute DNA, and that is no surprise; to do so would be inconsistent with the expressed policy objective in both measures to protect public safety.

For the foregoing reasons, we agree with the holding of our colleagues in Division One in *In re J.C.* (2016) 246 Cal.App.4th 1462, and respectfully disagree with the courts who have held that redesignation of a felony as a misdemeanor under section 1170.18 requires expungement of an offender's DNA and profile from the state database. (See *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209.) Redesignation of a felony to a misdemeanor under section 1170.18 does not require expungement.[6]

B. Equal Protection

C.H. also argues that retention of his DNA and profile in the state database following the passage of Proposition 47 violates his right to equal protection under law prescribed in the state and federal constitutions. (Cal. Const., Art. I, § 7, subd. (a); U.S. Const., 14th Amend.) He argues that if Proposition 47 were in effect when he committed his crime, he would be under no obligation to submit a DNA sample. Thus, removal of his DNA from the state database is necessary as a matter of equal protection so he will be treated similarly to an offender who commits a crime after the initiative's enactment. We disagree. Retaining C.H.'s DNA and profile in the state database does not violate his rights to equal protection.

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[6] In light of our interpretation of these statutes, we need not address C.H.'s contention that AB 1492 effected an unconstitutional amendment of Proposition 47.

"Where, as here, a disputed statutory disparity implicates no suspect class or fundamental right, 'equal protection of the law is denied only where there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose." ' " (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881(*Johnson*).) " 'The concept [of equal protection] recognizes that persons similarly situated with respect to the legitimate purpose of the law receive like treatment, but it does not . . . require absolute equality. [Citations.] Accordingly, a state may provide for differences as long as the result does not amount to invidious discrimination. [Citations.]' [Citation] 'Equal protection . . . require[s] that a distinction made have some relevance to the purpose for which the classification is made.' " (*People v. Cruz* (2012) 207 Cal. App.4th 664, 675.)

There is a rational basis supporting the retention of DNA obtained from offenders convicted of felonies before Proposition 47 whose crimes have been reduced to misdemeanors. Proposition 69 declares that an expansive DNA database is: "(1) The most reasonable and certain means to accomplish effective crime solving in California, to aid in the identification of missing and unidentified persons, and to exonerate persons wrongly suspected or accused of crime; [¶] (2) The most reasonable and certain means to solve crime as effectively as other states which have found that the majority of violent criminals have nonviolent criminal prior convictions, and that the majority of cold hits and criminal investigation links are missed if a DNA data base or data bank is limited only to violent crimes; [¶] (3) The most reasonable and certain means to rapidly and substantially increase the number of cold hits and criminal investigation links so that serial crime offenders may be identified, apprehended and convicted for crimes they committed in the past and prevented from committing future crimes that would jeopardize public safety and devastate lives; and [¶] (4) The most reasonable and certain means to ensure that California's Database and Data Bank Program is fully compatible with, and a meaningful part of, the nationwide Combined DNA Index System (CODIS)." (Voter Information Pamp., Gen. Elec. (Nov. 2, 2004) Text of Prop. 69, p. 135 <http://vig.cdn.sos.ca.gov/2004/general/english.pdf> [as of Aug. 30, 2016].) Preserving

the integrity and vitality of the state's DNA database system provides a rational basis to retain the DNA and profiles of offenders who were convicted before enactment of proposition 47, even if they would not be required to provide DNA if convicted after its effective date. It is reasonable to conclude that a more comprehensive database, with samples from more offenders, is a more effective and utilitarian database.

"To mount a successful rational basis challenge, a party must ' "negative every conceivable basis" ' that might support the disputed statutory disparity. (*Heller* [*v. Doe by Doe*] (1993) [509 U.S. 312,] 320; see [*People v.*] *Turnage* (2012) [55 Cal.4th 62,] 75.) If a plausible basis exists for the disparity, courts may not second-guess its ' " 'wisdom, fairness, or logic,' " ' " and "the Legislature is afforded considerable latitude in defining and setting the consequences of criminal offenses." (*Johnson, supra,* 60 Cal.4th at pp. 881, 887.)

Although courts "will not condone unconstitutional variances in the statutory consequences of our criminal laws, rational basis review requires that we respect a statutory disparity supported by a reasonably conceivable state of facts. ' " 'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.' " ' " (*Johnson, supra*, 60 Cal.4th at p. 889.)

DISPOSITION

The order is affirmed.

Siggins, J.

We concur:

McGuiness, P.J.

Jenkins, J.

Trial Court:	Contra Costa County Superior Court
Trial Judge:	Honorable Thomas M. Maddock

Patricia Noel Cooney, under appointment by the Court of Appeal, for Defendant and Appellant.

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