IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF C.H. Minor and Appellant	No. S237762 (Court of Appeal Case No. A146120; Contra Costa County Superior Court No. J11-00679)
PEOPLE OF THE STATE CALIFORNIA, Plaintiff and Respondent v. C.H. Defendant and Appellant	

APPELLANT'S OPENING BRIEF ON THE MERITS

After Decision by the Court of Appeal First Appellate District, Division Three
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By Appointment of the Court

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QUESTIONS PRESENTED FOR REVIEW

This case presents the following questions for review:

1. Did the juvenile court err by refusing to order the expungement of appellant's DNA record after his qualifying felony conviction was redesignated a misdemeanor under Proposition 47 (Penal Code, sec. 1170.18)?[1]

2. Does the retention of appellant's DNA sample violate equal protection because a person who committed the same offense after

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

Proposition 47 was enacted would be under no obligation to provide a DNA sample?

STATEMENT OF THE CASE

On April 19, 2011, Appellant C.H., was charged in an Original Juvenile Wardship Petition, pursuant to Welfare and Institutions Code section 602, 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, appellant admitted committing an amended count three, felony grand theft. (Sec. 487, subd. (c).) (CT 22.)

The disposition hearing took place on August 19, 2011 when appellant was 16 years old. (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 appellant was required to submit his DNA to the state, based on his adjudicated felony offense. (CT 26.)

On June 5, 2015 appellant filed a petition for modification based on the voter initiative Proposition 47, codified as section 1170.18. The petition sought designation of appellant's felony theft offense (sec. 487, subd. (c)) to a misdemeanor petty theft because the loss amounted to less than $950.00. (Sec. 490.2) (CT 100-101.) Appellant requested recalculation of his confinement time to six months, reduction of his fine to an amount in accordance with the misdemeanor offense, and expungement of his DNA –

removal of his DNA offender profile from the state database and destruction of his DNA sample. (CT 100-101.)

The juvenile court granted appellant's petition in all respects except the DNA expungement request. Appellant's offense was redesignated 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.)

As relevant to the court's denial of DNA expungement, 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 appellant's case.[2] (CT 105, RT 4.) The court denied appellant'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, appellant 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)* (2015) 238 Cal.App.4th 1209 (pet. rev. den. 10/14/2015) ["*Alejandro N.*"]. (CT 117-118.) *Alejandro N.* held that a juvenile's DNA should be expunged when his prior felony adjudication was designated a misdemeanor for all purposes pursuant to section 1170.18. The

[2] Appellant's request for judicial notice of the briefing in the Santino B-W case was granted. (*In re C.H.*, review granted Nov. 16, 2016, No. S237762 [previously published at 2 Cal.App.5th 1139] 1144, n. 3.)

parties again agreed to submit appellant's request on the pleadings and arguments presented in another juvenile case heard by the court, the Lamont P. case, J12-00947. (RT 8.)[3] On August 25, 2015, the court denied appellant's reconsideration request without prejudice. (CT 121; RT 8-9; RT 8/25/2015 pp. 1-11.)

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 appellant's request to expunge his DNA sample. (*In re C.H, supra,* 2 Cal.App.5th 1139.)

In *In re C.H.* the Court found that the redesignation of a felony offense as a misdemeanor pursuant to section 1170.18 did not support DNA expungement. The Court analogized to section 17, subdivision (b) which employs the identical language, "misdemeanor for all purposes", used in section 1170.18. (*In re C.H., supra*, 2 Cal.App.5th at p. 1145.) The Court held it was presumptively obligated to construe the phrase "misdemeanor for all purposes" in section 1170.18 and section 17 to mean the same thing: that a redesignated offense should be treated as a misdemeanor for all purposes only after the time of redesignation. (*In re C.H., supra*, 2 Cal.App.5th at pp. 1146-1147.) Therefore, an offender's obligation to

[3] The reporter's transcript of the proceedings on the Motion to Reconsider in In re Lamont P., J12-00947, is found at RT 8/25/2015 pp. 1-11 [hearing on reconsideration request on DNA denial in Lamont P. case, J12-00947]. The pleadings in the Lamont P. case referred to by the juvenile court are found at CT 122-124.

provide DNA to the state at the time of a felony conviction or adjudication was not affected by redesignation under section 1170.18. (*Id.* at p. 1147.)

The Court harmonized section 1170.18 and sections 296 and 299 of the DNA Act by finding that Proposition 47's directive that a redesignated felony is "a misdemeanor for all purposes" did not compel "expungement of DNA originally obtained as a result of a qualifying conviction or plea." (*Id.* at pp. 1148-1149.) The Court reasoned that if the provisions of the two propositions could not be harmonized then the specific crime-solving and identification provisions of Proposition 69 controlled over Proposition 47's general mandate that a redesignated crime is a misdemeanor for all purposes. (Sec. 1170. 18, subd. (k).) (*Id.* at p. 1149.) The Court of Appeal found that its reconciliation of Propositions 69 and 47 "was faithful to the public policy and purposes expressed in and supporting both initiative measures. (*Id.* at p. 1149.)

The Court also held there was no equal protection violation stemming from the retention of appellant's DNA because there is a rational basis supporting the retention of DNA from offenders convicted of felonies before Proposition 47 whose crimes have been redesignated as misdemeanors. (*Id.* at pp. 1151-1152.)

Appellant petitioned this Court for review which was granted on November 16, 2016.

STATEMENT OF FACTS

On January 26, 2011, appellant and two friends went into the Kohl's Department Store in Brentwood, California. According to the loss prevention officer, Michael Pardini, two of the boys left Kohl's with merchandise without paying for it. C.H. 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.) He was seen outside the store wearing the jeans before all three boys rode away on their bicycles. (CT 32, 34.)

C.H. 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 C.H. got a call from one of his friends saying a loss prevention officer had stopped him outside. C.H. panicked and accidentally left the store wearing the jeans. (CT 34.)

SUMMARY OF ARGUMENT

Proposition 47, The Safe Neighborhoods And Schools Act, was passed by California voters on November 4, 2014. Proposition 47 changed portions of the Penal Code to redesignate certain drug possession and theft-related offenses from felonies or wobblers to misdemeanors, unless the offenses were committed by certain ineligible offenders. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Proposition 47 also created a procedure making those changes available to offenders who had previously

been convicted or adjudicated of redesignated offenses, including persons who were still serving felony sentences and those who had completed their sentences. These offenders could petition the trial court to have their crimes redesignated as misdemeanors. (Sec. 1170.18; *Alejandro N. v. Superior Court*, *supra*, 238 Cal.App.4th at p. 1222-1223.)

Appellant C.H. took a pair of $46.00 jeans from a store without paying and now stands guilty of a misdemeanor petty theft, section 490.2, as a result of a successful petition filed pursuant to section 1170.18, added to the Penal Code by Proposition 47. The juvenile court redesignated his 2011 felony theft adjudication as a misdemeanor for all purposes, other than firearm restrictions. (Sec. 1170.18, subds. (f), (g), and (k).) Appellant also sought expungement of his DNA - destruction of the DNA sample he had provided at the time of his felony theft adjudication prior to redesignation and removal of his DNA offender profile from the database - because he no longer had a qualifying felony or misdemeanor offense. (Sec. 299.) The collection of DNA samples is authorized for felony convictions and adjudications, but not authorized based solely on the commission of a misdemeanor with the exception of sex and arson offenses. (Sec. 296; *Alejandro N. v. Superior Court*, *supra*, 238 Cal.App.4th at pp. 1226-1227.)

The juvenile court denied the expungement request, and the Court of Appeal affirmed the denial. (*In re C.H.*, *supra*, 2 Cal.App.5th at p. 1151.) The Court of Appeal found that the redesignation of a felony offense as a

misdemeanor pursuant to section 1170.18 did not allow DNA expungement. As noted previously, the Court analogized to section 17, subdivision (b) which employs the same language – "misdemeanor for all purposes" - as section 1170.18, subdivision (k). (*Id.* at p. 1145.) The Court found that a redesignated offense should be treated as a misdemeanor for all purposes only after the time of redesignation. (*Id.* at pp. 1146-1147.).

In *Alejandro N.* appellant challenged the denial of a request to expunge his DNA sample after successful redesignation as a misdemeanor "for all purposes" under section 1170.18. *Alejandro N.* held that section 1170.18 requires that once redesignated, the affected offense shall be treated exactly like any other misdemeanor offense. Accordingly, the Court in *Alejandro N.* held appellant was entitled to an order expunging his DNA.

Other published Court of Appeal decisions, including the present case, *In re C.H.*, have expressly disagreed with the reasoning of *Alejandro N.* The majority in *In re C.B.*, review granted Nov. 9, 2016, No. S237801 [previously published at 2 Cal.App.5th 1112][4], affirmed the juvenile court denial of the request to expunge C.B.'s DNA after a successful Proposition 47 redesignation, as did *In re J.C.* (2016) 246 Cal.App.4th 1462 (pet. rev. den. 8/10/2016). (*In re C.B.*, *supra*, 2 Cal.App.5th at p. 1128; *In re J.C.*,

[4] *In re C.B.* is on review in this Court. Cases pending on review may be cited for persuasive value. (Cal. Rules of Court, rule 8.115, subdivision (e).)

supra, 246 Cal.App.4th at p. 1483.) However, Justice Pollak dissented in *In re C.B.* and cited with approval *Alejandro N.'s* analysis in support of C.B.'s request to expunge his DNA sample.

Appellant contends that the Court of Appeal erred in affirming the denial of appellant's request to expunge his DNA sample. Proposition 47 states that redesignated offenses shall be treated as misdemeanors "for all purposes" except firearm restrictions. (Sec. 1170.18, subd. (k).) Appellant thus argues that the plain and unambiguous language of section 1170.18's provisions, particularly the "misdemeanor for all purposes" phrase in section 1170.18, subdivision (k), reveals the voters intended to remove all felony collateral consequences, except for restrictions on firearm possession, upon redesignation as a misdemeanor. DNA retention was similarly excluded. Appellant maintains that the "for all purposes" language in section 17 and section 1170.18 is not analogous because the purpose and effect of the two provisions are different. Further, appellant requests prospective expungement of his DNA, not retroactive relief as the Court of Appeal states.

Appellant also argues that Proposition 69's DNA provisions do not require retention of his DNA. In particular section 299, subdivisions (a) and (b), qualifies him for DNA expungement upon redesignation of his offense as a misdemeanor pursuant to section 1170.18. (See sec. 296.) Additionally, appellant agrees with the Court of Appeal that Propositions 47 and 69 can

be harmonized but not as the Court of Appeal suggests. Rather the two propositions can be harmonized by acknowledging the purpose and intent of the enactors of both provisions and adopting a plausible interpretation of section 1170.18, particularly subdivision (k), consistent with these principles. Appellant submits that the expungement of DNA for redesignated misdemeanants supports the public policy behind Proposition 47 and Proposition 69.

Although the Court of Appeal did not address this contention because of its interpretation of Propositions 47 and 69, appellant argues that the recent amendment to section 299, subdivision (f), Assembly Bill 1492 ["AB 1492"], unconstitutionally amends Proposition 47 and is inconsistent with the intent of the initiative. Finally, appellant argues that retention of appellant's DNA violates the equal protection clauses of the state and federal constitutions.

ARGUMENT

I. THE REDESIGNATION PROCEDURE UNDER PROPOSITION 47 RESULTS IN A MISDEMEANOR OFFENSE "FOR ALL PURPOSES" THAT DOES NOT QUALIFY AS AN OFFENSE PERMITTING DNA COLLECTION OR RETENTION.

A. Background And Standard Of Review.

1. Proposition 47/Section 1170.18.

Appellant's theft adjudication was properly designated as a misdemeanor petty theft for all purposes except for firearm restrictions pursuant to Proposition 47, codified in section 1170.18. Proposition 47 enacted the "Safe Neighborhoods and Schools Act" effective November 5, 2014. (Sec. 1170.18, subd. (a); *Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at p. 1222.) The intent of the voters in passing Proposition 47 was to reclassify nonserious and nonviolent crimes as misdemeanors "for all purposes" except for firearm restrictions. (Sec. 1170.18, subd. (k).) The Act changed portions of the Penal Code and Health and Safety Code to reduce various drug possession and theft-related offenses, including petty thefts valued under $950.00, from felonies (or wobblers) to misdemeanors, unless the offenses were committed by certain ineligible offenders. The provisions of Proposition 47 apply to juvenile offenders. (*Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at pp. 1217, 1222-1223.) Thus, any person who committed any

of these offenses after November 5, 2014 would be convicted of a misdemeanor.

Proposition 47 also added section 1170.18 to the Penal Code. Section 1170.18 allowed retroactive application of these changes to offenders who, prior to November 5, 2014, had been convicted or adjudicated of felony drug possession or theft offenses which were now redesignated as misdemeanors. Thus, qualifying offenders who incurred their felony convictions before November 5, 2014 were able to benefit from the Act's redesignation provisions. Subdivisions (a) and (b) of section 1170.18 provide for a resentencing procedure for persons currently serving a sentence for a felony conviction that would have been a misdemeanor under the Act. The court is required to resentence the petitioner unless he or she "would pose an unreasonable risk of danger to public safety." For someone like appellant, a person "who has completed his or her sentence for a conviction" of a felony, subdivisions (f), (g), and (h) of section 1170.18 provide that the person may petition the court to have the felony conviction designated as a misdemeanor. (Sec. 1170.18, subd. (f).) The statute provides that a felony conviction that is resentenced under section 1170.18, subdivision (b) or designated as a misdemeanor under section 1170.18, subdivision (g) "*shall be considered a misdemeanor for all purposes*, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his

or her conviction" for firearm possession. (Sec. 1170.18, subd. (k), italics added). No other exceptions were listed, including retention of the offender's DNA.

2. The California DNA Act.

Because appellant has only a misdemeanor adjudication for petty theft he no longer has an offense qualifying him for inclusion of his DNA in the state database.

According to the California DNA Act, as amended by Proposition 69 in 2004, the state is authorized to collect DNA from 1) adults and juveniles convicted following trial or plea of any felony offense; 2) juveniles adjudicated under Welfare and Institutions Code section 602 for any felony offense; 3) adults or juveniles required to register as sex or arson offenders for a felony or misdemeanor offense. (Sec. 296, 296.1.)

Pursuant to section 299, a person who "had no past or present offense or pending charge which qualifies that person for inclusion in the DNA databank" can apply for expungement. Expungement includes destroying the DNA sample and removing the searchable database profile from the databank. (sec. 299, subd. (a).)[5]

[5] The state has produced no evidence indicating that appellant has any subsequent juvenile adjudications or adult convictions for felonies or sex and arson misdemeanors, or any adult felony arrests, which would authorize the state to collect his DNA.

When appellant's offense was designated as a misdemeanor, the juvenile court was required to order appellant's DNA sample expunged. It was error for the Court of Appeal to affirm the juvenile court's order denying expungement.

3. Conflicting Decisions From the Court of Appeal.

The state appellate courts have disagreed on whether expungement of DNA is required for a juvenile offender whose offense has been designated as a misdemeanor pursuant to section 1170.18. The focus of that disagreement has been on the meaning of the provision in section 1170.18, subdivision (k), that an offense redesignated as a misdemeanor should be treated as "a misdemeanor for all purposes" except firearm restrictions.

The first case to rule on this issue was *Alejandro N.* In *Alejandro N.* appellant challenged the denial of a request to expunge his DNA sample after successful redesignation under section 1170.18. Pursuant to section 1170.18, subdivision (k), Alejandro's redesignated offense was deemed a misdemeanor "for all purposes" except for firearms restrictions. *Alejandro N.* held that section 1170.18 requires that once redesignated, the affected offense shall be treated exactly like any other misdemeanor offense and thus Alejandro 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 redesignation in section 1170.18, "the enactors effectively directed the courts not to carve out other exceptions to the

misdemeanor treatment of the redesignated offense absent some reasoned statutory or constitutional basis for doing so." (*Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at pp. 1227, 1230.)

Subsequently, two other appellate cases, in addition to *In re C.H.*, disagreed with the reasoning and holding of *Alejandro N.* and affirmed trial court rulings denying juvenile offenders' requests to expunge their DNA after their former felony adjudications were properly redesignated as misdemeanors pursuant Proposition 47. (*In re J.C., supra*, 246 Cal.App.4th 1462; *In re C.B., supra*, 2 Cal.App.5th 1112.) In *In re C.B.* Justice Pollak dissented and relied on the analysis in *Alejandro N.* in support of the juvenile offenders request to expunge his DNA.[6]

In *In re C.H.* the Court of Appeal found that the redesignation of a felony offense as a misdemeanor pursuant to section 1170.18 did not allow DNA expungement. The Court analogized to section 17, subdivision (b) which employs similar language to Proposition 47. (*In re C.H., supra*, 2 Cal.App.5th at p. 1145.) The Court held the phrase "a misdemeanor for all purposes" has a "well-defined meaning," citing the identical language used in section 17, subdivision (b). (*Ibid.*; sec. 17, subd. (b) (3).) The Court construed the phrase "misdemeanor for all purposes" under Proposition 47

[6] *In re C.B.* was decided by the First District, Division Three, the same court that decided *In re C.H.*

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." (*Id.* at p. 1147.) Accordingly, the Court found an offender's obligation to provide DNA to the state at the time of a felony conviction or adjudication is not affected by redesignation under Proposition 47. (*Id.* at p. 1147.)[7]

4. Principles of Statutory Construction and Standard of Review.

The question whether appellant's DNA should be expunged because his theft adjudication has been designated as a misdemeanor involves interpreting the statutory language stating that his offense is "a misdemeanor for all purposes" except for firearm restrictions.

The principles of statutory construction are well settled. The reviewing court looks first to the words of the statute recognizing that "they generally provide the most reliable indicator of legislative intent." (*People v. Gardeley* (1996) 14 Cal.4th 605, 621, disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, n. 13.) When the language of a statute is "clear and unambiguous and thus not reasonably susceptible of

[7] The Court's interpretation of "misdemeanor for all purposes" as well as the other findings of the Court will be more fully addressed in argument sections II and IV.

more than one meaning, . . . there is no need for construction, and courts should not indulge in it." (*Ibid.*)

If the language is ambiguous it is necessary to ascertain the intent of those who enacted the provision and interpret the statute to achieve that purpose. (*People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571.) Where there are two reasonable interpretations of the statute, the Court is obligated to follow the "rule of lenity" which gives "the defendant the benefit of every reasonable doubt on questions of interpretation". (*In re M.M.* (2012) 54 Cal.4th 530, 545.)

The interpretation of a voter initiative is no different. Initiatives are interpreted just like statutes. (*People v. Rico* (2000) 22 Cal.4th 681, 685.) The Court's "primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure. (*People v. Briceno* (2004) 34 Cal.4th 451, 459.)" (*T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 651-652.)

Further, if a statute states one exception, it precludes other exceptions not expressed. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 ["*Expressio unius est exclusio alterius.* The expression of some things in a statute necessarily means the exclusion of other things not expressed."]; *In re James H.* (2007) 154 Cal.App.4th 1078, 1084.)

It is assumed that the Legislature or voters know of existing laws when it enacts a law. It has long been settled that "the enacting body is

deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted and to have enacted or amended a statute in light thereof." (*People v. Superior Court* (*Cervantes*) (2014) 225 Cal.App.4th 1007, 1015.)

In interpreting a statute significance should be given to every word and surplusage should be avoided. Courts are reluctant to interpret a provision of a statute or initiative in a way that renders another word or phrase unnecessary or nugatory. (*In re Anthony C.* (2006) 138 Cal.Ap.4th 1493, 1510; *People v. Leiva* (2013) 56 Cal.4th 498, 506; *People v. Woodhead* (1987) 43 Cal.3d 1002, 1010.)

This is a question of statutory interpretation and so this Court reviews the decision of the juvenile court de novo. (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387.)

B. The Plain Language of Section 1170.18, Subdivision (k) Stating That Offenses Redesignated As Misdemeanors Should be Treated as Misdemeanors "For All Purposes" Except Firearm Restrictions Precludes DNA Retention.

The intent of the voters in passing Proposition 47 was to designate selected nonserious and nonviolent drug possession crimes and certain theft offenses as misdemeanors "for all purposes" except for firearm restrictions. (Sec. 1170.18, subd. (k).) The intent was expressed in clear and unambiguous language. Section 1170.18, subdivision (k) states that:

> [a]ny felony conviction that is . . . designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except [for firearm restrictions].

The Court in *Alejandro N.* noted that the unambiguous language of section 1170.18 reflects the enactor's intent:

> The plain language of section 1170.18, subdivision (k) reflects the voters intended the redesignated misdemeanor offense should be treated exactly like any other misdemeanor offense, except for firearm restrictions.

(*Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at p. 1227.)

Because firearm restrictions are the only stated exception any other exceptions which are not expressed, including DNA retention, are precluded. (*Gikas v. Zolin, supra*, 6 Cal.4th at p. 852.) As stated in *Alejandro N.*:

> Because the statute explicitly addresses what, if any, exceptions should be afforded to the otherwise all-encompassing misdemeanor treatment of the offense, and because only the firearm restriction was included as an exception, the enactors effectively directed the courts not to carve out other exceptions to the misdemeanor treatment of the redesignated offense absent some reasoned statutory or constitutional basis for doing so. (Footnote omitted.)

(*Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at p. 1227.)

The drafters of Proposition 47 and the voters who enacted the initiative are assumed to have known of laws existing in 2014, including the provisions of the California DNA Act governing the collection, retention and expungement of DNA. (*People v. Superior Court (Cervantes), supra,* 225 Cal.App.4th at p. 1015.)

The Court in *Alejandro N.* observed:

> At the time they enacted section 1170.18, the voters were presumed to have known of the existing statute authorizing DNA collection for felony, but not misdemeanor, offenders (see [*People v. Superior Court (Cervantes)* (2014)] 225 Cal.App.4th [1007] 1015), and yet they did not include DNA collection as an exception to the misdemeanor treatment of the offense. Thus, absent an intervening enactment providing otherwise, future offenders who commit a Proposition 47 redesignated misdemeanor offense will not be subject to DNA collection based solely on that offense.

(*Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at pp. 1227-1228.)

The Court in *Alejandro N.* concluded that the voters did not intend for an offense redesignated as a misdemeanor pursuant to Proposition 47, to be deemed a felony for purposes of retaining DNA samples. The clear statement that the offense should be treated as a misdemeanor "for all purposes", excepting firearm restrictions, required the court to expunge the juvenile offender's DNA. (*Id.* at pp. 1228, 1230.) That conclusion, based on applying well-established principles of statutory construction, is applicable to appellant.

Justice Pollak, dissenting in *In re C.B.*, *supra*, 2 Cal.App.5th at p. 1130, concurred with *Alejandro N.* stating "If *Alejandro* was correctly decided and remains good law, minor is clearly entitled to expungement."

Justice Pollak specifically agreed with *Alejandro N.* that section 1170.18, subdivision (k)'s use of the language "for all purposes" means what it says: that going forward the redesignated offense should not be

treated as a felony for purposes of DNA collection and retention. (*Id.* at pp. 1136-1137, dis. opn. of Pollak, J.)

This interpretation of the language "for all purposes" in section 1170.18 was recently adopted by the Fourth District, Division Two in *People v. Evans*, review granted Feb. 22, 2017, No. S239635 [previously published at 6 Cal.App.5th 894].)[8] In *Evans* the Court of Appeal struck a one-year prior prison enhancement to a felony sentence. The enhancement was based on a felony drug possession conviction which was designated as a misdemeanor pursuant to Proposition 47 before the sentence became final. The Court held that the redesignated misdemeanor offense could not be used to impose an enhancement based on the previous designation of the offense as a felony. In striking the enhancement in *Evans* the Court explained that section 1170.18, subdivision (k)'s plain "misdemeanor for all purposes" language expressly indicates that the voters intended that redesignated offenses be treated as misdemeanors and to have all felony collateral consequences extinguished, except for the restrictions on firearm possession. Among the collateral consequences of felony convictions that

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[8] This Court granted review in *Evans* on February 22, 2017, with further action deferred pending consideration and disposition of a related issue in *People v. Valenzuela*, review granted Mar. 30, 2016, No. 232900 [previously published at 244 Cal.App.4th 692]. The issue on review in *Valenzuela* is whether the defendant is eligible for resentencing on the penalty enhancement for serving a prior prison term on a felony conviction after the superior court had redesignated the underlying felony as a misdemeanor under the provisions of Proposition 47.

would be affected are the following: the right to vote (Elec. Code, sec. 2101), the loss of firearm ownership or possession (sec. 29800, subd. (a)(1)), the required provision of DNA samples to the state (sec. 296, subd. (a)(1)), and, if the offender is convicted of a felony in the future, the loss of probation as a sentencing option (sec. 1203, subd. (e)) and potential sentence enhancements (sec. 667.5, subd. (b)).

In *Evans* the Court stated:

> To ensure qualified offenders gain relief from those collateral consequences, Section 1170.18(k) directs "[a]ny felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) *shall be considered a misdemeanor for all purposes*, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm." (Italics added.)

(*People v. Evans, supra*, 6 Cal.App.5th 894 [Slip Opinion, p. 6.])

The Court in *Evans* also recognized that in excluding firearm restrictions from the "misdemeanor for all purposes" rule, the voters intended no other exceptions:

> Section 1170.18(k)'s "for all purposes" language is broad, indicating the voters intended it to apply to all collateral consequences except firearm possession. (*Hisel v. County of Los Angeles* (1987) 193 Cal.App.3d 969, 974 [statement of a "specific exception[] implies the exclusion of others"].) In *People v. Abdallah* (2016) 246 Cal.Appp.4th 736 (*Abdallah*), our colleagues in Division Seven of the Second Appellate District concluded Section 1170.18(k) reflects the voters' clear intention that-with the exception of firearm possession-redesignated misdemeanors be treated like any other misdemeanor offense, including for purposes of enhancements under section 667.5, subdivision (a). (*Abdallah*, at p. 746[.])

(*Id.* at pp. 6-7.)

Appellant asserts, with support from *Alejandro N.*, Justice Pollak's dissent in *C.B.* and *Evans*, that the plain and unambiguous language of section 1170.18's provisions, particularly the "misdemeanor for all purposes" language of section 1170.18, subdivision (k), reveals the voters' intention to exclude only firearm restrictions and not DNA retention from the felony collateral consequences extinguished by the misdemeanor designation.

Therefore the Court of Appeal erred in affirming the juvenile court denial of appellant's request and the reconsideration of his request to expunge his DNA after the successful redesignation of his offense as a misdemeanor pursuant to section 1170.18.

II. THE COURT OF APPEAL ERRED IN AFFIRMING THE DENIAL OF APPELLANT'S REQUEST TO EXPUNGE HIS DNA SAMPLE FROM THE STATE DATABASE.

The Court of Appeal in the present case affirmed the juvenile court's order denying appellant's request to expunge his DNA after his offense was redesignated as misdemeanor petty theft pursuant to Proposition 47 Disagreeing with the reasoning of *Alejandro N.*, the Court concluded that expungement of appellant's DNA was precluded under sections 299 and 1170.18. (*In re C.H.*, *supra*, 2 Cal.App.5th at pp. 1145-1151.) The Court improperly added an additional exception for DNA retention to the voters'

expressed intent to have the redesignated offense treated as a misdemeanor for all purposes, except for firearm restrictions.

The Court held that

> 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 our state's DNA collection law, Proposition 69, giving effect to each measure. [Footnote omitted.] 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.

(*In re C.H.*, *supra*, 2 Cal.App.5th at pp. 1143-1144.)

A. The Fact That Proposition 47 Did Not Expressly Address DNA Expungement Does Not Indicate That The Voters Intended to Preclude DNA Expungement After The Offense Has Been Redesignated as a Misdemeanor For All Purposes.

In concluding that section 1170.18 did not require DNA expungement for redesignated 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." (*Id.* at p. 1145.)

However the enactors' silence on the issue of DNA expungement in Proposition 47 does not indicate that they intended to preclude expungement. To the contrary, the drafters of the initiative and the voters were presumably aware of the then-existing DNA collection and

expungement provisions of the Penal Code and enacted Proposition 47 in light of this knowledge. The voters were presumed to have known of the existing statute authorizing DNA collection for a felony offense, but not for misdemeanors other than sex and arson offenses. However, they did not choose to include DNA collection or retention as an exception to the rule that a redesignated offense was to be treated as a misdemeanor for all purposes except for firearm restrictions. (*Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at p. 1227.)

B. The "For All Purposes" Language In Section 17 And Section 1170.18 Is Not Analogous Because The Purpose and Effect of The Two Provisions Are Different.

In finding that redesignation of an offense as a misdemeanor under Proposition 47 did not support expungement of appellant's DNA sample the Court analogized to section 17, subdivision (b). (*In re C.H.*, *supra*, 2 Cal.App.5th at p. 1145.) Thus the Court held the phrase "a misdemeanor for all purposes" has "a well-defined meaning" as this language is identical to the language used in section 17, subdivision (b) to describe the effect of a judicial declaration that a wobbler offense is to be considered a misdemeanor. (*Ibid.*; sec. 17, subd. (b) (3).)

The Court of Appeal noted that reduction of a wobbler to a misdemeanor under section 17 makes the offense a "misdemeanor for all purposes" from that time on. (*Id.* at p. 1146.) Thus, it does not affect an

offender's obligation to provide DNA to the state at the time of a felony conviction or adjudication. (*Id.* at p. 1147.)

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 for that particular offender. The original offense remains a felony. (*People v. Park* (2013) 56 Cal.4th 782, 795; *In re C.B.*, *supra*, 2 Cal.App.5th at pp. 1132-1133, dis. opn. of Pollak, J.)

In contrast, when a felony offense is redesignated 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 redesignation of a felony offense as a misdemeanor under section 1170.18 permanently removes the offense from the felony category (*Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at p. 1230.) The redesignated misdemeanor no longer qualifies as an offense permitting DNA collection or retention. (*Id.* at p. 1229.)

Justice Pollak agreed with *Alejandro N.* that redesignation of the offense pursuant to Proposition 47 permanently changes the nature of the offense from a felony to a misdemeanor so that offenders are no longer subject to DNA collection and retention:

> Redesignation of a conviction under section 1170.18 is not analogous to reduction of charges under section 17. Wobbler offenses may be sentenced and designated as misdemeanors because the court determines in its discretion that the particular circumstances of a case justify treating the offense as less serious than a felony. Relevant factors in the exercise of that discretion are " 'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.' " (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978. . . .) While the trial court sentencing a wobbler as a misdemeanor determined that " 'the rehabilitation of the convicted defendant either does not require, or would be adversely affected by, incarceration in a state prison as a felon' " (*People v. Park* (2013) 56 Cal.4th 782, 790. . .), it remains true that the person was found or pleaded guilty to the offense as a felony. In contrast, when the voters redesignated certain offenses as misdemeanors under Proposition 47, they changed the nature of those offenses in all cases from felonies (or wobblers) to misdemeanors. As explained in *Alejandro*, *supra*, 238 Cal.App.4th at page 1230, "distinct from wobbler offenses-the offenses now designated as misdemeanors for qualifying offenders under Proposition 47 have permanently been removed from the felony category and are no longer subject to DNA collection."

(*In re C.B.*, *supra*, 2 Cal.App.5th at pp. 1132-1133, dis. opn. of Pollak, J.)

In *People v. Evans*, *supra,* 6 Cal.App.5th 894, the Court examined section 17, subdivision (b) and concluded, like Justice Pollak, that the purpose and effect of section 17, subdivision (b) and section 1170.18 are not analogous. "Proposition 47 expresses the electorate's determination that we have punished a class of offenders too harshly" - specifically persons who committed designated drug possession and theft offenses. (*Id. at* Slip Opinion, p. 12.) These former felony or wobbler offenses are permanently changed to misdemeanors. The voters who approved Proposition 47 wanted

the benefits of that change to apply to the entire class of offenders, including those previously convicted of felonies who had served their sentences and thereafter successfully applied for redesignation of their offenses to misdemeanors. In contrast, section 17, subdivision (b) authorizes the trial court to exercise its discretion in an individual case to reduce a wobbler to a misdemeanor because incarceration in state prison is not appropriate for the particular defendant. (*Id.* at pp. 12-13.)

Unlike Proposition 47, section 17, subdivision (b) is not a provision expressing the voters' or the Legislature's determination that a lighter punishment, specifically misdemeanor treatment, is warranted for a particular class of offenders. Rather, section 17, subdivision (b) bestows discretion on the trial court to make that judgment in a particular case. (*Id.* at p. 13.)

Thus, the redesignation of appellant's theft adjudication to a misdemeanor petty theft pursuant to section 1170.18 is not comparable to reduction of charges under section 17. A court sentencing a wobbler offense as a misdemeanor under section 17 makes a *discretionary choice* that the particular circumstances of a case justify treating the offense as less serious than a felony. While the court sentences a wobbler as a misdemeanor, the person sentenced is still guilty of a felony.

Section 1170.18 made redesignation *automatic* upon a finding that an eligible defendant's conduct "would have been a misdemeanor under [the Proposition] had [it] been in effect at the time of the offense", and no hearing is necessary. (Sec. 1170.18, subds. (f), (g) and (h).) The redesignation of a felony offense under section 1170.18 removes the offense from the felony category permanently making DNA collection and retention unavailable.

Therefore, the language "for all purposes" in section 1170.18 should not be accorded the same interpretation as in section 17 because the two statutes do not "cover the same or an analogous subject matter." (*In re C.H.*, *supra*, 2 Cal.App.5th at p. 1147.)

The Court of Appeal also disregarded the fact that the language in section 17 and section 1170.18 are not identical. Section 17 states that when a wobbler is reduced to a misdemeanor "it is a misdemeanor for all purposes." Section 1170.18, subdivision (k) states that "any felony conviction or adjudication that is designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes " except that the person shall not be permitted to own, possess or have custody or control of any firearm and may be convicted of violating provisions prohibiting firearm possession by prohibited persons.

The express exception for firearm restrictions, appearing only in section 1170.18, subdivision (k), is significant. The inclusion of this

exception precludes any other exceptions, including any exception for DNA retention. (*Alejandro N. v. Superior Court*, *supra*, 238 Cal.App.4th at p. 1227; *In re C.B.*, *supra,* 2 Cal.App.5th at p. 1130, dis. opn. of Pollak, J. [accord]; *Gikas v. Zolin* (1993) 6 Cal.4th 841, 842.)

In interpreting a statute significance should be given to every word and surplusage should be avoided. (*In re Anthony C.*, *supra*, 138 Cal.Ap.4th at p. 1510; *People v. Leiva*, *supra*, 56 Cal.4th at p. 506; *People v. Woodhead*, *supra,* 43 Cal.3d at p. 1010.) By ignoring the firearm exception the Court of Appeal makes the words excepting firearm possession and ownership in section 1170.18, subdivision (k) superfluous rendering the exception unnecessary or nugatory.

Accordingly, the Court of Appeal erred in analogizing the language "for all purposes" in sections 17 and 1170.18 to affirm the denial of appellant's request to expunge his DNA sample.

C. Appellant Is Requesting Prospective Expungement of His DNA.

According to the Court of Appeal in the present case, because the obligation to contribute DNA arises from a felony conviction or plea, "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." (*In re C.H.*, *supra*, 2 Cal.App.5th at p. 1147.) Thus, the Court of Appeal states that an application for DNA expungement, following redesignation of an offense as a misdemeanor for all purposes pursuant to section 1170.18, seeks retroactive relief. (*Ibid.*)

The analysis by the Court is flawed. As recognized by the Court in *Alejandro N.* and by Justice Pollak in *In re C.B.*, redesignation of an offense under section 1170.18 changes the nature of an offense from a felony to a misdemeanor. (*Alejandro N. v. Superior Court*, *supra*, 238 Cal.App.4th at pp. 1229, 1230; *In re C.B.*, *supra,* 2 Cal.App.5th at p. 1133, dis. opn. of Pollak, J.) The redesignated misdemeanor no longer qualifies as an offense permitting DNA collection or retention. (*Alejandro N. v. Superior Court*, *supra*, 238 Cal.App.4th at p. 1229.) Pursuant to section 1170.18, subdivision (k), it should be treated as a misdemeanor for all purposes, except for firearm restrictions. The Court of Appeal ignored the fact that expungement is a prospective remedy that applies when the person

no longer has an offense or pending charge which qualifies that person for inclusion of their DNA in the database. (Sec. 299, subd. (a) (1).)

Appellant's request seeks misdemeanor treatment of his redesignated offense. Appellant's request for expungement does not challenge the validity of the order requiring him to provide his DNA sample at the time of his adjudication. Appellant does not seek to retroactively 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 redesignated 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.

(In re C. B., supra, 2 Cal.App.5th at p. 1136, dis. opn. of Pollak, J.)

In order to effectuate the intent of the enactors that a redesignated misdemeanor be treated as a misdemeanor for all purposes except firearm restrictions, Proposition 47 requires the expungement of a redesignated misdemeanant's DNA sample. Accordingly, the Court of Appeal erred in affirming the juvenile court's order denying DNA expungement in appellant's case.

D. Proposition 69's DNA Collection and Expungement Provisions Do Not Require The Retention Of A Redesignated Misdemeanant's DNA Sample.

1. Appellant's Misdemeanor Offense Qualifies Him For Expungement Of His DNA Under Section 299, Subdivisions (a) and (b).

In support of its argument that appellant, whose theft offense was redesignated a misdemeanor, is not eligible for expungement of his DNA, the Court of Appeal cited section 299, subdivisions (a) and (b)[9] of the DNA Act. The Court acknowledged that "Section 299, subdivision (a) allows

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[9] 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.

expungement when 'the person has no past or present offense or pending charge which qualifies that person for inclusion.'" (*In re C.H.*, *supra*, 2 Cal.App.5th at pp. 1147-1148.) The Court then emphasized that subdivision (b) describes the circumstances under which DNA may be expunged. The Court claimed this was an exhaustive list and noted that appellant did not fall within any of the circumstances set forth. (*Id.* at p. 1148.) While this is true, as asserted by the Court in *Alejandro N.* and by Justice Pollak in *In re C.B.*, the fact that section 299, subdivision (b) does not list redesignation of the crime as a non-qualifying offense under Proposition 47 as grounds for expungement is not determinative. (*Alejandro N. v. Superior Court*, *supra*, 238 Cal.App.4th at pp. 1228-1229; *In re C. B.*, *supra*, 2 Cal.App.5th at p. 1137, dis. opn. of Pollak, J.)

Appellant qualifies to have his DNA expunged under section 299, subdivision (a). His theft offense has been designated as a misdemeanor. Adjudication of a misdemeanor, other than sex and arson offenses, does not qualify a juvenile offender for inclusion of his DNA in the databank. (Sec. 296.) As Justice Pollak stated:

> 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 redesignation of minor's offense thus brings him or her within the scope of section 299, subdivision (a)[.]

(*In re C. B.*, *supra*, 2 Cal.App.5th at p. 1137, dis. opn. of Pollak, J.)

The fact that redesignation of a felony offense as a misdemeanor pursuant to section 1170.18 is not listed in section 299, subdivision (b) does not matter as this list does not provide exclusive authority for removing DNA from the database that does not belong there. (*In re C. B.*, *supra*, 2 Cal.App.5th at p. 1137, dis. opn. of Pollak, J.; *Alejandro N. v. Superior Court*, *supra*, 238 Cal.App.4th at pp. 1228-1229.)

As the Court stated in *Alejandro N.* Proposition 47 redesignation provides another circumstance in which the offender no longer has a qualifying offense.

> The grounds for expungement listed in section 299 concern circumstances where an alleged offender is charged with an offense that qualifies for DNA collection, and then the case is not pursued or is dismissed, or the alleged offender is found not guilty or innocent. . . . 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 redesignated 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 [juvenile court's erroneous failure to designate offense as misdemeanor or felony at time of adjudication as required by Welfare and Institutions Code, § 702 allows minor to seek DNA expungement should trial court designate offense as misdemeanor upon remand].) (Italics in original.)

(*Ibid.*)

Moreover, the circumstances resulting from the enactment of Proposition 47 did not exist at the time section 299, subdivision (b) was promulgated, and thus were not included among the circumstances listed in that subdivision.

> 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*, 2 Cal.App.5th at p. 1137, dis. opn. of Pollak, J.)

2. The Provisions of Proposition 47 and Proposition 69 Can Be Harmonized.

The Court of Appeal held that its job was to harmonize any possible tension between Proposition 47 and Proposition 69 by "reconciling inconsistencies and construing them to give force and effect to all their provisions." The Court then harmonized section 1170.18 and sections 296 and 299 of the DNA Act by finding that Proposition 47's directive that a redesignated felony is a "misdemeanor for all purposes" did not compel "expungement of DNA originally obtained as a result of a qualifying conviction or plea":

> 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.

(*In re C.H.*, *supra*, 2 Cal.App.5th at p. 1149.)

The Court cited *State Department of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955-956 ["*State Dept.*"] in support of this analysis. In *State Dept.* the Supreme Court addressed two statutes governing the confidentiality of citations issued to long-term care facilities. *State Dept.* ultimately found the two statutes before it impossible to reconcile and was required to apply the various doctrines designed to select between conflicting statutes. (*Id.* at pp. 960-961.) But the Supreme Court in *State Dept.* stressed that

> the requirement that courts harmonize potentially inconsistent statutes when possible "is not a license to redraft the statutes to strike a compromise that the Legislature did not reach." The cases in which we have harmonized potentially conflicting statutes involve choosing one plausible construction of a statute over another in order to avoid a conflict with a second statute. [Citations.] This canon of construction, like all such canons, does not authorize courts to rewrite statutes." (See *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 479 . . . [" the general policy underlying legislation 'cannot supplant the intent of the Legislature as . . . expressed in a particular statute'"].)

(*Id.* at p. 956.)

To harmonize Propositions 47 and 69 as the Court suggests ignores the cardinal rule of statutory construction-to ascertain the intent of the enactors and the purpose of each statute. (*In re C.H.*, *supra*, 2 Cal.App.5th at p. 1145; *In re C. B.*, *supra*, 2 Cal.App.5th at p. 1117; *T.W. v. Superior*

Court, *supra*, 236 Cal.App.4th at pp. 651-652.) The Court also ignores the plain language of section 1170.18. (*Alejandro N. v. Superior Court*, *supra*, 238 Cal.App.4th at p. 1227 ["The plain language of section 1170.18, subdivision (k) reflects the voters intended the redesignated misdemeanor offense should be treated exactly like any other misdemeanor offense, except for firearm restrictions."])

The voters' intent in enacting Proposition 47 was to reduce the severity of the punishment and the collateral consequences for nonserious and nonviolent low-level drug possession and theft offenders by designating or redesignating their crimes as misdemeanors. The intent in enacting Proposition 69 was to identify felons and arson- and sex-related misdemeanants who commit unsolved crimes yielding DNA evidence in order to aid crime-solving.

In order to accomplish its purpose, the enactors of Proposition 69 made a policy judgment that only persons convicted and juveniles adjudicated of felony offenses and misdemeanors requiring sex and arson registration must submit DNA to the state. (Sec. 296.) The apparent intent behind that rule is that persons who were found to have committed those more serious offenses were the ones likely to commit violent crimes yielding DNA evidence. (See *Rise v. Oregon* (9th Cir. 1995) 59 F.3d 1556, 1561 [the crimes that typically yield DNA evidence are violent crimes, particularly rapes and murders, and persons convicted of these violent

felonies are more likely to have committed these crimes in the past or to do so in the future].)

Justice Pollak recognized that the intent in enacting Proposition 69 to include only DNA samples from felons and certain specified misdemeanants in the database as a way to solve crime, precludes DNA retention for any other misdemeanor, including redesignated misdemeanors under Proposition 47.

> The situation would of course be different if section 296 required the inclusion of DNA from persons convicted of any misdemeanor, but that is not the law. That is why the 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.

(In re C. B., supra, 2 Cal.App.5th at p. 1137, dis. opn. of Pollak, J.)

In this case the Court harmonized Propositions 69 and 47 by redrafting them to "strike a compromise" that the enactors of Propositions 69 and 47 did not intend or envision: to treat a redesignated misdemeanor as a felony for purposes of DNA retention. (See secs. 296, subd. (a) (3); 296.1, subd. (a) (2) (A), 299 and 1170.18.) But it is equally possible to harmonize sections 1170.18 and section 299 in such a way that does not redraft the statutes or supplant the intent of the enactors. The two propositions can be harmonized by acknowledging the purpose of both provisions and adopting a plausible interpretation of section 1170.18, particularly subdivision (k), consistent with these principles.

The enactors of Proposition 47, as codified in section 1170.18, expressly stated that a low-level drug possession or theft offense redesignated as a misdemeanor shall be "a misdemeanor for all purposes" except for restrictions on firearm possession and ownership. (Sec. 1170.18, subd. (k).) As argued above, the enactors were presumably aware of the DNA collection and expungement provisions of Proposition 69, passed in 2004 and codified in sections 296 and 299. They chose not to include DNA collection and retention as exceptions to the "misdemeanor for all purposes" mandate. Moreover, the Court of Appeal ignored the rule of statutory construction that the express statement of one exception to a rule precludes others. (*Gikas v. Zolin*, *supra*, 6 Cal.4th 841, 852.) The drafters of Proposition 47, and the voters that approved it, did not intend for the redesignated misdemeanant to suffer any of the other consequences of a felony conviction or adjudication, other than the firearm restrictions.

Proposition 47 changes the nature of the qualifying drug possession or theft offense from a felony to a misdemeanor. "[U]nder Proposition 47, the redesignated misdemeanor no long qualifies as an offense permitting DNA collection." (*Alejandro N. v. Superior Court*, *supra*, 238 Cal.App.4th at p. 1229.) Thus, persons with misdemeanor offenses, redesignated by Proposition 47, in accordance with section 1170.18 (f), (g) and (k), no longer have qualifying offenses, entitling them to expungement under section 299.

This interpretation reconciles any perceived inconsistencies and construes section 1170.18 and sections 296 and 299 to give force and effect to *all* their provisions. Hence, the Court of Appeal is incorrect. The statutes can be harmonized but not as the Court suggests.

The Court of Appeal reasoned that even if Propositions 47 and 69 could not be harmonized, the Court would still find that Proposition 69's specific crime-solving and identification provisions take precedence over Proposition 47's general mandate that a redesignated crime is a misdemeanor for all purposes. (Sec. 1170.18, subd. (k).) (*In re C.H.*, *supra*, 2 Cal.App.5th at p. 1149)

The Court explained that

> [t]he rules we must apply when faced with two irreconcilable statutes are well established. 'If conflicting statutes cannot be reconciled, later enactments supersede earlier ones . . ., and more specific provisions take precedence over more general ones . . . .'. . . 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.

(*Ibid.*)

The Court cited *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."] and Code of Civil

Procedure section 1859 ["CCP 1859"] [when a general and particular provision are inconsistent, the latter is paramount to the former].[10]

Applying this rule is unnecessary in this case because, as explained above, the relevant provisions of Proposition 47 and Proposition 69 are not in conflict and can be reconciled to give full effect to the intent behind both provisions. Accordingly, the rules regarding specific and general statutes articulated in *People v. Gilbert, supra*, 1 Cal.3d 475 and in CCP 1859 are not useful in this case.

Nevertheless, the Court of Appeal's analysis assumes that Proposition 47 is the general statute and that Proposition 69 is the more specific statute which overrides the provisions of Proposition 47.

However, the rule that a specific statute takes precedence over a general statute does not apply in the instant case because the rule assumes

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[10] CCP 1859 is entitled "Intention of Legislature or intention of parties in construction of statute or instrument." This section states in its entirety:

> In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.

This code section merely reiterates the rule that in statutory construction where possible the Court's *fundamental* purpose is to ascertain the intent of the enactors and to effectuate the purpose of the law. (*In re C.H., supra*, 2 Cal.App.5th at p. 1145.) However, as the Court of Appeal noted, CCP 1859 also states that where there are conflicting statutes, the intent of the specific statute controls over the more general one regardless of the timing of the enactments.

the specific and the general statutes cover the same subject matter. (*People v. Jenkins* (1980) 28 Cal.3d. 494, 505-506.) But Proposition 47 and Proposition 69 do not cover the same subject matter: Proposition 47 redesignated certain nonserious, nonviolent drug possession and theft felonies and wobblers as misdemeanors for all purposes, excepting only firearm restrictions and not DNA expungement. In contrast, Proposition 69 regulated DNA collection and expungement. Because the two propositions cover different subject matters the general and specific rule of statutory construction does not apply in the present case.

Even if Proposition 47 is the more general enactment, Proposition 69's specific provisions on the subject of DNA expungement do not override or control Proposition 47 which clearly stated the voters' intent to reduce punishment and extinguish all but one felony consequence for offenders whose low-level drug possession and theft crimes are redesignated as misdemeanors. Retention of DNA is one of those consequences, and as noted, it was not excluded from the "misdemeanor for all purposes" mandate.

"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.)

Finally, Proposition 47 directs that its provisions "shall be liberally construed to effectuate its purposes." (The Safe Neighborhoods And Schools Act, Gen. Elec. [Proposition 47] (Nov. 4, 2014) Ballot Pamphlet, Text of Proposed Law, sec. 18, p. 74; and see sec. 15 entitled "Amendment" ["This act shall be broadly construed to accomplish its purposes."]) A liberal construction of Proposition 47's provisions gives appellant the benefit of his offense reduction "for all purposes" and without felony level DNA retention. This construction furthers the purpose of Proposition 47 to "[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession." (Proposition 47 Ballot Pamphlet, sec. 3 "Purpose and Intent", subdivision (3), Text of Proposed Laws, p. 70.)

Therefore, the Court of Appeal erred in finding the provisions of Proposition 69 should take precedence over the provisions of Proposition 47.

E. Expungement Of DNA For Redesignated Misdemeanants Supports The Public Policy Behind Proposition 47 and Proposition 69.

The Court of Appeal found that its reconciliation of Propositions 69 and 47 to require the retention of DNA and preclude expungement for offenders with redesignated misdemeanor adjudications "was faithful to the

public policy and purposes expressed in and supporting both initiative measures." (*In re C.H.*, *supra*, 2 Cal.App.5th at p. 1149.) The Court of Appeal is incorrect.

The Court of Appeal claimed that "a concern of the voters in passing both Propositions 47 and 69 was the preservation and protection of public safety." (*Id.* at p. 1150.) The Court indicated that the best way to protect public safety would be to retain the DNA of misdemeanants, like appellant, even though they would not be required to provide their DNA to the state if they committed their low-level drug possession and theft offenses after the effective date of Proposition 47.

The court admitted that the voters' aim in enacting Proposition 47 was to require misdemeanors rather than felonies for non-serious, nonviolent crimes like petty theft and drug possession. (*Id.* at p. 1149.) The Court also acknowledged that those who had been convicted or adjudicated of these crimes prior to Proposition 47 could request resentencing, or as in appellant's case, request redesignation of the qualifying offense to a misdemeanor. (*Id.* at pp. 1149-1150.) However, the court noted that a defendant who committed one of these offenses but had prior convictions for specified very violent or serious crimes, would not be eligible for misdemeanor treatment. (*Id.* at p. 1149.) Also the court noted that the right to resentencing to a misdemeanor under Proposition 47 requires an

assessment of whether the individual poses a risk for public safety.[11] (*Id.* at p. 1150.) However, what the Court of Appeal ignores is that once an offender who has his specified drug possession or theft offense redesignated as a misdemeanor, the trial court has made the determination that he does not have a disqualifying offense and does not pose a risk to public safety. Thus the public safety concerns of the enactors of Proposition 47 are satisfied. Thereafter, the offender's crime is to be treated as a misdemeanor for all purposes, except for firearm restrictions.

As for Proposition 69, the court states that the enactors' goals of collecting DNA and placing it in the databank to accurately and expeditiously identify criminal offenders and effectively solve crimes, is undoubtedly motivated by concerns for public safety. The court notes that to this end, "the voters did not intend to limit the collection of DNA to only offenders convicted of violent crimes." (*Id.* at p. 1150.) However, the Court of Appeal disregards the fact that the voters did limit the collection of DNA to persons convicted of, or juveniles adjudicated for, felonies or misdemeanors requiring sex or arson registration. (Sec. 296, subd. (a) (1) and (3).) The voter's concerns with public safety did not lead them to require the collection of DNA from persons convicted of, and juveniles adjudicated for, most misdemeanors. Most misdemeanors were not

[11] Redesignation for an offender who has already served his sentence under 1170.18 (f) and (g) does not require this preliminary assessment of risk.

qualifying offenses for DNA collection, and persons who no longer had any qualifying offenses were permitted to request expungement of their DNA. (Sec. 299, subd. (a).) Thus, the public safety and crime solving concerns motivating Proposition 69 do not require the collection or retention of DNA from misdemeanants, including drug possession and theft offenders who have had their crimes redesignated as misdemeanors pursuant to Proposition 47.

Justice Pollak correctly points out the relevant public policy in these cases 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, including redesignated misdemeanors. (See sec. 296.) Justice Pollak clarifies this analysis:

> [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 designated 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 designated 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.

(In re C. B., supra, 2 Cal.App.5th at pp. 1137-1138, dis. opn. of Pollak, J..)

Therefore, denying appellant's request to expunge his DNA after redesignation pursuant to section 1170.18 does not support the public policy goals expressed in both Propositions 47 and 69. Appellant requests that his DNA sample be expunged from the state database.

III. INTERPRETING AB 1492 TO PRECLUDE DNA EXPUNGEMENT FOR REDESIGNATED OFFENSES UNCONSTITUTIONALLY AMENDS PROPOSITION 47 AND IS INCONSISTENT WITH THE INTENT OF THE INITIATIVE.

AB 1492, passed by the Legislature in September 2015, 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).)

In light if its interpretation of Propositions 47 and 69 as precluding expungement for persons whose low-level offenses have been redesignated as misdemeanors pursuant to section 1170.18, 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. (*In re C.H.*, *supra*, 2 Cal.App.5th at p. 1148, n. 4 and p. 1151, n. 6.)

However, in *In re J.C.*, *supra*, 246 Cal.App.4th 1462, the Court of Appeal held that AB 1492 was a clarification of the law and applied retroactively to deny J.C.'s request to expunge his DNA. *J.C.* explained that although juveniles convicted solely of misdemeanors are not required to provide a DNA sample, the recent amendment to section 299, subdivision (f) "insert[ed] '1170.18' into the list of statutes that do not authorize a judge to relieve a person of the duty to provide a DNA sample," and thereby "prohibit[s] the expungement of a defendant's DNA record when his or her felony offense is reduced to a misdemeanor pursuant to section 1170.18." (*Id.* at pp. 1472, 1475; see also *In re C.B.*, *supra*, 2 Cal.App.5th at p. 1126.) Although the Court of Appeal in the present case did not consider this issue appellant contends that AB 1492 does not affect appellant's eligibility for expungement. Moreover, if it does preclude expungement, it unconstitutionally amends Proposition 47 and therefore is invalid.

The plain language of section 299, subdivision (f) does not refer to expungement but to the "duty to provide" a sample. Section 299, subdivision (f) 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.

In his dissent in *C.B.*, Justice Pollak observed that:

> [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, 2 Cal.App.5th at pp. 1133-1134, dis. opn. of Pollak, J.)

Justice Pollak also noted that the Court in *In re J.C.*, recognized this distinction yet impermissibly rewrote the words of section 299, subdivision (f) to infer that this section precludes expungement of DNA for an offender whose offense has been redesignated a misdemeanor pursuant to Proposition 47. (See *In re J.C., supra*, 246 Cal. App. 4th at p. 1472.)

Justice Pollak stated:

> 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*, 2 Cal.App.5th at p. 1134, n. 7, dis. opn. of Pollak, J.)

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).) The amendment to section 299, subdivision (f) relating to DNA collection does not change the court's authority to order expungement after a successful redesignation of an offense to a misdemeanor under section 1170.18.

If AB 1492 is interpreted to prohibit DNA expungement after successful redesignation, it is an unconstitutional amendment to Proposition 47. Such an interpretation would disregard the stated intent of Proposition 47 to treat redesignated crimes as misdemeanors "for all purposes" except firearms restrictions:

> Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm . . . .

(Sec. 1170.18, subd. (k).)

Further, it would unconstitutionally amend Proposition 47 by drafting an additional "exception" to prohibit DNA expungement for crimes redesignated as misdemeanors.

The California Constitution limits the Legislature's power to amend an initiative statute. (Cal. Const. art. II, sec. 10, subd. (c) [Legislature may amend initiative statute only with voters' approval unless initiative statute permits amendment or repeal without voters' approval].) "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; and see *In re C.B.*, *supra*, 2 Cal.App.5th at p. 1134, dis. opn. of Pollak, J.)

Proposition 47 expressly allows amendment of its provisions 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." (Proposition 47, sec.15, italics added].)

Adding an exception for DNA retention to the misdemeanor treatment of redesignated offenses is an amendment to Proposition 47, even if it is accomplished by amending section 299, subdivision (f). 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 [section 3455 denying Proposition 36[12] ["Prop. 36"] drug treatment to nonviolent drug possession ["NVDP"] violators unconstitutionally amends Prop. 36]; and see *People v. Kelly, supra,* 47 Cal.4th at p. 1014 [newly created statutory provision of Medical Marijuana Program ["MMP"] impermissibly amends voter enacted Compassionate Use Act (Health and Safety Code sec. 11362.5)].)

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), supra,* 48 Cal.4th at p. 571.) If DNA expungement is precluded by the amended section 299, subdivision (f), the amendment prohibits what Proposition 47 authorizes – the treatment of redesignated 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 redesignated offenders –

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[12] In 2000 California voters passed Proposition 36 for the purpose of placing nonviolent drug offenders into substance abuse treatment programs, rather than incarcerating them. (Prop. 36, as approved by voters, Gen. Elec. (Nov. 7, 2000), sec. 3.)

something Proposition 47 prohibits by only listing one exception (firearm restrictions) to the mandate that a redesignated misdemeanor shall be "a misdemeanor for all purposes". (*Ibid.*) It effectively adds a second exception to the misdemeanor treatment of redesignated 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.)

It does not matter that AB 1492 did not directly amend section 1170.18, subdivision (k) by adding another exception for retention of DNA. "[T]he Legislature cannot indirectly accomplish . . . what it cannot accomplish directly by enacting a statute which amends the initiative's statutory provisions." (*Proposition 103 Enforcement Project v. Quackenbush, supra*, 64 Cal.App.4th at p. 1487.) The "purpose of California's constitutional limitation on the Legislature's power to amend initiatives is to 'protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.' [Citations.]" (*People v. Kelly, supra,* 47 Cal.4th at p. 1025, citing *Proposition 103 Enforcement Project v. Quackenbush, supra,* 64 Cal.App.4th at p. 1484.)

Justice Pollak agreed that "[i]f 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." [Citation omitted.] (*In re C. B., supra*, 2 Cal.App.5th at p. 1135, dis. opn. of Pollak, J.)

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.)

Accordingly, to construe section 299, subdivision (f) to prohibit expungement of DNA after an offense has been redesignated a misdemeanor for all purposes disregards the intent of the initiative enactors and unconstitutionally amends Proposition 47.

IV. RETENTION OF APPELLANT'S DNA SAMPLE VIOLATES THE EQUAL PROTECTION CLAUSES OF THE CALIFORNIA AND FEDERAL CONSTITUTIONS.

Appellant's DNA was collected pursuant to section 296, subdivision (a), due to his felony adjudication for grand theft. That felony adjudication no longer exists – it has been redesignated as a misdemeanor petty theft "for all purposes." (Sec. 1170.18, subd. (k).) If appellant were adjudicated today, or if he had committed the identical crime on or after November 5, 2014, section 296, subdivision (a) would not apply, as adults and juveniles convicted or adjudicated of misdemeanors, except for sex or arson offenses, need not provide their DNA to the state. (Sec. 296.)

Section 1170.18, subdivision (a) and (f) 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), (f).)[13] Appellant 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 the same as an offender who committed the identical crime after passage of Proposition 47, and that the new misdemeanor adjudication be considered a misdemeanor for all purposes except for restrictions on firearm possession and ownership.

Allowing appellant's DNA sample to remain in the state database violates the equal protection clauses of the state and federal constitutions because there is no rational basis for treating offenders who become

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[13] Section 1170.18, subdivision (a) states: (a) A person who, on November 5, 2014, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ("this act") had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.

Section 1170.18, subdivision (f) provides: (f) A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.

misdemeanants, pursuant to section 1170.18, differently from persons who committed the same misdemeanor crimes on or after November 5, 2014. (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 redesignated as misdemeanors. (*In re C.H.*, *supra*, 2 Cal.App.5th at pp. 1151-1152.) 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." (*In re C.H.*, *supra*, 2 Cal.App.5th at p. 1152.)

This is not correct. Proposition 69 does not require collecting, much less retaining, DNA samples from misdemeanants other than those committing sex and arson crimes. The vast majority of misdemeanors are not qualifying offenses for DNA collection and retention. (Sec. 296.) The policy underlying the DNA law reflects the determination that persons convicted of low-level nonserious offenses- misdemeanors other than sex and arson offenses -do not have to provide DNA samples for inclusion in

the DNA database. The enactors of Proposition 69 rightfully concluded that those who committed misdemeanors, as opposed to felonies, would be less likely to commit violent and serious crimes yielding DNA evidence (See *Rise v. Oregon*, *supra*, 59 F.3d at p. 1561.) In extending DNA collection to persons convicted or adjudicated of all felonies and sex and arson misdemeanors, the enactors of the DNA Act determined that persons committing these felonies and selected misdemeanors were likely recidivists, but those who committed most misdemeanors were not. Consequently, misdemeanants need not submit their DNA to the state.

Proposition 47 established that certain less serious behavior, drug possession and theft offenses, specifically theft of property worth less than $950, did not warrant felony treatment and instead warranted misdemeanor treatment for all purposes except firearm restrictions. Considering the intent behind both Proposition 69 and Proposition 47, there is no reasonable basis for finding, 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] databank." See *In re C. B.*, *supra*, 2 Cal.App.5th at pp. 1137-1138, dis. opn. of Pollak, J.

Accordingly, the retention of appellant's DNA in the state database violates his equal protection rights under the state and federal constitutions. (Cal. Const., art. I, sec. 7, subd. (a); U.S. Const., Fourteenth Amend.)

CONCLUSION

The Court of Appeal erred in affirming the juvenile court order denying expungement of appellant's DNA sample and finding no equal protection violation. Based on the foregoing, appellant respectfully requests that this Court remand his case to the juvenile court and order that appellant's DNA sample be removed from the state DNA databank.

Respectfully submitted,

Patricia Cooney

Dated: March 16, 2017

Patricia Cooney
Attorney for C.H.
Defendant and Appellant

PROOF OF SERVICE BY MAIL

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 March 16, 2017 I served a true copy of the attached OPENING BRIEF ON THE MERITS

on each of the following via the True Filing system:

California Court of Appeal
First Appellate District, Div. Three
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and on each of the following via the USPS:

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by placing same in sealed envelopes, addressed to each of the individuals named above, 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.

Patricia Cooney

Patricia Cooney

WORD COUNT CERTIFICATE

I hereby certify, under penalty of perjury, that the attached Appellant's Opening Brief on the Merits, minus the Tables, Proof of Service and Word Count Certificate, contains 13, 989 words, as determined by the computer program used to prepare this document.

Respectfully submitted,

Dated: March 16, 2017

Patricia Cooney

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Attorney for Appellant