S237801

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re C.B., a minor

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

C.B.,

Defendant and Appellant.

S237801

First District Court of Appeal Case No. A146277
Contra Costa County Superior Court Case No. J1301073
The Honorable Thomas Maddock, Judge

OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED FOR REVIEW

1. Whether, when a juvenile has a felony reclassified as a misdemeanor pursuant to Penal Code section 1107.18, the statute's directive that the reclassified offense be treated as a misdemeanor "for all purposes" mandates that courts grant the juvenile's request that the DNA sampled collected pursuant to the original felony adjudication be expunged from the state's DNA database.

2. Whether Assembly Bill 1492 was an amendment to Proposition 47, such that it should not be retroactively applied to juveniles who petitioned the court for expungement prior to its enactment.

3. Whether, when enacting Assembly Bill 1492, which courts have interpreted to prohibit expungement of a juvenile defendant's DNA following reclassification of an offense from a felony to a misdemeanor, the legislature impermissibly amended Proposition 47, because AB 1492 contravened the purpose of Proposition 47.

STATEMENT OF THE CASE

On September 20, 2013, the Contra Costa District Attorney filed a petition under Welfare and Institutions Code section 602, alleging that appellant Cody Buffum had committed one count of second degree robbery and personally used a knife in that robbery (Count 1; Pen. Code § § 211/212.5(c) & 12022(b)(1)), and one count of first degree burglary (Count 2; Pen. Code § 459/560(a)). (I CT 1-3.) [1] On October 1, 2013, the District Attorney amended the petition to charge one count of grand theft from a person (Count 3; Pen. Code §487(c)), and one count of misdemeanor second degree burglary (Count 4; Pen. Code §459/460(b)). (I CT 3, 8.) The court then dismissed counts 1 and 2. (I CT 8.) On October 1, 2013, appellant admitted the remaining allegations in the amended petition, felony theft and misdemeanor second degree burglary. (I CT 8.)

On October 15, 2013, appellant was made a ward of the court, placed on juvenile probation with no termination date, and ordered into out of home placement. (I CT 10.) As part of his disposition, he was ordered to submit samples for DNA collection pursuant to Penal Code section 296.1. (I CT 12.) On August

[1] CT refers to Clerk's Transcript on appeal and RT refers to Reporter's Transcript on appeal.

17, 2015, the juvenile court vacated the wardship order and ordered appellant's probation terminated unsuccessfully. (RT 28; II CT 351.)

On July 6, 2015, after the passage of Proposition 47, appellant petitioned the juvenile court to reduce his felony theft adjudication to misdemeanor petty theft under Penal Code section 490.2,[2] recalculate his maximum confinement period, reduce fines imposed to be consistent with a misdemeanor adjudication, and expunge his DNA from the state's DNA database, all pursuant to Penal Code section 1170.18.[3] (RT 9; II CT 289-290; 297-303.) At the July 21, 2015 hearing on the motion, the juvenile court reduced the grand theft to a misdemeanor petty theft, a violation of Penal Code section 490.2. (RT 10-11; II CT 294.) The court

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[2] Because the amount of the items stolen in the theft was less than $950, appellant was eligible for relief under Proposition 47. Penal Code section 490.2 states: (a) Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290. Appellant has none of these disqualifying prior offenses.

[3] Section 1170.18, was implemented by Proposition 47 in 2014. Subdivision (a) of that section states: "A person currently 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." (Pen.Code, § 1170.18.) The subsequent subsections lay out the procedures for filing that petition.

denied appellant's expungement request, incorporating by stipulation the argument and ruling found in *In re S.B.*, which had been decided by the court on June 4, 2015. (RT 10; II CT 295, 338-339; Transcript from In Re S.B., 6/4/15 1-21.)

Appellant filed a timely notice of appeal from the denial of his expungement request on September 14, 2015. (II CT 360-361.) Division Three of the First District Court of Appeal issued a published two-to-one opinion on August 30, 2016. The majority opinion affirmed the ruling of the juvenile court, holding that reclassification of appellant's offense from a felony to a misdemeanor did not entitle him to have his DNA expunged from the state's DNA database. In his dissent, Justice Pollak held that appellant's DNA should have been expunged upon the grant of his motion to redesignate his offense as a misdemeanor for all purposes except firearm restriction. A true and correct copy of that opinion is attached hereto as Appendix A.[4] Appellant filed a timely Petition for Review and this court granted review on November 19, 2016.

STATEMENT OF FACTS

Appellant incorporates the summary of the facts included in the Court of Appeal's majority opinion in footnote no. 2 (Opn. at 2, n. 2.)

SUMMARY OF ARGUMENT

When the voters passed the Safe Neighborhoods and Schools Act, "Proposition 47" in 2014, they unequivocally intended to "[r]equire misdemeanors

[4] Cites to the Court of Appeal opinion will reference the page numbers in the copy of the opinion attached hereto as Appendix A.

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." (Proposition 47, § 3.) As relevant here, the voters effected that intent by: 1) redefining the misdemeanor offense of petty theft to include obtaining any property by theft where the value of goods taken does not exceed $950, and 2) enabling a person who has completed his sentence/disposition "who would have been guilty of a misdemeanor under this act had this act been effect at the time of the offense" to petition the court to have the offense designated a misdemeanor. (Proposition 47, §§ 3, subd. (2), 8, 14, Pen. Code §§ 490.2, 1170.18, subd. (f)-(g).) The voters also stated that once a former felony is designated a misdemeanor, it "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 under [certain gun possession statutes]." (*Id.* § 14, Pen.Code § 1170.18, subd.(k).) Thus, the voters declared that certain non-violent offenses that were formally felonies should now be considered misdemeanors for all purposes except one - gun possession restrictions and law violations.

The penal Code requires that people convicted of, or adjudicated for, felonies submit DNA samples to the state's DNA databank. (Pen. Code § 296.) Misdemeanants with arson and sex offense convictions/adjudications are also required to submit DNA samples. (*Id.*) No other misdemeanants are required to submit DNA samples. Read together with Proposition 47's redesignation of

certain nonserious, nonviolent offenses as misdemeanors and the state's existing DNA collection requirements show that for people whose felony offenses have now been designated misdemeanors, the state should no longer be able to maintain their DNA samples in the state's DNA database.

Yet, courts, and now the legislature, have created an additional exception to the misdemeanor treatment of the offenses that now been deemed misdemeanors, by requiring that people whose offenses have been reclassified continue to have their DNA samples maintained in the state's DNA database, even when they are no longer guilty of having committed an offense requiring them to submit a DNA sample. That exception is contrary to both the plain language of Proposition 47, and the intent of the voters in enacting it.

Appellant was entitled to have the DNA sample he submitted with the original adjudication expunged from the state's database under the plain language of Proposition 47. An order to that effect is consistent with the intent and purpose of the voters in enacting Proposition 47. Nonetheless, the trial court denied appellant's request to have his DNA expunged and the Court of Appeal affirmed that decision. In so doing, the courts relied on both the fact that Proposition 47 was silent on the issue of DNA expungement, and on a subsequent amendment to the DNA collection statute, Assembly Bill 1492. That reliance was misplaced.

The plain language contained in Penal Code section 1170.18, subdivision (k) clearly states that redesignated offenses should be treated as misdemeanors for all purposes except for one. Multiple well-established principles of statutory

construction required the court below to give the plain language of section 1170.18, subdivision (k) its plain meaning. That application would result in a finding that appellant now falls squarely within the provisions of Penal Code section 299, subdivision (a) which entitles anyone who "has no past or present offense or pending charge which qualifies that person for inclusion in" the state's DNA database to have his DNA sample destroyed and expunged. (Pen. Code §299, subd. (a).)

The lower court's contention that redesignation of appellant's offense does not entitle him to expungement because redesignation is akin to reduction of a wobbler from a felony to a misdemeanor under Penal Code section 17, subdivision (b) fails to account for the fact that the very nature of redesignated offenses under Proposition 47 have been changed. They are simply no longer felonies for any purpose. That puts them in a fundamentally different category than wobblers which remain chargeable as felonies now, and at any time in the future. That difference mandates a different approach to analyzing the collateral consequences, including DNA expungement, that flow from the original convictions in the two types of cases.

Moreover, a finding that appellant and those similarly situated are entitled to DNA expungement is wholly consistent with the public policy underlying both Proposition 47 and Proposition 69, the DNA and Forensic Identification Act passed in 2004. The majority opinion's assertion that denial of appellant's request for expungement is necessary to harmonize the two propositions, or to ensure

public safety, is incorrect.

Finally, the amendment to Penal Code section 299, subdivision (f) enacted by Assembly Bill 1492 in 2016 by its plain language does not apply to expungement requests because that subdivision of the statute, applies to the duty to provide the DNA, not the state's obligation to expunge a misdemeanant's DNA. Even if that were not the case, however, the changes made by AB 1492 should not be applied to appellant's case. First, because it was enacted after he requested relief, to which he was clearly entitled under the caselaw in place at the time of his motion. Second, AB 1492 was an impermissible amendment to Proposition 47 because it did not further the intent of the statute.

ARGUMENT

I. BECAUSE THE PLAIN LANGUAGE OF PENAL CODE SECTION 1170.18 MANDATES THAT REDESIGNATED OFFENSES BE CONSIDERED MISDEMEANORS FOR ALL PURPOSES EXCEPT FOR RESTRICTIONS ON THE USE AND POSSESSION OF FIREARMS, AND BECAUSE JUVENILES ADJUDICATED AS DELINQUENTS FOR MISDEMEANORS OTHER THAN SEX AND ARSON OFFENSES ARE NOT REQUIRED TO PROVIDE DNA SAMPLES, APPELLANT WAS ENTITLED TO HAVE HIS DNA EXPUNGED WHEN HIS OFFENSE WAS REDESIGNATED AS A MISDEMEANOR.

There is no dispute that pursuant to Proposition 47, appellant's theft offense was correctly redesignated as a misdemeanor petty theft for all purposes except firearm restrictions. (See Pen.Code, § 1170.18, subds. (f), (g); Opn. at 5.) The issue before the juvenile court, the Court of Appeal, and this Court is whether appellant's DNA should be expunged - his DNA sample destroyed and his DNA profile removed from the data bank - because he no longer has an offense qualifying for DNA submission, and his redesignated offense is to be treated as a "misdemeanor for all purposes except for firearm restrictions. (See Pen.Code, secs.1170.18, subd. (k), 296, 299, subd. (a); Opn. at 5.) The plain language of Penal Code sections 1170.18[6] and 299 mandated that the Court of Appeal find that appellant was entitled to have his DNA sample expunged from the state's database.

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

A. APPLICABLE LAW.

The issue in this case involves judicial interpretation of an initiative statute, specifically Penal Code section 1170.18, enacted pursuant to Proposition 47. Where an appeal involves the interpretation of a statute enacted as part of a voter initiative, the issue on appeal is a legal one, which courts review de novo. (*People v. Sledge* (2017) 7 Cal.App.5th 1089.) Appellate courts independently review the decision of the trial court concerning statutory interpretation. (*People v. Taylor* (1992) 6 Cal.App.4th 1084, 1090-1091.)

1. Proposition 47.

In November 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, intending 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." (Proposition 47, § 3.) Consistent with that intent, the initiative designated a number of non-violent, non-serious felony offenses as misdemeanors. Appellant's offense of theft from a person of property valued at less than $950 was redignated as misdemeanor petty theft. (Pen.Code § 490.2.)[7]

People who were convicted of, or adjudicated for, of any of the reclassified offenses prior to passage of the act can petition the court to have their conviction

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[7] Proposition 47 applies to juveniles who were found to be delinquents, under Welfare and Institutions Code section 602, when they were found to have committed one of the reclassified offenses. (*Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1226.)

designated as a misdemeanor, even after they have served any sentence or disposition associated with the original felony offense. (Pen. Code § 1170.18, subds. (f), (g).) The mechanism for petitioning the court for redesignation, as appellant successfully did in this matter, is contained in Penal Code section 1170.18. Subdivision (k) of section 1170.18 addresses the impact of redesignation. It provides:

> Any felony conviction that is recalled and resentenced...or designated as a misdemeanor...*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 under [the firearm restriction statutes.]

(Pen.Code § 1170.18, subd. (k), emphasis added.)

Thus, the plain language of Proposition 47 makes clear that redesignated offenses are to be treated as misdemeanors for all purposes except restrictions on firearm ownership and possession. There are no other exceptions to this pervasive misdemeanor treatment in the statute, and courts are not free to create additional exceptions.

2. The California DNA Act.

In 2004, the voters passed Proposition 69, which amended the California DNA Act to require certain groups of offenders to submit to the collection of their DNA samples for the purpose of creating identifying DNA profiles and retaining those profiles in a state-maintained data base. (See *Haskell v. Brown* (N.D. Cal.

2009) 677 F. Supp. 2d 1187, 1190-91.) The following people must submit DNA samples: Any person convicted of or adjudicated for a felony; any adult arrested for, or charged with, a felony; and any person required to register as a sex offender or arsonist as a result of a felony or misdemeanor conviction or adjudication. (Pen.Code §§ 295, 296.) Juveniles who are adjudicated wards of the court for misdemeanors other than sex and arson offenses, are not required to submit DNA samples. (*Id.*) As long as the person's DNA profile remains in the database, the state is required to retain and store his entire DNA sample. (*United States v. Kriesel* (9th Cir. 2013) 720 F.3d 1137, 1141-45.)

Penal Code section 299 lays out the criteria and procedure by which a person may request that his/her DNA be expunged after collection. Subdivision (a) of section 299 states:

> 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 the 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.

(Pen.Code § 299, subd. (a), emphasis added.) Subdivision (b) of the statute lists the circumstances under which someone may have their DNA expunged because they no longer have a qualifying offense or qualifying pending charge, even though they had a qualifying arrest or conviction at the time of DNA collection. Subdivision (b) does not list redesignation pursuant to section 1170.18 as one of

those circumstances.[8] (Pen. Code §299, subd. (b).) Multiple courts have, however, recognized that the list in subdivision (b) is not exhaustive. (*In re Alejandro N., supra,* 238 Cal.App.4th at 1228-1229; *Coffey v. Superior Court* (2005) 129 Cal.app.4th 809, 817.)

Subdivision (e) of section 299 provides that the state is not required to remove the DNA profile from the data base or destroy the DNA sample if the person's duty to register as a sex or arson offender ha been terminated. (Pen. Code § 299, subd. (e).) Subdivision (f) of section 299 states that a judge is not authorized to relieve certain categories of persons from the duty to provide DNA to the state if they were convicted of or adjudicated for a qualifying felony or misdemeanor sex or arson offenses, but thereafter were relieved of punishments and penalties. (Pen. Code § 299, subd. (f).) At the time of appellant's successful July 2015 motion to redesignate his felony theft offense as misdemeanor petty theft, that section read:

Notwithstanding any other law, including Sections 17, 1203.4, and 1203.4a,

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[8] Section 299(b) states: 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.

> 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.

(Pen.Code § 299, subd. (f).)[9]

3. Case Law

***Alejandro N. v. Superior Court* (2015) 238 Cal. App. 4th 1209.**

In *In re Alejandro N.* (2015) 238 Cal.App.4th 1209[11] (*Alejandro N.*) Division One of the Fourth District Court of Appeal held that Proposition 47's redesignation provisions were applicable to juveniles, a holding that has not been contested by the Attorney General in subsequent cases. (*Id.* at 1226.) The court then considered whether a juvenile who successfully petitioned a court to redesignate his felony as a misdemeanor should also be able to have his DNA sample expunged from the state's DNA database pursuant to Penal Code section 299.

The juvenile court in *Alejandro N.* had denied the appellant's request to expunge his DNA from the state's DNA database because reclassification of an offense under Proposition 47 was not one of the grounds for expungement listed in

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[9] In 2015, the legislature passed Assembly Bill 1492 and it became effective on January 1, 2016. Among other things, that legislation amended section 299(f) to add "section 1170.18" to the list of statues that do not relieve a person of the duty to provide DNA samples. In Arguments II, appellant argues that 1) the statutory changes made by AB 1492 are not applicable to appellant's case because his motion was granted before the bill was enacted and 2) AB 1492's amendment to section 299(f) was an impermissible amendment of Proposition 47.

[11] The Petition for Review of *Alejandro N.* was denied by this court on October 14, 2015.

Penal Code section 299, subdivision (b). (*In re Alejandro N.*, *supra*, 238 Cal.App.4th at 1226-1227.) The Court of Appeal was not persuaded by that reasoning. The court focused on the language in section 299, subdivision (a) which "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." (*Id.* at 1228, emphasis in original.) The court read that language, along with section 1170.18's broad directive that redesignated offenses are "misdemeanors for all purposes" except for restrictions on the ownership and possession of firearms, and reasoned that reclassified offenses "are therefore disqualified for DNA retention" under the plain language of section 299, subdivision (a). (*Id.* 1229)

The court held that by creating one specific exception to the misdemeanor treatment of reclassified offenses, the voters "directed courts not to carve out other exceptions to the misdemeanor treatment of the reclassified offenses." (*Alejandro N.* at 1227.) The court also recognized that voters were presumed to have been aware of the existing law precluding DNA collection for most misdemeanors but "did not include DNA collection as an exception to the misdemeanor treatment of the [redesignated] offenses." (*Id.* at 1227.)

The court in *Alejandro N.* declined to apply the earlier decision in *Coffey v. Superior Court* (2005) 129 Cal. App. 4th 809, to the circumstances of the case before it. In *Coffey*, the defendant was charged with a wobbler offense and pled guilty to a felony. His offense was reduced to a misdemeanor at sentencing

pursuant to Penal Code section 17, subdivision (b).[12] The defendant had argued that he was not "convicted" until sentencing, and that since he was sentenced as a misdemeanant, he had no duty to provide his DNA to the state. He sought expungement as a remedy, which the Court of Appeal ruled was unavailable under those facts. (*Id.*)

Coffey held that the duty to provide DNA arose at the time the defendant pled guilty to a felony, and the section 17(b) reduction to a misdemeanor at sentencing did not obviate that duty, as the offense would only be treated as a misdemeanor from the time of sentencing onward. Thus, the defendant was not entitled to expungement of his DNA. (*Coffey v. Superior Court, supra*, at 821, 823; *Alejandro N., supra*, at 1229.)

In declining to apply *Coffey* to the facts before it, the court in *Alejandro N.* found substantive differences between the reduction of wobblers under section 17(b) and reclassification of offenses under section 1170.18, stating that reclassified offenses were "distinct from wobbler offenses" in that, unlike wobblers, which remain chargeable as felonies or misdemeanors, "the offenses now classified as

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[12] The text of that statute states: (b) When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:(1) After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. (2) When the court, upon committing the defendant to the Division of Juvenile Justice, designates the offense to be a misdemeanor.(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.

misdemeanors for qualifying offenders under Proposition 47 have permanently been removed from the felony category and are no longer subject to DNA collection." (*Id.* at 1230.)[13]

Court of Appeal Opinion In This Case

In the case at bar, the majority opinion from Division Three rejected appellant's argument that he was entitled to expungement of his DNA sample. The majority held that the redesignation of appellant's offense to a misdemeanor that does not require DNA collection, and language in section 1170.18 mandating that redesignated misdemeanors "shall be considered misdemeanors for all purposes" except for firearms restrictions, did not authorize the juvenile court to grant appellant's request to have his DNA sample expunged. (Opn. at 8; See Pen. Code §§1170.18, subd. (k) and 299, subd. (a).) The majority asserted that because Proposition 47 did not mention DNA collection, and redesignation of an offense under Proposition 47 is not one of the listed grounds for DNA expungement in section 299 (b), appellant was not entitled to expungement. (Opn. at 8-9.) The majority thus created a second exception to the "misdemeanor for all purposes" language of section 1170.18 (k) - the retention of DNA samples.

The majority also relied on the reasoning in the opinion in *Coffey v.*

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[13]At the time *Alejandro N.* was decided, subdivision (f) of section 299 did not list reclassification of an offenses under Penal Code section 1170.18 as one of the circumstances, specifically including reduction to a misdemeanor pursuant to section 17, that does not relieve a person of the duty to provide DNA. The opinion in *Alejandro N.* relied in part on the absence of that language to distinguish the facts of that case from the facts in *Coffey*. (*In re Alejandro N.*, *supra*, 238 Cal.App.4th at 1229-1230.)

Superior Court and analogized redesignation of offenses to misdemeanors under section 1170.18 to the discretionary reduction of wobbler offenses to misdemeanors at sentencing under section 17, subdivision (b). (Opn. at 9-11.) The majority asserted that, as with reduction at sentencing of wobbler offenses originally charged as felonies, the redesignation of offenses for the select former felonies that are now misdemeanors should be given prospective effect only for the purposes of analyzing appellant's obligation to provide DNA, and his right to request that his DNA be expunged. (Opn. at 11-12.) The majority held that irrespective of the validity of the Legislature's subsequent amendment to Penal Code section 299 (f), a person whose offense as been redesignated a misdemeanor pursuant to Proposition 47 is not entitled to have his DNA expunged.[15]

The majority also found that the 2014 Assembly Bill 1492's ("AB 1492") amendment to section 299, subdivision (f), adding section 1170.18 to the list of statutory provisions that do not obviate a person's duty to provide DNA to the state merely clarified existing law and did not amend, or change the effect of, the language in section 1170.18 (k) mandating that reclassified offenses be treated as misdemeanors for all purposes. (Opn. at 16.) And, on that basis, held that AB 1492 may be applied retroactively to appellant's case even though it was enacted after

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[15] That reasoning is consistent with the discussion in *In re C.H.* another decision from Division Three of the First District which is also pending review before this court. (*In re C.H.*, review granted Nov. 9, 2016, No. 237801 [previously published at 2. Cal.App. 4th 1139].)

the order was made, and appeal was taken. Finally, the court summarily rejected appellant's argument that AB 1492 was an impermissible amendment to Proposition 47. (Opn. at 16.)[16] The majority opinion is largely consistent with the decision from Division One of the First District in *In re J.C.* (2016) 246 Cal.App.4th 1462.

Justice Pollak dissented from the majority opinion. He wrote that in enacting Proposition 47, the voters intended that reclassified offenses be considered misdemeanors "for all purposes" and carved out only one exception to the misdemeanor treatment of those offenses: firearm restrictions. (Dissent at 3.) He wrote that the voters were presumed to be aware of the law governing DNA collection and retention when they passed Proposition 47, and did not opt to include the retention of DNA samples as an additional exception to the misdemeanor treatment of reclassified offenses; therefore, the voters did not intend to exclude DNA retention from the misdemeanor treatment of reclassified offenses. (*Id.*)

Justice Pollak rejected the argument that redesignation of offenses under section 1170.18 is analagous to reduction at sentencing of wobbler offenses from felonies to misdemeanors under section 17(b). (Dissent at 7.) He pointed out that, unlike wobbler offenses, which remain chargeable as felonies, reclassified offenses "have permanently been removed from the felony category and are no

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[16] Appellant's argument that the majority wrongly analyzed the effect of AB 1492 on his request for expungement can be found below in arguments II

longer subject to DNA collection." (Dissent at 7.) He also disagreed with the majority's finding that the amendment to section 299, subdivision (f) was applicable to appellant's request for two reasons: first, because section 299(f), by its plain language applies only to the duty to provide a DNA sample, not to a request to expunge a DNA sample, and second because the amendment was an invalid amendment to Proposition 47. (Dissent at 7-8.)

Justice Pollak pointed out that application of the majority's reasoning "would treat a reclassified offense as a felony precluding expungement rather than a misdemeanor entitling the defendant to expungement" and that application was counter to the plain language of Proposition 47, and therefore impermissible. (Dissent at 8-9.) Finally, Justice Pollak wrote that because appellant no longer has been adjudicated for an offense requiring him to submit a DNA sample, under the plain language of section 299(a) he is entitled to expungement. (Dissent at 11-12.)

As illustrated in Justice Pollak's well reasoned dissent in this case, and discussed *infra*, the majority opinion was in error.

B. THE LAW GOVERNING DNA SUBMISSION AT TIME OF APPELLANT'S PETITION, REQUIRED THAT THE COURT GRANT HIS REQUEST TO HAVE HIS DNA EXPUNGED FROM THE STATE'S DATABASE.

As outlined above, Pursuant to the California DNA Act, as amended by Proposition 69, a juvenile adjudication for a misdemeanor other than a sex or arson offense does not require a minor to submit a DNA sample to the state's DNA database. (Pen. Code, §§ 296, 296.1; see also *In re Nancy C.* (2005) 133

Cal.App.4th 508 [order requiring minor to submit DNA sample was stayed pending trial court's determination of the felony/misdemeanor status of her offense, and if misdemeanor, juvenile court ordered to strike the order to give DNA samples pursuant to Penal Code, section 296, subdivision (a)(1)].),

Proposition 47, in turn, permanently reclassified selected drug possession and theft offenses – including appellant's offense of theft of less than $950 - as misdemeanors. (See Pen. Code §490.2.) Proposition 47 also provided for retroactive redesignation of those offenses if the defendant was still serving the original felony sentence, or if the defendant had completed his/her sentence or disposition. (Pen. Code § 1170.18, subs. (a),(b), (f) & (g).) There is no dispute that appellant's offense was properly redesignated as a misdemeanor. (Opn. at 4-5.)

As also discussed above, section 1170.18, subdivision (k), mandates that a redesignated offense shall be treated as a misdemeanor for all purposes except one - firearm restrictions. (Pen. Code §1170.18, subd. (k).) Because appellant has now been adjudicated for a misdemeanor that does not require him to submit a DNA sample, and because Proposition 47 did not exempt DNA submission and retention from the misdemeanor treatment of reclassified offenses, appellant is entitled to have his DNA expunged.

1. Application of Established Principles of Statutory Interpretation to the Provisions of Proposition 47 Show That Appellant Is Entitled to Expungement.

Under well-established rules of statutory interpretation, section 1170.18(k)

means what it plainly says: the only exception to the "misdemeanor for all purposes" treatment of an offense designated a misdemeanor pursuant to Proposition 47, is that the offender may not own or possess firearms, or prevent his conviction for crimes prohibiting firearm possession by certain felons. The Court of Appeal in this case improperly carved out an additional exception to the misdemeanor treatment of redesignated offenses: retention of DNA samples. That holding is at odds with established cannons of statutory construction.

In interpreting a statute or an initiative, 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 more than one meaning, . . . there is no need for construction, and courts should not indulge in it." (*Ibid.*)[17]

As outlined in the dissenting opinion in this case, and succinctly stated in *Alejandro N.*:

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

(*Alejandro N., supra*, 238 Cal. App. 4th at p. 1227.) In his dissent, Justice Pollak

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[17]As the Court of Appeal recognized, the rules of statutory interpretation apply to initiatives. (Opn. at 3. citing *Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188, 1212.)

found that the reasoning of Alejandro N., on this point and others, "is unassailable." (Dissent at 5.)

A second well established cannon of statutory interpretation states that "expression of some things in a statute necessarily means the exclusion of other things not expressed" or *Expressio Unius Est Esclusio Alterius.* (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852, citations omitted.) In other words, when the enactors of a statute or initiative explicitly state one exception to a rule, it is presumed that they intentionally excluded all others. The enactors of Proposition 47 identified and expressly stated only one exception (firearm restrictions) to the "misdemeanor for all purposes" treatment of reclassified offenses in section 1170.18, and in so doing, precluded the addition of others. As stated in *Alejandro N.*, and recognized by Justice Pollack in his dissent:

> Because the statute expressly 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 reclassified offense absent some reasoned statutory or constitutional basis for doing so.

(*In re Alejandro N.supra*, 238 Cal.App 4th 1227; Dissent at 3 [quoting *Alejandro N.*, with approval, on this point].)

A third cannon of statutory interpretation states that the drafters or Proposition 47, and the voters who approved the initiative, are assumed to have known of the laws existing in 2014, including those provisions of the California

DNA Act, as amended in 2004,governing the collection, retention and expungement of DNA. (*In re W.B.* (2012) 55 Cal.4th 30, 57.)

Thus, as the Court recognized in *Alejandro N.*:

> 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 [citation], and yet they did not include DNA collection as an exception to the misdemeanor treatment of the offense. .....[T]he voters did not intend that a reclassified misdemeanor offense be deemed a felony for purposes of retention of DNA samples.

(*Alejandro N., supra* at p. 1228; see also Dissent at 3.)

Yet, one premise of the majority's opinion is that because Proposition 47 is "completely silent with respect to the state-maintained DNA databank," no expungement is required upon reclassification of an offense. (Opn. at 8.) That premise defies principles of statutory construction; it is just the opposite - voters are presumed to have known they could have created an exception to the misdemeanor treatment of redesignated offenses and chose not to do so.

Finally, "[w]ell-established canons of statutory construction preclude a construction [that] renders a part of a statute meaningless or inoperative." (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274.) The majority's reasoning that Proposition 47's silence on DNA collection, retention, and expungement means that expungement is precluded impermissibly renders Proposition 47's mandate that reclassified offenses be considered misdemeanors "for all purposes" meaningless.

Taken to its logical conclusion, the majority's analysis would allow courts

and/or the legislature to nullify any and all collateral benefits that flow from reclassification of an offense, because Proposition 47 is "silent" as to the exact nature of those benefits. Such an interpretation transmutes the language requiring that a reclassified offense be treated as a misdemeanor "for all purposes" into 'for all purposes except those decided by a court or the legislature.' That was not the intent of the voters in enacting Proposition 47.

2. The Majority's Analysis Contravenes the Intent of the Voters to Provide Broad Relief Under Proposition 47.

As the Court in *Alejandro N.* noted:

> The fact that the voters chose to extend the benefits of Proposition 47 on a broad retroactive basis to persons convicted of felonies before the Act's effective date–allowing them to petition to reclassify their offenses and reduce their sentences–supports that the voters likewise intended to provide retroactive relief with regard to retention of already-secured DNA samples. Based on the broad mandate set forth in section 1170.18, subdivision (k) to treat reclassified offenses as misdemeanors for all purposes except for firearm restrictions, as well as the extension of an expansive retroactive remedy under section 1170.18, we conclude the voters did not intend that a reclassified misdemeanor offense be deemed a felony for purposes of retention of DNA samples.

(*Alejandro N., supra*, at p. 1228.)

In *People v. Evans*, review granted Feb. 22, 2017, No. S239635 [previously published at 6 Cal. App. 5th 894][18], Division Two of the Fourth District also recognize the voters' intent to relieve people with reclassified offenses from the liabilities associated with a past felony conviction. In *Evans*, the Court of Appeal

[18] 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 March 30, 2016 No. S232900. The case may be cited for persuasive value. (Cal. Rules of Court, rule 8.1115(e).)

struck a one-year prior prison enhancement based on a felony drug possession conviction which was redesignated as a misdemeanor pursuant to Proposition 47 before the sentence became final in the current felony case. The Court held that the redesignated misdemeanor offense could not be used to impose an enhancement because the offense was no longer 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 to have all to all felony collateral consequences extinguished except for the restrictions on firearm possession. The court stated:

> The plain language of Proposition 47 also explicitly anticipates misdemeanor reclassification will affect the collateral consequences of felony convictions. Among other things, suffering a felony conviction may result in the offender losing the right to vote (Elec. Code, § 2101), losing the right to own or possess a firearm (Pen. Code, § 29800, subd. (a)(1)), being required to provide biological samples to law enforcement for identification purposes.(Pen. Code, § 296, subd. (a)(1)), and, if the offender is convicted of a felony in the future, losing probation as a sentencing option (Pen. Code, § 1203, subd. (e)) and being exposed to sentence enhancements (Pen. Code, § 667.5, subd. (b)). 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 in the original.)

(*People v. Evans* (2016) 6 Cal.App.5th 894, 900-901.)

Appellant asserts, with support from *Alejandro N.*, Justice Pollak's dissent the opinion in *Evans*, and established principles of statutory interpretation, 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) demonstrates the voters' intention to exclude only firearm restrictions, and not DNA retention, from the felony collateral consequences extinguished by the redesignation of an offense under Proposition 47.

3. Appellant Is Entitled to Exhpungement of His DNA Pursuant to the Plain Language of Penal Code Section 299, As He Does Not Have an Offense Qualifying Him For Inclusion In the State's DNA Database.

At all times during the pendency of these proceedings, Penal Code section 299 has stated that a person is entitled to have his/her DNA expunged from the state's database "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." (Pen.Code § 299, subd. (a).) Appellant is now a person who has been adjudicated for misdemeanor theft, rather than a felony. His misdemeanor offense does not qualify him for inclusion in the DNA data bank. He therefore no longer has a qualifying offense under section 299, subdivision (a) and is entitled to have his request to expunge his DNA granted.

As Justice Pollak stated in his dissent:

> 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).

(Disssent at 12.)

The majority held that because appellant admitted to a theft offense that was a felony prior to the passage of Proposition 47, he still has a qualifying felony offense that requires that his DNA remain in the database. (Opn. at 10.) The majority reaches this conclusion by analogizing the effects of redesignating an offense as a misdemeanor pursuant to section 1170.18 to the effects of reducing felony conviction, whether by plea or jury verdict, to a misdemeanor under section 17, subdivision (b), so that the individual defendant may be punished as a misdemeanant. (Opn. 9-12.) The problems with this analogy will be discussed in more detail below, but the main flaw is that, unlike wobblers which remain chargeable as felonies today, "[w]hen voters reclassified certain offenses as misdemeanors under Proposition 47, they changed the nature of those offenses *in all cases* from felonies (or wobblers) to misdemeanors."(Dissent at 6-7.) Thus, the two types of statutes are not analogous; one remains a felony today and would therefore be excluded from the scope of section 299(a) depending on how it was charged. The other could not, as a matter of law, be charged as a felony today and would fall squarely within the scope of section 299, subdivision (a).

Courts have consistently held that reclassification of an offense under section 1170.18 means that the offense no longer qualifies as a past felony conviction (even when a prison term has been served) for the purposes of

imposing future sentencing enhancements. (See *People v. Abdallah* (2016) 246 Cal.App.4th 736, 747 [reclassified offense is not considered a prior felony for sentencing enhancement]; *People v. Jones* (2016) 1 Cal.App.5th 221, review granted 9/14/16 S235901 [court assumes without deciding that once an offense is reclassified it cannot be used to enhance future sentences]; *People v. Evans* (2016) 6 Cal.App.5th 894, review granted 2/22/17 S239635 [reclassification before judgment becomes final is basis for striking enhancement based on reclassified offense].)

The analysis is no different here. Section 299(a) states that appellant is entitled to expungement if he no longer has a past offense qualifying him for inclusion in the DNA databank. He does not. He is therefore entitled to have his DNA expunged.

Finally, the absence of a reference to section 1170.18 in section 299, subdivision (b) is not a bar to expungement as asserted by the majority. (See

Pen.Code § 299, subd. (b).) [19]

Multiple courts have recognized that section 299, subdivision (b) is not an exclusive list of circumstances in which expungement is proper. (See *In re Alejandro N., supra,* 238 Cal.App.4th at 1228-1229, citing *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, section 702 allows minor to seek DNA expungement should trial court designate offense as misdemeanor upon remand].); *Coffey v. Superior Court* (2005) 129 Cal.App.4th 809, 817.)

In addition, as the Court stated in *Alejandro N.*, Proposition 47 redesignation simply provides another circumstance in which the offender no longer has a qualifying offense under the plain language of section 299(a):

> 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

[19] Section 299(b) states: (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.

> 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 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

(*Alejandro N.*, *supra*, 238 Cal.App.4th at pp. 1228-1229 (italics in original.).)

Even under section 299(b), however, the legality of the initial collection of the DNA sample has no bearing on the right to expungement. Instead, the right to expungement arises based on events that take place *after* DNA has been provided in compliance with the law. In all of the circumstances listed in section 299(b), the offender had a qualifying felony arrest or qualifying conviction at the time his/her DNA was collected. (Pen. Code § 299, subd. (b)(1)-(b)(4). Under subdivisions (b)(1), (b)(3) and (b)(4), the adult offender has a qualifying felony or misdemeanor arrest or charge that permitted his DNA to be collected under section 296, but he was not prosecuted or convicted for the qualifying offense. Under section (b)(2), the person had a qualifying conviction or disposition, which was subsequently reversed. Thus, the reference to a "past qualifying offense" in section 299(a) and (b) cannot be referring to the underlying charge or conviction in that case. As with appellant, p[eople in those categories are not claiming that the state had no right to collect their DNA at the time of arrest, conviction or

adjudication, but rather that they no longer have a qualifying offense.

Appellant is asking that the Court recognize that now, as a matter of law, he is not guilty of an offense "which qualifies [him] for inclusion within the state's DNA and Forensic Identification Database and Databank Program." (Pen.Code §299, subd. (a).) As noted by the dissent, appellant "does not seek retroactive application of section 1170.18 but prospective application to his request for expungement." (Dissent at 11.)

Appellant asks this COURT TO GIVE THE WORDS "MISDEMEANOR FOR ALL PURPOSES" THEIR PLAIN AND INTENTIONAL MEANING, APPLY THE LAW AS IT EXISTED AT THE TIME HE MADE HIS REQUEST FOR EXPUNGEMENT, AND GRANT HIS REQUEST TO HAVE HIS DNA EXPUNGED FROM THE STATE'S DATABASE.

C. THE COURT OF APPEAL ERRED IN HOLDING THAT APPELLANT WAS NOT ENTITLED TO DNA EXPUNGEMENT BASED ON *COFFEY V. SUPERIOR COURT*, BECAUSE RECLASSIFICATION OF AN OFFENSE UNDER PROPOSITION 47 IS NOT EQUIVALENT TO REDUCTION OF A FELONY TO A MISDEMEANOR UNDER PENAL CODE SECTION 17.

The majority found that *Coffey v. Superior Court* (2005) 129 Cal.App.4th 809 ("*Coffey*") was persuasive authority. (Opn. at 9.) In *Coffey,* Division Five of the First District held that where the defendant plead guilty to a wobbler offense as a felony and the court later reduced that offense to a misdemeanor at sentencing, the defendant was not relieved of his obligation to provide a DNA sample and thus

not entitled to expungment of his DNA sample.[20]

After his felony offense was reduced to a misdemenor at sentencing, defendant Coffey moved to have DNA samples that had been collected after his initial felony plea removed from the state's DNA database, claiming he had never been "convicted" of a felony, and the taking of those samples violated his Fourth Amendment rights. (*Id.* at 813-814.) The Court denied that request based on cases holding that the duty to provide DNA to the state arises at the time of the plea to a felony, and wobblers were to be considered felonies until they were reduced to misdemeanors at sentencing. The court found that the language in the DNA collection statute in place at the time of Coffey's plea, as well as subsequent amendments to those statues also supported its ruling. (*Id.* at 821-822; former Penal Code § 296, subd. (a) former 299, subd. (f).) Because the state had the right to order collection of his DNA at the time of his felony plea, the court reasoned that the defendant had no right to expungement, and the discretionary reduction of a felony wobbler offense to a misdemeanor at sentencing only renders an offense a misdemeanor for all purposes thereafter, without any retroactive effect. (*Coffey v. Superior Court*, *supra*, 129 Cal.App.4th at 823.)

The majority in the case at bar held that redesignation of a felony offense to

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[20]In Coffey, an adult defendant was charged with a battery under Penal Code section 245, subdivision (a), which was a wobbler offense that could be treated as a felony or misdemeanor. (*Coffey* at 812.) Coffey pled guilty to a felony with the understanding that if he completed certain programs, the offense would be reduced toa misdemeanor at sentencing, pursuant to Penal Code section 17, subdivision (b) (*Id.*) After he successfully completed his requirements, Coffey was sentenced to a misdemeanor battery. (*Id.* at 813.)

a misdemeanor pursuant to Penal Code section 1170.18 should be treated exactly like the reduction of a felony wobbler to a misdemeanor at sentencing pursuant to section 17, subdivision (b) for purposes DNA sample submission and retention. The majority therefore ruled that, as in *Coffey*, a person who had been adjudicated for an offense that was subsequently redesignated as a misdemeanor for all purposes under section 1170.18, subdivisions (f), (g), and (k), was not entitled to expungement. (Opn. at 11.)

The majority's analogy is flawed. That analogy was rejected in *In re Alejandro N.* (2015) 238 Cal.App.4th 1209, and in the dissenting opinion in this case. As the dissent states:

> Reclassification of a conviction under section 1170.18 is not analogous to reduction of charges under section 17. Wobbler offenses may be sentenced and classified 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, and his traits of character as evidenced by his behavior and demeanor at the trial.' " (Citations.) 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 state prison as a felon' " (Citations), it remains true that the person was found or pleaded guilty to the offense as a felony. In contrast, when the voters reclassified 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 N.], *distinct from wobbler offenses—the offenses now classified as misdemeanors for qualifying offenders under Proposition 47 have permanently been removed from the felony category and are no longer subject to DNA collection.*

(Dissent at 6-7, emphasis added.)

The dissent recognized that any wobbler offense reduced to a misdemeanor, under section 17 (b) can be treated as a felony now and any time in the future. In contrast, offenses reclassified as misdemeanors by Proposition 47, and redesignated as misdemeanors under section 1170.18, cannot be felonies now or any time in the future. The electorate has declared that reclassified offenses are no longer felonies under any circumstances, but no such determination has been made as to wobblers. The analogy to section 17(b) thus does not provide a reasoned basis for denying appellant's expungement request.

An additional critical difference between Proposition 47 and Penal Code section 17 is that Proposition 47 specifically and clearly enables even defendants who have already *completed* their sentences or dispositions to petition the trial court to have reclassified offenses designated as misdemeanors. (Pen.Code § 1170.18, subd. (f).) No such relief is available under Penal Code section 17 where the disposition or sentence dictates the felony or misdemeanor nature of the offense. Thus, part of the purpose and intent of Proposition 47 is to relieve juvenile offenders like appellant – who have already completed their disposition - of all but one of the consequences of having a felony adjudication. One such consequence is having a DNA sample retained in the state's DNA database. (See *People v. Evans* (2016) 6 Cal.App.5th 894, 900-901,)

The categorical and permanent reclassification of certain offenses, including appellant's, from felonies to misdemeanor, as well as Proposition 47's

specific, retroactive, remedy that applies even to people who have already completed any sentence or disposition, are clearly distinguishable from section 17(b). Unlike a wobbler, appellant's offense is now a misdemeanor for all purposes. If he were adjudicated for that offense today, he would not have to submit a DNA sample. He is thus no longer guilty of an offense that compels him to submit a DNA sample and he is entitled to have his DNA sample expunged.

D. HOLDING THAT THE EXPUNGEMENT OF DNA IS AUTHORIZED WHEN THE COURT REDESIGNATES AN OFFENSE AS A MISDEMEANOR PURSUANT TO PENAL CODE SECTION 1170.18 SUPPORTS THE PUBLIC POLICY BEHIND BOTH PROPOSITION 47 AND PROPOSITION 69, AND CALIFORNIA'S STRONG PUBLIC POLICY OF PRIVACY PROTECTION.

The majority held that interpreting Section 1170.18 as precluding DNA expungement harmonizes the statutory schemes of Proposition 47 and Proposition 69, and promotes the shared intent of both measures to promote public safety. (Opn. at 13-14.) The majority misinterprets the purpose of Proposition 47 and misunderstands the goal of harmonizing statutory schemes.

As this Court held in *State Department of Public Health v. Superior Court* (2015) 60 Cal. 4th 940, the goal of harmonizing potentially inconsistent statutes "is not a license to redraft the statutes to strike a compromise that the Legislature did not reach." (*Id.* at 956.) A court is not authorized to rewrite the statutes or to

supplant the intent of the Legislature [or the electorate] as expressed in a particular statute. (*Ibid*, citing *Garcia v. McCutchen* (1997) 16 Cal. 4th 469, 479.)

The cardinal rule of statutory construction is to ascertain the intent of the enactors and the purpose of each initiative. (Opn. at 3.)When analyzing an initiative passed by the voters, "[a]n 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.)

1. Expungement of DNA Is Consistent WithThe Public Policy Behind Proposition 47

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 the crimes as misdemeanors. The voters effected that intent by clearly stating that those low level offenses shall be a "misdemeanor for all purposes" except restrictions on firearm possession and ownership.

As noted above, the enactors were presumably aware of the DNA collection and expungement provisions of Proposition 69, passed in 2004 and codified in Section 296 and 299. Yet, they chose not to include DNA collection and retention as exceptions to the "misdemeanor for all purposes" mandate in section 1170.18.

The voters thus did not intend a person with a redesignated misdemeanor to suffer any of the other collateral consequences of a felony conviction other than the firearm restrictions.

The voters specifically addressed concerns about public safety in enacting Proposition 47 by: 1) barring people who a judge finds to pose an unreasonable risk to public safety from being able to have their offenses reclassified (see Pen. Code §1170.18, subd. (b)-(c)); and 2) disqualifying people with a record of committing violent offenses from relief under the act. (Pen. Code §1170.18, subd. (i).) Thus, the voters deliberately chose to address any public safety concerns by making certain classes of people ineligible for relief under the act. They did not, however, elect to limit the relief provided to eligible people, except as to gun possession.

2. Expungement of DNA Is Consistent With The Public Policy Behind Proposition 69

The enactors of Proposition 69 were undoubtedly motivated by concerns for public safety. As the majority recognized, the electorate in passing Proposition 69, "specifically acknowledge the link between nonviolent convicted criminals and violent crime. (Opn. at 13.) Proposition 69 thus expanded the pool of people required to submit their DNA to include all adult felony arrestees, and adults convicted of, and juveniles adjudicated for felonies and misdemeanor arson and sex offenses. The voters concerns with public safety did not, however, require collection of DNA from people convicted of/adjudicated for most misdemeanors.

(Pen. Code § 296.). The voters decided that those offenses should not qualify for DNA collection, and that persons who no longer had any qualifying offenses were permitted to request expungment of their DNA. (Pen. Code § 299.)

The enactors of Proposition 69 thus made a policy judgment that limited DNA collection and retention arrested for felony offenses, as well as and adults convicted of, and juveniles adjudicated for, felony offenses and misdemeanors requiring sex and arson registration. (Pen. Code §§ 296, 296.1). The apparent intent behind designating those categories is that persons who were found to have committed these more serious offenses were the ones likely to commit violent crimes yielding DNA evidence.

In his dissent, Justice Pollak addresses this point:

> [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.

(Dissent at 12-13, italics added.)

In sum, the enactors of Proposition 69 determined the public safety concerns underlying the Proposition did not require collection of DNA from the large majority of misdemeanants. The enactors of Proposition 47 decided that appellant's offense should now be a misdemeanor for all purposes but one. Thus, denying appellant's request to expunge his DNA after reclassification pursuant to section 1170.18 is at odds with the public policy goals expressed in both Propositions 47 and 69.

3. Expungement of DNA Is Consistent With California's Strong Public Policy of Privacy Protection.

The California Constitution protects a person's privacy right in his own DNA profile and genetic information, even if the only reason it is collected is for identification purposes. (Cal. Const. art. I, § 1; *County of San Diego v. Mason* (2012) 209 Cal.App.4th 376, 381.) "Courts have [] recognized that DNA contains an extensive amount of sensitive personal information beyond merely identifying information, and people therefore have a strong privacy interest in controlling the use of their DNA." (*Id.*, citations omitted.) An offender's reasonable expectation of privacy in his genetic material is therefore implicated by the state's retention of his DNA. Samples of DNA analyzed and stored by the state can reveal information regarding race, gender, ancestry, familial relationships, sexual orientation, health,

pre-disposition to genetic conditions and diseases (including mental illness and alcoholism), and behavioral traits. (*U.S. v. Kincaide* (9th Cir 2004) 379 F.3d 813, 842, fn. 3 (Guild J conc. opn.).[21] As long as a person's DNA remains in the database, the state is required to retain his entire DNA sample, which includes the individual's entire genetic blueprint. (See *United States v. Kriesel* (9th Cir. 2013) 720 F.3d 1137, 1141-1145.)

Moreover, it is not just the collection of the sample alone that implicates people's privacy rights, it is the long term storage of that sample. In *United States v. Jones* (2012) 565 U.S. 400, 132 S.Ct. 945, the Supreme Court held that the surreptitious attachment of a GPS device to a suspect's jeep and the resulting constant police surveillance of his movements for 28 days violated his reasonable expectation of privacy and thus constituted a search. In her concurring opinion in *Jones*, Justice Sotomayor explained how long-term government access to private information may violate an individual's reasonable expectation of privacy, even if state officials use only a small portion of that data. (*Id.* at 954-957 (Sotomayor, J., conc. opn).) Justice Sotomayor emphasized that such continual "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious and sexual associations." (*Id.* at 955.) Even if the government uses only the GPS data establishing the suspect's involvement in criminal activity, the tracking device

[21] See *Haskell v. Brown* (N.D. Cal. 2009) 677 F. Supp.2d 1187, 1190 for a detailed discussion of the process by which a DNA sample is collected and a DNA profile created.

also records "trips of an undisputably private nature," including those to the psychiatrist, the plastic surgeon or the abortion clinic. The government "could store such records and effectively mine them for information years into the future." (*Id.* at 955-956.) It is thus the government's long-term access to indisputably private information that violates the individual's privacy interests.

Similarly, California's long term access to his stored DNA sample, which could potentially be mined for personal information for years to come, implicates appellant's reasonable privacy interest, and that of other people whose offenses are reclassified under Proposition 47. Because California has determined, as a matter of policy, that it does not have an interest in collecting the DNA of most misdemeanants, including those convicted of/adjudicated for appellant's reclassified offense, appellant's privacy interest should trump any interest the state may assert in retaining his DNA sample.

II AB 1492'S AMENDMENT TO THE STATUTE GOVERNING DNA COLLECTION AND EXPUNGEMENT IS NOT APPLICABLE TO APPELLANT'S CASE BECAUSE: 1) HIS REQUEST TO HAVE HIS DNA EXPUNGED WAS MADE PRIOR TO THAT AMENDMENT; 2) THE AMENDMENT CHANGED, AND DID NOT MERELY CLARIFY EXISTING LAW, AND 3) THE AMENDMENT IS COUNTER TO THE VOTERS' INTENT IN ENACTING PROPOSITION 47.

A. APPLICABLE LAW.

As discussed above, on November 2, 2004, voters approved Proposition 69, amending the California DNA Act. That initiative expanded the State's DNA collection and testing program to allow for the warrantless collection of DNA samples from adults arrested for any felony offense. (Pen.Code §§ 295 et seq., 296, subd. (a)(2)(C).) That provision of the act was struck down by the Court of Appeal in *People v. Buza* (*Buza*), review granted Feb. 18, 2015, S223698, previously published at 231 Cal.App. 4th 1446. *Buza* held that collection of DNA from felony arrestees prior to a probable cause determination was unconstitutional. (*Id.*) This Court granted the state's petition for review in *Buza,* and a decision is still pending.

Assembly Bill 1492 (Legislative Session 2015-2016), signed by the Governor of the State of California on October 4, 2015, and effective January 1, 2016, amended portions of Penal Code sections 298 and 299 in an effort to comport with a potential decision by the California Supreme Court upholding *Buza.* The Legislature specifically stated this intent: "It is the intent of the Legislature to limit the analysis of buccal swab samples and blood samples taken

from felony arrestees for purposes of DNA analysis only to the extent required by the decision in *People v. Buza*, and to further the purposes of .... Proposition 69, approved by the voters at the November 2, 2004, statewide general election. ..." (2015 Cal. Legis. Serv. Ch. 487 (AB 1492) §1.)

The Legislature included alternative provisions in AB 1492 that go into effect based upon what decision is rendered in *Buza*. The primary purpose of the bill was to change the California DNA act to provide for automatic expungement of DNA for cases where no probable cause determination is made after arrest, as well as to delay analysis of DNA samples until a probable cause determination is made if the decision in *Buza* is upheld. (*Id.*, §§ 3, 5, enacted only if *Buza* affirmed.)

Regardless of how *Buza* is decided, the bill also amended section 299, subdivision (f), by adding Penal Code section 1170.18 to its list of statutes that do not relieve a person of their duty to provide a DNA sample if they were initially found guilty or adjudicated a ward for a qualifying offense. As amended, that section now states:

> Notwithstanding any other law, including sections 17, 1170.18, 1203.4, and 1203.4(a), 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, §§4-5; amended section 299, subd. (f).) The legislature provided no

explanation for this amendment to section 299(f) in the legislative history of Section 1492. (See *In re J.C.* (2016) 246 Cal.App.4th 1462, 1472.)

The amended version of section 299, subdivison (f) went into effect on January 1, 2016, after appellant had petitioned the court for redesignation of his offense to a misdemeanor and requested expungement of his DNA, and after that expungement request was denied on July 21, 2015. Thus, it only affects appellant if it applies retroactively.

AB1492 did not amend the DNA expungement provisions of section 299, subdivisions (a) and (b), which specifically delineate the bases for expungement nor section 299, subdivision (e), which prohibits expungement upon termination of registration as a sex offender or arsonist.

1. The Court of Appeal's Analysis Of the Applicability of AB 1492 to Appellant's Case.

The majority opinion below agreed with the findings made by Division One of the First District in *In re J.C.* (2016) 246 Cal.App.4th 1462 ("J.C."), and held that there was no bar to applying the provisions of AB 1492 to appellant's request for expungement because AB 1492 merely "clarified" existing law and confirmed the court's finding that even prior to enactment of AB 1492, appellant was not entitled to expungement. (Opn. at 14; *In re J.C.* at 1475-1482.) The majority also opined that the change to section 299, subdivision (f) adding section 1170.18 to the list of statutory schemes where defendants are ineligible for DNA expungement did not amend, or change the effect of, the language in section

1170.18 (k) mandating that reclassified offenses be treated as misdemeanors for all purposes. (Opn. at 14, 16; *J.C.* at 1482) And, on that basis, the amendment may be applied to appellant's case. even though it was enacted after the order was made, and appeal was taken. (*Id.*) Finally, the court summarily denied the appellant's argument that AB 1492 was not a proper amendment to Proposition 47 because Proposition 47 can only be amended in a manner consistent with its intent. (Opn. at 16-17.)

Justice Pollack, in his dissent, rejected the majority's interpretation of AB 1492 and its amendment to Section 299, subdivision (f). Justice Pollak first expressed doubt that AB 1492 had any bearing on the right to expungement because section 299(f) talks only about the *duty to provide* a DNA specimen, and by its plain language should not be construed to address expungement or destruction of DNA samples. (Dissent at 7-8, fn. 7.)

Justice Pollak also argued that, as interpreted by the majority, AB 1492's amendment to section 299(f) was an invalid amendment to Proposition 47 because it did not further the intent of the Proposition. (Dissent at 8-9.) He opined that because redesignation of an offense under Proposition 47 requires DNA expungement, "[i]f the amendment to section 299, subdivsion (f) is construed to prohibit expungement, the section would prohibit what Proposition 47 authorizes. So construed, the amendment therefore would be invalid. [citation]." (Dissent at 9.) Justice Pollak's reasoning is sound.

B. ALEJANDRO N. EXPRESSLY CONSIDERED WHETHER THE PRIOR VERSION OF SECTION 299, SUBDIVISION (F) APPLIED TO RECLASSIFIED OFFENSES UNDER PROPOSITION 47, AND HELD THAT IT DID NOT. THEREFORE, AB 1492 DID MORE THAN CLARIFY EXISTING LAW; IT EXPANDED EXISTING LAW, AND RETROACTIVE APPLICATION IS PROHIBITED.

AB 1492's addition to section 299 subdivision (f) is not a clarification of existing law as the majority asserts, but is instead an amendment without retroactive effect. (See *Green v. Workers' Comp. Board of Appeals* (2005) 127 Cal.App.4th 1426, 1436-1437 [when new legislation amends statutory rights, it is applied prospectively unless clear that legislature intended retroactive application].) AB 1492 is thus inapplicable to appellant's case.

In general, no part of the Penal Code is retroactive, unless it expressly so declares.[22] (*People v. Brown* (2012) 54 Cal.4th 314.) In determining whether application of a law is prospective or impermissibly retroactive, courts do not look to the chronology of events in a case; instead, courts consider whether a new statute or amendment "changes the legal consequences of past conduct by imposing new or different liabilities" on a party. (*California for Disability Rights v. Mervyn's LLC* (2006) 39 Cal.4th 223, 230-232.) If the statute or amendment changes the legal consequences of an act by creating additional liabilities for a party, its application to events preceding its enactment is deemed retroactive and is generally prohibited. (*Id.*) If no additional liabilities are created, application of the

[22] AB 1492 made no such declaration.

statute to events that occurred prior to enactment is not considered to be retroactive and is permissible. (*Id.*)

In *Alejandro N.*, decided prior to the passage of AB 1492, the appellate court expressly considered whether a juvenile whose offense had been reclassified as a misdemeanor for all purposes except firearm restrictions pursuant to Proposition 47, was entitled to expungement of his DNA under the former version of Penal Code section 299, subdivision (f). (*In re Alejandro N.*, *supra*, 228 Cal.App.4th 1209, 1229-1230.) As already discussed, that court held that the minor was entitled to expungement because section 299(f) did not list section 1170.18 as one of the statutory schemes under which a court was prohibited from relieving a person of the duty to provide DNA, or granting a request for expungement. Moreover, the redesignation of an offense to a misdemeanor pursuant to Proposition 47 permanently changes the nature of the offense. (*Id.*)

As Justice Pollak recognized in his dissent, *Alejandro N.* was correctly decided, on this point and others. Thus, prior to amendment by AB 1492, section 299(f) had been found not to bar DNA expungement for people whose offenses had been reclassified under section 1170.18. The amendment to section 299(f), as construed by the majority opinion thus changed the legal consequences of reclassification by removing appellant's ability to have his DNA expunged from the state's DNA database after redesignation of his offense. Because AB 1492 created an additional liability for appellant - being unable to remove his DNA sample from the state's datbase - application of the amendment to appellant's case

is impermissibly retroactive and therefore prohibited under established principles of statutory construction.

Regardless, it is not clear that AB 1492 was enacted in order to prevent expungement of DNA for people whose offenses are re designated pursuant to Proposition 47.

C. IN ENACTING AB 1492, THE LEGISLATURE DID NOT CLEARLY INTEND TO OVERRULE ALEJANDRO N. NOR PROHIBIT DNA EXPUNGEMENT FOR OFFENSES REDESIGNATED AS MISDEMEANORS PURSUANT TO PENAL CODE SECTION 1170.18.

As discussed above, the legislature passed AB 1492 specifically to address the court's holding in *People v. Buza* (2014) 231 Cal.App.4th 1446, rev. granted 2/18/2015 S223698. (2015 Cal.Legis.Serv. Ch. 487 (AB 1492), Legislative Counsel's Digest.) By outlining the clear purpose of the bill and by deliberately leaving untouched the Penal code sections 299(a)(b) and (e), addressing expungement rather than collection of DNA, the Legislature demonstrated that it did not intend to overrule *Alejandro N.* or preclude expungment of DNA collected from a person whose offense has been redesignated a misdemeanor for all purposes under Proposition 47. The clear purpose of AB 1492 was to address *Buza*.

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) thus, by its plain language, refers to the situation where a person has yet to submit

a DNA sample. The duty to provide a DNA sample under sectin 299(f) is *not* the equivalent of DNA expungement, or the preclusion thereof.

As Justice Pollak observed of AB 1492's amendment to section 299, subdivision (f):

> [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.

(Dissent at 7-8.)

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. (*In re J.C.*, *supra*, 246 Cal. App. 4th at p. 1472.)

> Justice Pollak stated of that reasoning:
>
> 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).

(Dissent at 8, fn. 7.)

If the Legislature had intended to prohibit expungement, it could have added language to subsection (e), which specifies when expungement is not permitted, stating:

> Notwithstanding any other law, the Department of Justice DNA Laboratory is not required to expunge DNA profile or forensic identification information or destroy or return specimens, samples, or print impressions taken pursuant to this section if the duty to register under Section 290 or 457.1 is terminated.

(Pen.Code, § 299, subd (e).)

The legislature also could have specifically amended section 1170.18, subdivision (k), which states that reclassified offenses are to be treated as misdemeanors for all purposes, except firearm restrictions. It did not do so.

Finally, by naming *Buza* as the caselaw that AB 1492 intended to address, the Legislature demonstrated that the bill was not intended to overrule *Alejandro N.* An enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time the legislation is enacted. (*People v. Superior Court (Cervantes),* (2014), 225 Cal.App.4th 1007). Thus, we must presume that the Legislature was aware of *Alejandro N.* but did not include overturning that decision in its stated purpose. Thus, there is no evidence that the legislature

intended to overturn that rulin. Nor did it alter the expungement provisions of the DNA Act.

Absent clear legislative or voter direction in this matter, the court must not judicially create a DNA retention exception that goes against the intent of Proposition 47, which expressly directed that a redesignated be treated as a misdemeanor for all purposes, except for the ownership and possession of firearms.

D. INTERPRETING AB 1492 TO PRECLUDE DNA EXPUNGEMENT FOR RECLASSIFIEDOFFENSES WOULD EFFECTIVELY AMEND PROPOSITION 47 IN A MANNER THAT DOES NOT FURTHER THE THE INTENT OF THE VOTER-ENACTED INITIATIVE. SUCH AN AMENDMENT IS PROHIBITED.

The legislature may only amend Proposition 47 in a manner that is consistent with the purpose of the initiative. Interpreting AB 1492 to prohibit DNA expungement after successful reclassification places that amendment in direct conflict with the purpose of Proposition 47.

Article II section 10 of the California Constitution allows amendment or repeal of referendum statutes like Proposition 47, "only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." (Cal.Const, Art. II §10; *Proposition 103 Enforcement Project v. Quackenbush*(1998) 64 Cal.App.4th 1473, 1483-1484.) Section 15 of Proposition 47, in turn 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, §15, italics added.) AB 1492 did not further the intent of Proposition 47.

1. AB 1492 Amends Proposition 47 In a Manner That Is Inconsistent With the Purpose of the Proposition.

An amendment is "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 couched as such or directly alter the Proposition itself in order to have that effect. (See *Kelly, supra,* at p. 1014 [holding that a newly created statutory provision of the Medical Marijuana Program passed by the Legislature impermissibly amended voter enacted Compassionate Use Act even though it did not literally amend the specific statutory provision].)

In deciding whether a particular provision amends Proposition 47, courts "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.) Interpreting the changes to section 299, subdivision (f) to preclude expungement would mean that the Legislature has changed the provisions of Proposition 47 by adding an additional exception to the misdemeanor treatment of reclassified offenses. Under that interpretation, amended Penal Code section 299(f) prohibits what Proposition 47 requires – the treatment of reclassified offenses as misdemeanors for all purposes except

firearms restrictions. (Pen. Code §1170.18, subd.(k).) AB 1492 thus changes the scope and effect of Proposition 47.

Such an amendment is counter to the intent of the voters in enacting Proposition 47. Proposition 47 set forth a list of purposes for the Act, including:

> to "ensure that prison spending is focused on violent and serious offenses"; "maximize alternatives for nonserious, nonviolent crime"; "invest the savings ... into prevention and support programs"; "ensure[] that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed"; *"[r]equire misdemeanors instead of felonies for nonserious, nonviolent offenses like petty theft* and drug possession, unless the defendant has prior convictions for specified violent or serious crimes"; "[a]uthorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses ... that are now misdemeanors"; and "[r]equire 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."

(Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70.) The proposition further stated that the Act "shall be liberally construed to effectuate its purposes." (*Ibid.*)

As already discussed, consistent with that intent and mandate, 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 ineligible offenders with extremely serious and violent prior convictions. (*Alejandro N., supra,* 238 Cal.App.4th at p. 1222; *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) The voters thus enacted a statutory scheme where certain specified less serious crimes are to be treated as misdemeanors.

The voters even went so far as to mandate retroactive relief from felony consequences for those previously convicted of, or adjudicated for, those misdemeanos. They authorized resentencing for those previously convicted of reclassified crimes and enabled people who have finished their sentences to obtain redesignation of their offenses. The only possible purpose of that retroactive redesignation is to relieve people of the liabilities associated with a past felony conviction.

Given the voters' broad mandate to change the nature of redesignated offenses and to reduce the severity of the treatment and consequences of reclassified misdemeanor offenses, AB 1492 cannot be interpreted as retaining felony level treatment of redesignated offenses by allowing retention of DNA samples for misdemeanor crimes that no longer require submission of DNA. Ifi it is so interpreted, it will run afoul of the intent of the voters in enacting Proposition 47.

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 *Quackenbush, supra,* at p. 1484.) "[T]he Legislature cannot indirectly accomplish ... what it cannot accomplish directly by enacting a statute which amends the initiative's statutory provisions." (*Quackenbush, supra,* at p. 1487.)

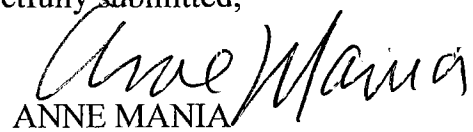
The majority's interpretation of AB 1492 undoes what the voters did when they passed Proposition 47. The voters mandated that redesignated offenses be considered misdemeanors for all purposes but one, but the majority now interprets the law to require that redesignated offenses be treated as felonies for a second purpose, DNA retention. That interpretation does not advance the purpose of Proposition 47 and AB 1492 is an invalid amendment to Proposition 47.

CONCLUSION

For the reasons set forth above, appellant requests that this Court remand his case to the juvenile court, and order that his DNA sample be destroyed and his DNA profile be removed from the State's DNA database.

Dated: March 17, 2017

Respectfully submitted,



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CERTIFICATE OF WORD COUNT

Counsel for C.B..hereby certifies that this brief consists of 13,864 words (excluding tables, proof of service, and this certificate), according to the word count of the computer word-processing program.

(Cal. Rules of Court, 8.304(b).)

March 17, 2017

Anne Mania

PROOF OF SERVICE

I am employed in Alameda County, over the age of 18 years and not a party to this action; my business address is 1946 Embarcadero Oakland CA 94606. March 17, 2017 I served the following:

APPELLANT'S OPENING BRIEF

as designated below through the Court of Appeal, First District, electronic service:

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I placed a copy of each document in an envelope for each addressee, sealed each envelope and, with postage thereon, fully prepaid, placed each envelope for deposition with the U.S. Postal Service at Oakland, California, to the following:

C.B.., appellant	Contra Costa Cnty District Attorney 900 Ward St, 1st Floor Martinez, CA 94553
Hon. Thomas M. Maddock Superior Court of Contra Costa Juvenile Court 725 Court Street Martinez, CA 94553	

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed this same day at Oakland, California.

/s/ Anne Mania

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.B., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. C.B., Defendant and Appellant.	A146277 (Contra Costa County Super. Ct. No. J1301073)

This is an appeal from a juvenile court order denying a request by defendant C.B. (minor) to expunge his DNA samples from the state's database following the juvenile court's grant of his simultaneous request to redesignate his admitted felony offense as a misdemeanor. Minor brought these requests under Penal Code section 1170.18, a measure enacted following passage of Proposition 47, the Safe Neighborhoods and Schools Act, which reduced the classification of certain crimes from felony to misdemeanor.[1] According to minor, his DNA samples should be expunged because, had his offense been classified as a misdemeanor at the time he admitted committing it, the juvenile court would have, in the first instance, lacked authority to order him to submit the samples.

However, as explained below, Proposition 47 construed in conjunction with the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (DNA Database Act), section 295 et seq., supports the juvenile court's decision to deny minor's

[1] Unless otherwise stated, all statutory citations herein are to the Penal Code.

expungement request in this case. Moreover, and confirming this conclusion, our Legislature recently enacted Assembly Bill No. 1492 (2015-2016 Reg. Sess.) (Bill No. 1492), which clarifies that, pursuant to section 299, a trial court is not authorized to order expungement of a defendant's DNA sample when granting relief under section 1170.18 to redesignate a felony offense as a misdemeanor. Accordingly, we affirm the juvenile court's order.

FACTUAL AND PROCEDURAL BACKGROUND

On September 20, 2013, a petition was filed pursuant to Welfare and Institutions Code section 602, alleging that minor committed second degree robbery in violation of sections 211 and 212.5 (count one), and first degree residential burglary in violation of sections 459 and 460, subdivision (a) (count two). This petition was amended on October 1, 2013, to add allegations that minor also committed felony grand theft from the person (§ 487, subd. (c)) (count three), and misdemeanor burglary (§§ 459, 460, subd. (a)) (count four).[2] On the same date, minor admitted the amended allegations (counts three and four) and the remaining allegations (counts one and two) were dismissed.

On October 15, 2013, the juvenile court adjudged minor a ward of the court with no termination date, ordered his out-of-home placement and, among other things, ordered him to submit DNA samples for the state DNA database.

On July 6, 2015, minor filed a petition for relief under section 1170.18, requesting that his felony grand theft adjudication be redesignated as a misdemeanor, that the order requiring submission of DNA samples be vacated, and that his DNA samples be expunged from the state DNA database. Following a hearing, on July 21, 2015, the juvenile court granted minor's request to redesignate his felony offense as a

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[2] According to the probation report, minor broke into an apartment in Concord and stole the resident's cell phone, wallet and Nintendo game. When leaving the apartment, minor was confronted by the resident, who began assaulting him. In response, minor brandished a knife in self defense. Because the facts of this incident are not relevant to the sole legal issue raised on appeal, however, we provide no further details.

misdemeanor, but denied his requests to vacate the order to submit DNA samples and to expunge his samples from the state DNA database. On September 14, 2015, minor filed a timely notice of appeal of this order.[3]

DISCUSSION

Minor raises one argument on appeal—to wit, that the juvenile court misconstrued Proposition 47 when finding that he was not entitled to have his DNA samples expunged from the state database after reclassifying his felony offense as a misdemeanor. The standard of review is not in dispute.

We review de novo questions of statutory or voter-initiative interpretation. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1212 [rules of statutory interpretation apply to voter initiatives]; *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1176.) The fundamental rule of statutory (or voter-initiative) construction is that we must ascertain the intent of the drafters so as to effectuate the purpose of the law. (*Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 213.) "To determine the intent of legislation, we first consult the words themselves, giving them their usual and ordinary meaning." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) "We do not, however, consider the statutory language in isolation; rather, we look to the entire substance of the statutes in order to determine their scope and purposes. [Citation.] That is, we construe the words in question in context, keeping in mind the statutes' nature and obvious purposes. [Citation.] We must harmonize the various parts of the enactments by considering them in the context of the statutory frame work as a whole. [Citation.] If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then we may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history." (*People v. Cole* (2006) 38 Cal.4th 964, 975.)

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[3] On August 17, 2015, the juvenile court set aside the placement order and terminated minor's probation as unsuccessful.

In this case, minor contends proper interpretation of Proposition 47 requires a trial court to expunge DNA samples submitted by a criminal defendant (including a juvenile) whose offense is reclassified from a felony to a misdemeanor pursuant to section 1170.18. Proposition 47, as mentioned above, " 'reduces penalties for certain offenders convicted of nonserious and nonviolent property and drug crimes' and 'allows certain offenders who have been previously convicted of such crimes to apply for reduced sentences.' (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35 (Ballot Pamphlet).) One of those 'nonserious and nonviolent property and drug crimes' is shoplifting, so long as the value of the stolen property is less than $950. (See Ballot Pamphlet, *supra*, text of Prop. 47, § 5, p. 71.)" (*In re J.C.* (2016) 246 Cal.App.4th 1462, 1469.) Minor, relying on a recent decision from the Court of Appeal, Fourth District, *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209 (*Alejandro*), contends the juvenile court was required under Proposition 47 to grant his request to expunge his DNA record because, once his crime was reclassified as a misdemeanor, it was no longer a "qualifying offense" for purposes of the DNA Database Act. (See § 296, subd. (a).)

The People, to the contrary, contend, first, that *Alejandro* was wrongly decided and, second, that, even if correctly decided when published, *Alejandro* is no longer good law because, in enacting Bill No. 1492, the Legislative made clear that section 1170.18, properly read, does not authorize a trial court to expunge a defendant's DNA sample when granting a petition to redesignate the qualifying offense from felony to misdemeanor. We agree with the People's latter point and, thus, need not directly address the wisdom of *Alejandro.*

Turning first to the relevant statutory framework, section 1170.18 provides a procedure by which persons, like minor, found to have committed a felony, yet "who would have been guilty of a misdemeanor under [Proposition 47]" had it been in effect at the time of their offense, may request redesignation of the offense from felony to misdemeanor. (§ 1170.18, subd. (a).) Relevant here, section 1170.18, subdivision (f), provides that 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." Further, where the section 1170.18 applicant has satisfied the criteria in subdivision (f), the trial court "shall designate the felony offense or offenses as a misdemeanor." (§ 1170.18, subd. (g).)

There is no dispute in this case that minor satisfied the criteria in section 1170.18, subdivision (g), such that the juvenile court was required to (and did) redesignate his offense as a misdemeanor. The dispute, rather, centers around whether the juvenile court was required, in light of this redesignation, to order expungement of minor's DNA samples from the state database pursuant to section 299, the statute governing DNA record expungement. Part of the DNA Database Act, section 299 was amended in 2004 through passage of Proposition 69, the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, which "substantially expanded the range of persons who must submit DNA samples to the state's forensic identification databank." (*Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1498.) Persons qualifying under this Act for submission of DNA samples include: any person, including any juvenile, who is convicted of or pleads guilty or no contest to any felony offense, or is found not guilty by reason of insanity of any felony offense, or any juvenile who is adjudicated under Section 602 of the Welfare and Institutions Code for committing any felony offense; any adult person arrested for or charged with one of the enumerated felony offenses; any person, including any juvenile, required to register under Section 290 or 457.1 because of the commission of, or the attempt to commit, a felony or misdemeanor offense; or any person, including any juvenile, who is housed in a mental health facility or sex offender treatment program after referral to such facility or program by a court after being charged with any felony offense. (§ 296, subd. (a).) The DNA submission requirements "shall apply to all *qualifying* persons regardless of sentence imposed . . . and regardless of disposition rendered or placement made in the case of juvenile who is found to have committed any felony offense . . . ." (§ 296, subd. (b), italics added.)

Under section 299, a person whose DNA profile has been included in the state databank "shall have his or her DNA specimen and sample destroyed and searchable database profile expunged from the databank program 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." (§ 299, subd. (a).) Further, under subdivision (f) of this statute, "[*n*]*otwithstanding any other law*," a judge is barred from relieving a person of his or her administrative duty to submit DNA pursuant to this chapter if the person has been found guilty or was adjudicated a ward of the court for a qualifying offense under section 296, subdivision (a), or pleaded no contest to one of these qualifying offenses. (§ 299, subd. (f), italics added.)

This provision, as it read at the time of minor's petition for relief, set forth a non-exhaustive list of three statutes pursuant to which a judge is prohibited from relieving a person of his or her duty to submit DNA for the state forensic identification DNA database—to wit, sections 17, 1203.4 and 1203.4a. (Former § 299, subd. (f).) Each of these three enumerated statutes are similar to section 1170.18 in that they provide postconviction relief from punishment or penalties to qualifying defendants by, for example, reclassifying a felony offense as a misdemeanor, or dismissing the information entirely upon successful completion of a probationary term. (See § 17 [authorizing a trial court, in its discretion, to treat a qualifying offense as either a felony or a misdemeanor]; § 1203.4 [authorizing a trial court, in certain cases, to set aside a guilty verdict and "dismiss the accusations or information against the defendant," thereby releasing the defendant "from all penalties and disabilities resulting from the offense"]; § 1203.4a [authorizing a trial court to, among other things, set aside a guilty verdict and dismiss the information against a misdemeanant who was not granted probation, has served his sentence, has not been charged with or convicted of a subsequent crime, and has, since judgment, lived "an honest and upright life"].)

In October 2015, Bill No. 1492 was signed into legislation and, among other things, amended section 299, subdivision (f) to include section 1170.18 in the non-

exhaustive list of statutes that do *not* authorize a judge to relieve a person of his or her administrative duty to provide DNA. Thus, effective January 1, 2016, this provision reads: "*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 . . . samples . . . required by this chapter if a person . . . was adjudicated a ward of the court by a trier of fact of a qualifying offense as defined in subdivision (a) of Section 296."[4] (§ 299, subd. (f), italics added.)

Notwithstanding the former or amended version of section 299, subdivision (f), minor contends a criminal defendant's right to expungement of DNA records is triggered by a court's redesignation of a criminal offense under Proposition 47 by way of another statute, section 1170.18, subdivision (k), which states: "Any felony conviction that is . . . 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 or prevent his or her conviction [for being a felon in possession of a firearm]." (§ 1170.18, subd. (k), italics added.) According to minor, this statutory command that his offense be considered a misdemeanor "for all purposes" requires expungement of his DNA samples because, under California law, juvenile delinquents are not required to submit DNA unless they are found to have committed a felony. Minor's argument finds support in *Alejandro*, which held that a felony redesignated a misdemeanor pursuant to section 1170.18 "no longer qualifies as an offense permitting DNA collection" and, thus, is "outside the matters contemplated by the Penal Code DNA expungement statute."[5] (*Alejandro, supra,* 238 Cal.App.4th at p. 1229.)

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[4] There appears to be nothing in the legislative history of Bill No. 1492 explaining the Legislature's intent with respect to this particular amendment. (See *In re J.C., supra,* 246 Cal.App.4th at p. 1472.)

[5] The *Alejandro* court reasoned: "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

We reject minor's analysis on several grounds. First, as the People (and the juvenile court) have noted, Proposition 47 nowhere mentions DNA expungement. Rather, it is completely silent with respect to the state-maintained DNA databank. As such, we question minor's interpretation of Proposition 47 as *requiring* expungement whenever a court grants relief to a criminal defendant under section 1170.18. (See *Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 350 [courts are not "[o]rdinarily . . . free to add text to the language selected by the Legislature"].)

Further, the DNA sample submission requirement under the DNA Database Act does not necessarily hinge on whether a person is convicted of a felony or misdemeanor. Rather, under the relevant statutory language, the Act's triggering point is when "[a]ny person, including any juvenile, . . . is convicted of or *pleads guilty or no contest to any felony offense*." (§ 296, subd. (a)(1), italics added.) In addition, the Act does not apply only to convicted felons, but extends to several categories of misdemeanants, including those required to register with law enforcement as sex offenders or arsonists (see § 296, subd. (a)(3)), a fact reflective of the measure's administrative—and nonpunitive—design of creating a state databank to "to assist in the accurate identification of criminal offenders." (§ 295, subd. (d); see also § 295, subd. (b)(2) ["It is the intent of the people of the State of California, in order to further the purposes of [the Act], to require DNA and forensic identification data bank samples from all persons, including juveniles, for the felony *and misdemeanor* offenses described in [section 296, subdivision (a)]," italics added]; *Good v. Superior Court, supra*, 158 Cal.App.4th at p. 1508 ["Proposition 69, immediately effective, listed felon and misdemeanant registrants as among those who qualified for DNA sampling. The requirement is not punitive, does not involve concepts of retroactivity or ex post facto implications, but is confined to a simple administrative identifying procedure akin to fingerprinting or keeping one's whereabouts known to law enforcement."]; *People v. Travis* (2006) 139 Cal.App.4th 1271, 1295 [DNA collection is

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the misdemeanor treatment of the reclassified offense absent some reasoned statutory or constitutional basis for doing so." (*Alejandro, supra*, 238 Cal.App.4th at p. 1227, fn. omitted.)

"not penal"].) We thus find without legal support minor's assumption that reclassification of the offense underlying a conviction from a felony to a misdemeanor, in and of itself, triggers the right of a criminal defendant to have his or her DNA records expunged. (See *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission* (1990) 51 Cal.3d 744, 764 [when interpreting statutory language, courts must try to "reconcile or harmonize conflicting statutory provisions in an effort to give effect to all provisions if it is possible].)

Indeed, and to the contrary, the DNA Database Act expressly limits the right to seek expungement to persons with "no past or present qualifying offense" whose cases fall within one of four legal categories: (1) following arrest no accusatory pleading is filed for prosecution or a qualifying charge is dismissed prior to adjudication; (2) the qualifying conviction has been reversed and the case dismissed; (3) the defendant has been found factually innocent; or (4) the defendant has been found not guilty or acquitted of the qualifying offense. (§ 299, subd. (b)(1)-(4).) Here, minor, who admitted committing the qualifying offense, falls within none of the identified categories.

In addition, we find persuasive the decision relied upon below by the juvenile court, *Coffey v. Superior Court* (2005) 129 Cal.App.4th 809 (*Coffey*), which addressed whether the defendant, who pled guilty to a "wobbler" offense as a felony, was entitled to expungement of his DNA sample after the court reduced the charge pursuant to section 17, the so-called "wobbler" statute, and sentenced him to a misdemeanor.[6] There, as here, the defendant claimed a right to expungement on the ground that "DNA sampling is not required or authorized for a misdemeanor offense." (*Coffey*, p. 818.) The defendant relied upon subdivision (b) of section 17, which reads: "When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor *for all purposes* under the following circumstances: [¶] (1) After a judgment imposing a punishment other than imprisonment in the state prison." (Italics added.) Thus, as the *Coffey* court noted, under this provision,

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[6] A "wobbler" is an offense punishable in the court's discretion as either a felony or a misdemeanor. (*Coffey, supra*, 129 Cal.App.4th at p. 812, fn. 2.)

"if a judge sentences the defendant to a misdemeanor punishment, the defendant's crime becomes a misdemeanor." (*Coffey*, p. 818, fn. 7.)

The *Coffey* court nonetheless rejected the defendant's argument that his offense should be treated as a misdemeanor for purposes of DNA record expungement. The court reasoned that, "for purposes of the DNA Database Act, Coffey was convicted of a felony when he pled guilty to a wobbler offense as a felony. He was therefore subject to the DNA Database Act when his DNA samples were taken, and the collection of the samples was lawful [under section 296] . . . . Because the samples were lawfully collected, there is no constitutional right to their return." (*Coffey, supra*, 129 Cal.App.4th at p. 823.)

According to the People, this analysis in *Coffey* resonates here, in that, like a felony reclassified as a misdemeanor under section 17, a felony reclassified as a misdemeanor under section 1170.18 remains a qualifying offense for purposes of the administrative duties set out in the DNA Database Act, such that the offender is not eligible for expungement on the basis of the reclassification. Minor, in turn, insists section 17 is distinct from section 1170.18 and, thus, irrelevant to the issue raised herein. He reasons that, when an offense is reduced to a misdemeanor under section 17, the offense is deemed a misdemeanor for all purposes only going forward, yet when, as here, an offense is reclassified as a misdemeanor under section 1170.18, it is deemed a misdemeanor for all purposes, going forward *and* retroactively.

We agree with the People that *Coffey* is instructive here. As aptly explained by our colleagues in Division One of this District when recently addressing the identical legal issue: "Prior to the addition of section 1170.18 by Bill No. 1492, section 299(f) referred to sections 17, 1203.4, and 1203.4a. Section 17 governs 'wobbler' offenses, which are offenses that can be treated as felonies or misdemeanors in the discretion of the sentencing court. ([*People v.*] *Lynall* [(2015)] 233 Cal.App.4th 1102, 1108.) Subdivision (b) of section 17 dictates '[w]hen' a wobbler is treated as a misdemeanor, including after a defendant has been sentenced to a punishment other than prison (*id.*, subd. (b)(1)), when a court declares a wobbler a misdemeanor upon granting probation (*id.*, subd.

(b)(3)), and when the prosecutor designates the crime as such in a charging document (*id.*, subd. (b)(5)). In addition, under subdivision (c) of section 17, if a juvenile is committed to the Division of Juvenile Justice on the basis of a wobbler conviction, the violation is 'thereafter . . . deemed a misdemeanor for all purposes' following his or her discharge. Sections 1203.4 and 1203.4a govern the dismissal of charges following a successful completion of probation. (See, e.g., *Doe v. Harris* (2013) 57 Cal.4th 64, 72-73 . . . .) These statutes have one thing in common. Their application generally results in the reduction of a felony conviction suffered by a defendant to something less serious—either a misdemeanor under section 17 or, in the case of sections 1203.4 and 1203.4a, dismissal altogether. The felony conviction necessarily required provision of a DNA sample, but the defendant would not have been required to provide a sample had the conviction been designated a misdemeanor from the outset or if there had been no criminal charges at all. *The unmistakable implication of the reference to these statutes in section 299(f) is that the section was intended to prohibit trial courts, when reducing or dismissing charges pursuant to the listed statutes, from also expunging the DNA record given in connection with the original felony conviction.*" (*In re J.C., supra*, 246 Cal.App.4th at pp. 1472-1474, fn. omitted, italics added.)

Our colleagues went on to note that a conviction for a wobbler offense charged as a felony has "traditionally been regarded as a felony until the point in time at which the trial court's sentencing decision converts it to a misdemeanor," and is only deemed a misdemeanor for all purposes following the decision. (*In re J.C., supra*, 246 Cal.App.4th at p. 1479.) Thus, "[i]f redesignation under section 1170.18 is similarly analogized to the treatment of wobbler offenses, the redesignation of a felony conviction would not justify DNA record expungement. Under section 299, subdivision (b), a person is entitled to expungement of his or her DNA record only 'if the person has no past or present offense or pending charge which qualifies that person for inclusion.' (§ 299, subd. (a).) If a felony conviction redesignated as a misdemeanor pursuant to section 1170.18 is treated as a felony up until the time of redesignation, similar to a wobbler felony conviction under section 17, the defendant would continue to have a past qualifying conviction even

after the redesignation. Under the terms of section 299, the defendant would not be entitled to expungement of his or her DNA record." (*In re J.C., supra*, at p. 1479.)

We agree with our colleague's reasoning in this regard and, thus, conclude, like our colleagues, that section 1170.18 should be treated like section 17 for purposes of the DNA Database Act, with the effect that a felony reclassified as a misdemeanor under section 1170.18 remains a qualifying offense under the Act, precluding the offender from obtaining additional relief in the form of expungement on the basis of such reclassification. (Accord *Coffey, supra,* 129 Cal.App.4th at pp. 821-822 [section 299(f), as enacted in 2004, "merely clarified existing law" that a defendant is not entitled to expungement of a DNA record when a wobbler conviction is reduced to a misdemeanor pursuant to section 17].) As stated above, the Act is quite clear that a defendant, including a juvenile, becomes subject to the DNA submission requirement upon being "convicted of or plead[ing] guilty or no contest to any felony offense," and "regardless of the . . . disposition rendered or placement made in the case of juvenile who is found to have committed any felony offense . . . ." (§ 296, subds. (a)(1), (b).) As such, the fact that an admitted felony offense is later reclassified as a misdemeanor does not change the offense's status as a qualifying offense for purposes of the Act.

Moreover, even before its recent amendment, section 299, subdivision (f), expressly stated that, *notwithstanding any other law*, a judge cannot relieve a defendant of the administrative duty to provide DNA for inclusion in the state's DNA database. Given this particular language, we decline to read the more general language in section 1170.18 that an offense reclassified as a misdemeanor must be treated as a misdemeanor "for all purposes" as a legislative grant of authority to a judge to disregard the restrictions placed upon his or her authority by section 299, subdivision (f). (See *Coffey, supra*, 129 Cal.App.4th at p. 823 ["since the definition and consequence of a 'misdemeanor' is a creation of the Legislature, the term 'all purposes' merely refers to the purposes delineated by the Legislature. And because the Legislature has determined that a defendant whose sentence is reduced to a misdemeanor under section 17, subdivision (b), *must* provide DNA samples (§ 296), it cannot be that a defendant is

insulated from providing DNA samples merely because his sentence is reduced to a misdemeanor under section 17, subdivision (b)"]. Indeed, the law of statutory interpretation requires the opposite. (See *Ni v. Slocum* (2011) 196 Cal.App.4th 1636, 1647 [The phrase "notwithstanding any other provision of law" generally expresses a legislative intent " ' "to have the specific statute control despite the existence of other law which might otherwise govern" ' " and to " ' "declare[] the legislative intent to override all contrary law." ' "].) The law of statutory interpretation also dictates that where, similar to here with section 17(b), "legislation has been judicially construed and a subsequent statute on a similar subject uses identical or substantially similar language, the usual presumption is that the Legislature [or the voters] intended the same construction, unless a contrary intent clearly appears." (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437; see also *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1100 ["the language in [section 1170.18, subdivision (k)] that a conviction that is reduced to a misdemeanor under that section '*shall be . . . a misdemeanor for all purposes*' is not significantly different from the language in section 17(b), which provides that after the court exercises its discretion to sentence a wobbler as a misdemeanor, and in the other circumstances specified section 17(b), '*it is a misdemeanor for all purposes.*' (Italics added.) . . . [I]n construing this language from section 17(b), the California Supreme Court has stated that the reduction of the offense to a misdemeanor does not apply retroactively' "].)

Moreover, our interpretation of section 1170.18 is consistent with the goal of promoting harmony among different, but related, statutory schemes if reasonably possible. (See *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955-956.) As mentioned above, both Proposition 47 and Proposition 69 were intended to promote public safety. And while Proposition 47 does indeed serve the goal of reducing penalties for certain nonserious and nonviolent offenders, the electorate, when passing Proposition 69, specifically acknowledged the link between nonviolent convicted criminals and violent crime. To wit, as set forth in Proposition 69's statement of purpose: "(d) Expanding the statewide DNA Database and Data Bank Program is: [¶] . . . (2) The

most reasonable and certain means to solve crimes as effectively as other states which have found that the majority of violent criminals have nonviolent criminal prior convictions, and 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." (Voter Information Guide, Gen. Elec. (Nov. 2, 2004) text of Proposed Laws, § II (Findings and Declarations of Purpose), p. 135.) By interpreting section 1170.18 as redesignating minor's felony offense as a misdemeanor for all purposes going forward from the date of the court's redesignation order (and, thus, not for the purpose of determining whether the offense qualifies for DNA submission under Proposition 69), we reconcile any potential tension or inconsistency between section 1170.18, on the one hand, and sections 296 and 299, on the other, while still advancing the measures' common goals of promoting public safety, enhancing crime-solving capabilities, focusing prison spending on violent and serious offenses, and maximizing alternatives for nonserious, nonviolent crime. (See Voter Information Guide, *supra*, argument in favor of Prop. 47, at p. 38.)

We hasten to add that, if there was any doubt about the proper interplay between Proposition 47 and the DNA Database Act, it was recently laid to rest by the legislative amendment adding section 1170.18 to the non-exhaustive list of statutes identified in section 299 which, by statutory mandate, bar a trial court from relieving an otherwise qualified person from his or her administrative duty to submit DNA samples. This amendment clarified what was arguably ambiguous in the former statute—to wit, that the redesignation procedure under section 1170.18 does not give rise to a right to relief from the defendant's DNA submission obligations under section 299. As such, the legislative amendment confirms our interpretation of the statutory framework set forth above that expungement is not part of the relief available to criminal defendants under Proposition 47.[7]

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[7] Minor makes much of the fact that, when amending section 299, the Legislature referenced just one particular case, *People v. Buza* (2014) 231 Cal.App.4th 1446 (*Buza*), a decision regarding the proper scope of section 299 currently before the California Supreme Court for review. Section 299, subdivision (g) provides that "[t]his section shall

Minor attempts to draw a distinction between the "administrative duty to provide [DNA samples]," referred to in the amended version of section 299, subdivision (f), and the requirement that the Department of Justice DNA Laboratory "expunge DNA . . . samples" under certain circumstances, referred to in section 299, subdivision (e), but not in section 299, subdivision (f). However, the same argument was discussed and rejected by our colleagues in *In re J.C.*: "The minor argues section 299(f) could not have been intended to affect a court's duty to order expungement under section 299, subdivision (b) because section 299(f) speaks of 'reliev[ing]' a defendant of the 'duty to provide' a DNA sample, language that, as the minor argues, 'applies to a situation where a person has yet to submit a sample.' As explained above, while we might agree in the absence of the statutory references to sections 17 1203.4, and 1203.4a, the inclusion of those statutes makes sense only if section 299(f) is interpreted as precluding expungement when an originally qualifying offense is reduced to a nonqualifying offense in the course of judicial proceedings. We acknowledge the use of the phrase 'relieve . . . of the separate administrative duty to provide' is not an intuitive way to refer to expungement, but the language has been so understood at least since the issuance of *Coffey*, over 10 years ago." (*In re J.C., supra*, 246 Cal.App.4th at p. 1475.)

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become inoperative if the California Supreme Court rules to uphold the California Court of Appeal decision in [*Buza*] in regard to the provisions of Section 299 . . . , as amended by Section 9 of the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, Proposition 69, approved by the voters at the November 2, 2004, statewide general election, in which case this section shall become inoperative immediately upon that ruling becoming final." As minor notes, the Legislature did not acknowledge, much less purport to overrule *Alejandro*, the decision discussed above holding that expungement is required when a criminal defendant's request under section 1170.18 to reclassify a felony offense as a misdemeanor is granted. We decline to read any significance into the Legislature's silence on this 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."].) Moreover, *Buza* is inapposite. There, unlike here, the issue is the constitutionality of section 299 as it relates to expungement of DNA samples submitted by arrestees who are not thereafter convicted of a qualifying crime.

We again agree with our colleagues' reasoning and adopt it for purposes of this case. Under a reasonable reading of section 299, considered in its entirety and as a whole, if a judge is not authorized to relieve a defendant of his or her administrative duty to submit DNA, the judge is not authorized to order the expungement of his or her DNA. (See also *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission, supra,* 51 Cal.3d at p. 764 [principles of statutory interpretation require courts to "reconcile or harmonize conflicting statutory provisions in an effort to give effect to all provisions if it is possible].)

Finally, we turn to minor's argument that Bill No. 1492, enacted after entry of the challenged order, cannot apply retroactively to his case because it impermissibly amends section 299. (See *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1487 ["the Legislature cannot indirectly accomplish . . . what it cannot accomplish directly by enacting a statute which amends the initiative's statutory provisions"].) According to minor, this bill "effectively amend[ed] Proposition 47 by creating a new exception to the treatment of reclassified crimes as misdemeanors." Or, "[s]aid another way, it authorizes the retention of DNA samples from reclassified offenders—something Proposition 47 prohibits by mandating that reclassified offenses be treated as misdemeanors for all purposes except firearm restrictions." We again disagree.

As our discussion from above makes clear, Bill No. 1492 did not amend section 1170.18. Rather, the bill clarified section 299 by adding section 1170.18 to the otherwise non-exhaustive list of statutes in subdivision (f) barring lower courts from excusing qualifying defendants from their administrative duty to submit DNA. Even assuming the former version of the statute was susceptible to minor's proposed interpretation (to wit, an interpretation omitting section 1170.18 from the list of statutes delineated therein), the fact that two equally reasonable interpretations exist merely confirms the statute's ambiguity and, thus, the impetus for its legislative amendment. (See *In re J.C., supra,* 246 Cal.App.4th at p. 1479 [acknowledging two distinct, yet equally plausible, readings of the relevant statutes governing DNA record expungement, to wit, one treating a redesignated conviction under section 1170.18 as a misdemeanor

from the date of conviction, per *Alejandro*, and the other treating it as such from the date of sentence recall, per *Coffey* and section 17].)

Accordingly, we conclude the current version of section 299, subdivision (f), may be properly applied to this appeal regardless of the fact that the juvenile court order under challenge predated its amendment. (E.g., *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922 ["A statute that merely clarifies, rather than changes, existing law is properly applied to transactions predating its enactment."]; *Negrette v. California State Lottery Com.* (1994) 21 Cal.App.4th 1739, 1744 ["An amendment which merely clarifies existing law may be given retroactive effect even without an expression of legislative intent for retroactivity."].)

Thus, for all the reasons stated, we affirm the juvenile court's order barring expungement of minor's DNA samples from the state database following the reclassification of his offense as a misdemeanor.

DISPOSITION

The juvenile court order denying minor's request for an order to expunge his DNA records from the state database is affirmed.

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Jenkins, J.

I concur:

Siggins, J.

POLLAK, J., Dissenting.

Because the retention of an individual's DNA sample is not authorized based on an adjudication that the person committed a misdemeanor, and because Proposition 47 requires that offenses redesignated from felonies to misdemeanors under its provisions be treated as misdemeanors "for all purposes" except with respect to firearm restrictions, I believe that minor is entitled to the expungement of his DNA sample from the state's database.

"Proposition 47 enacted ' "the Safe Neighborhoods and Schools Act" ' (the Act), effective November 5, 2014. [Citation.] The Act 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 the offenses were committed by certain ineligible offenders. [Citation.] . . . [¶] In addition to reclassifying certain felonies as misdemeanors, Proposition 47 also added section 1170.18 to the Penal Code.[1] Section 1170.18 provides an opportunity for qualifying offenders who incurred their felony convictions before the effective date of the Act to benefit from the Act's reclassification provisions. . . . As to 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. [Citation.] The statute . . . provides that a felony conviction that is resentenced or designated as a misdemeanor '*shall be considered a misdemeanor for all purposes*' except with respect to firearm restrictions." (*Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1222-1223, fns. & first italics omitted (*Alejandro*).)[2]

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

2 Proposition 47, an initiative measure, was adopted at the November 4, 2014 general election. Section 1170.18 was included as section 14 of Proposition 47. Section 1170.18 provides in relevant part as follows: "(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

There is no dispute that minor's prior offense was properly designated a misdemeanor under section 1170.18, subdivision (g). And, as set out in footnote 2 above, subdivision (k) of section 1170.18 provides that "[a]ny felony conviction that is . . . 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 or prevent his or her conviction [for possession of a firearm]." (Italics added.)

The DNA and Forensic Identification Database and Data Bank Act of 1998 (§ 295 et seq.), as amended, is intended "to require DNA and forensic identification data bank samples from all persons, including juveniles, for the felony and misdemeanor offenses described in subdivision (a) of Section 296." (§ 295, subd. (b)(2).) Section 296, subdivision (a) specifies only felony offenses and misdemeanors that are sex or arson offenses.[3] The collection of DNA samples from persons adjudicated to have committed any other misdemeanor, including shoplifting, is not authorized. "DNA sampling is not required or authorized for a misdemeanor offense." (*Coffey v. Superior Court* (2005) 129 Cal.App.4th 809, 818 (*Coffey*); see also *In re J.C.* (2016) 246 Cal.App.4th 1462, 1470 (*J.C.*) ["Except as provided in section 296, subdivision (a)(3), persons convicted solely of misdemeanors are not required to provide DNA samples."].)

In *Alejandro*, which was decided just days after the trial court's order in this case, the court agreed that a person whose conviction is reduced from a felony to a misdemeanor under Proposition 47 is entitled to the expungement of his or her DNA

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designated as misdemeanors. [¶] (g) If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor. . . . [¶] . . . [¶] (k) Any felony conviction that is . . . 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 or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 or Part 6 [prohibited possession of a firearm]."

[3] Subdivisions (a)(1) and (a)(2) of section 296 refer only to felonies. Subdivision (a)(3) refers to felonies and misdemeanors requiring registration under section 290, for sex offenses, or section 457.1, for arson offenses.

from the database. (*Alejandro*, *supra*, 238 Cal.App.4th at pp. 1226-1230.) The court explained that section 1170.18, subdivision (k) "reflects the voters [intent that] the redesignated misdemeanor offense should be treated exactly like any other misdemeanor offense, except for firearm restrictions. 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 reclassified offense absent some reasoned statutory or constitutional basis for doing so. [¶] 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 [citation], 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 reclassified misdemeanor offense will not be subject to DNA collection based solely on that offense." (*Alejandro*, *supra*, at pp. 1226-1228, fn. omitted.) "[T]he voters did not intend that a reclassified misdemeanor offense be deemed a felony for purposes of retention of DNA samples." (*Id.* at p. 1228.) If *Alejandro* was correctly decided and remains good law, minor is clearly entitled to expungement.

The Attorney General argues both that *Alejandro* was wrongly decided and that, in any event, a statutory amendment adopted subsequent to that decision requires a different result. The decision in *J.C.* does not adopt the first of these contentions but does agree as to the validity and effect of the statutory amendment.

The Attorney General contends that *Alejandro* was wrongly decided because section 299, rather than section 1170.18, subdivision (f), governs DNA expungement and section 299 does not provide for expungement in these circumstances. Section 299 authorizes the expungement of one's DNA from the databank if the person has not been

proved to have committed an offense justifying collection of the DNA sample.[4] In *Alejandro, supra*, 238 Cal.App.4th at page 1228, the court held that "[t]he fact that reclassification of a felony to a misdemeanor is not among the grounds listed in section 299[, subdivision (b)] for DNA expungement does not convince us the remedy is unavailable for Proposition 47 reclassified misdemeanor offenses." The court explained, "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. [Citations.] 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. [Citation.] 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

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[4] Section 299 has provided at all relevant times in part as follows: "(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."

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." (*Alejandro*, pp. 1228-1229, fn. omitted; see also *Coffey, supra,* 129 Cal.App.4th at p. 817 [rejecting Attorney General's argument that section 299 is defendant's "sole remedy" because it is the "only statute[] addressing the destruction, expungement, and retention of DNA samples and profiles collected under the DNA [and Forensic Identification Database and Data Bank Act of 1998]."].) I believe the reasoning in *Alejandro* is unassailable.

The Attorney General also argues that *Coffey* compels a contrary result and that *Alejandro* incorrectly distinguished that case. (*Coffey*, *supra*, 129 Cal.App.4th 809; *Alejandro, supra*, 238 Cal.App.4th 1209.) In *Coffey*, the defendant was convicted of a "wobbler" that was charged as a felony but after the defendant completed a successful probationary period sentenced as a misdemeanor under section 17.[5] The court rejected the defendant's contention that his DNA should never have been collected because "[a]t the time the DNA samples were collected from Coffey he had pled guilty to the charge of felony assault, and had not yet completed the requirements for reduction of the charge to a misdemeanor." (*Coffey*, p. 820.) The court also held that Coffey was not entitled to expungement because even though section 17, subdivision (b) made the offense a "misdemeanor for all purposes," his plea to the offense as a felony was determinative of the right to enter his DNA into the databank and section 17 rendered his offense a misdemeanor for all purposes only "*thereafter*, without any retroactive effect." (*Coffey*, p. 823.) In reaching this conclusion the court relied on the fact that section 299,

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[5] Section 17, subdivision (b) provides in relevant part: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] . . . [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor."

subdivision (f) explicitly prohibited the court from relieving a person of the obligation to provide a DNA sample if found guilty of a qualifying offense, " '[n]otwithsanding any other provision of law, *including section . . . 17.*' "[6] (*Coffey*, p. 821.) "[B]ecause the Legislature has determined that a defendant whose sentence is reduced to a misdemeanor under section 17, subdivision (b), *must* provide DNA samples (§ 296), it cannot be that a defendant is insulated from providing DNA samples merely because his sentence is reduced to a misdemeanor under section 17, subdivision (b)." (*Coffey*, p. 823.)

Alejandro correctly distinguished the circumstances in *Coffey,* where the defendant had pled guilty to the offense as a felony but at sentencing the offense was deemed a misdemeanor under section 17, from the situation in which a defendant's offense has been reclassified as a misdemeanor pursuant to section 1170.18. Reclassification of a conviction under section 1170.18 is not analogous to reduction of charges under section 17. Wobbler offenses may be sentenced and classified 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, and 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 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

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[6] At the time, section 299, subdivision (f) read as follows: "Notwithstanding any other law, including Sections 17, 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 . . . ." (Prop. 69, § 111.9, as approved by voters, Gen. Elec. (Nov. 2, 2004, eff. Nov. 3, 2004).)

reclassified 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 classified as misdemeanors for qualifying offenders under Proposition 47 have permanently been removed from the felony category and are no longer subject to DNA collection." Moreover, as the court in *Alejandro* pointed out—correctly at the time—"[u]nlike the circumstances in *Coffey,* there is no statutory provision reflecting a Legislative or voter determination that a DNA sample should be retained for an offender whose offense has been designated a misdemeanor under Proposition 47." (*Alejandro*, pp. 1229-1230.)

The Attorney General argues that whatever the situation when *Alejandro* was decided, the law has been changed by an amendment to section 299, subdivision (f) that was enacted subsequent to that decision. The majority here adopts this argument. In the course of enacting alternative amendments to sections 298 and 299, one of which will become effective depending on how the Supreme Court rules on an appeal challenging the constitutionality of requiring a DNA sample from an individual on the basis of the person's arrest, the Legislature inserted reference to section 1170.18 into section 299, subdivision (f). (Stats. 2015, ch. 487, § 4.) Thus, the provision quoted in footnote 6 above now begins, "Notwithstanding any other law, including Sections 17, *1170.18,* 1203.4, and 1203.4a . . . ." (§ 299, subd. (f), italics added.)

It 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" (§ 299, subds. (a), (b), (c)(1), (c)(2), (d),

(e)), subdivision (f) refers to "provid[ing]" a sample and says nothing about expungement.[7]

Even accepting the Attorney General's questionable premise that the amendment to subdivision (f) was intended to preclude expungement based on the reclassification of a felony as a misdemeanor pursuant to section 1170.18, I disagree with the Attorney General and my colleagues that the amendment would be valid. 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. Article 2, section 10, subdivision (c) of the California Constitution requires that " '[w]hen 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.' " (*People v. Armogeda* (2015) 233 Cal.App.4th 428, 434.) Section 15 of Proposition 47 provides that "[t]he provisions of the measure may be amended 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

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[7] 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).

this act."[8] An amendment is " 'a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision.' " (*People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571.) 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.)

This conclusion is not at odds with the interpretation of section 17, as construed in *Coffey supra,* 129 Cal.App.4th 809. As the court pointed out in *Alejandro,* when a defendant is sentenced for an offense pled as a felony but sentenced as a misdemeanor pursuant to section 17, it remains true that the defendant was found or pleaded guilty to a felony offense. In contrast, "offenses now classified as misdemeanors for qualifying offenders under Proposition 47 have permanently been removed from the felony

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[8] Assembly Bill No. 1492 was passed by the required two-thirds vote. (Assem. Weekly Hist. (2015-2016 Reg. Sess.) Feb. 4, 2016, p. 928.)

category." (*Alejandro, supra,* 238 Cal.App.4th at p. 1230.) Moreover, although *Coffey* did involve a request for expungement, the court's analysis focused on the petitioner's contentions that *taking* the DNA sample violated the petitioner's Fourth Amendment rights and that a "conviction" under a wobbler did not occur until sentencing. As the Court of Appeal opinion states, Coffey "essentially argued that the collection of the DNA sample violated his Fourth Amendment rights because it was not authorized by the DNA Database Act. Although Coffey asserted that the proper remedy was expungement under section 299 . . . , in context he was merely attempting to justify a particular remedy by analogy, not undertaking to meet the prerequisites of section 299 or rely on its statutory authority.' (*Coffey, supra,* at p. 816.) In rejecting Coffey's arguments, the Court of Appeal held that the "for all purposes" language in section 17 did not mean that the prior order under section 296 requiring the petitioner to *provide* a DNA specimen, correct when entered, should retroactively be determined to have been erroneous. This conclusion was consistent with prior Supreme Court decisions that section 17 applies only prospectively. (E.g., *People v. Feyrer* (2010) 48 Cal.4th 426, 439 ["If ultimately a misdemeanor sentence is imposed [pursuant to section 17, subdivision (b)], the offense is a misdemeanor from that point on, but not retroactively."], superseded by statute on another ground in *People v. Park* (2013) 56 Cal.4th 782, 789, fn. 4.)

The opinion in *Coffey* did not suggest that a wobbler sentenced as a misdemeanor, though formerly a felony, should not be treated as a misdemeanor when relevant to a future application before the court. The petition before the court in *Coffey* challenged retroactively the validity of the order that required Coffey to provide his DNA sample. The court did not focus on whether the reduced classification of the offense should apply to a future application not based on a challenge to the validity of the prior order.

Unlike the application before the court in *Coffey,* minor's request for expungement is not based on a challenge to the validity of the order that required him to provide his DNA sample. He does not seek to retroactively invalidate an order he acknowledges was correctly entered. Rather, he 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 ["There is no dispute that, under the rule in [cases holding a wobbler to be a felony for all purposes unless reduced pursuant to section 17], defendant would be subject to the section 667(a) enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor."].) 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 [The "reduction of a wobbler to a misdemeanor under section 17(b) generally precludes its use as a prior felony conviction in a subsequent prosecution."].) 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,[9] 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 ["Proposition 47 precludes the court from using [a conviction reclassified under its terms as a misdemeanor] as a felony merely because it was a felony at the time the defendant committed the offense."].) Similarly, in the present case minor seeks only prospective application of section 1170.18.

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[9] Review in several such cases has been granted by our Supreme Court with briefing deferred pending resolution of a related question in *People v. Valenzuela* (2016) 367 P.3d 682, review granted March 30, 2016, S232900.

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* and *Coffey* 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).

The fundamental public policy that is relevant with respect to application of the DNA and Forensic Identification Database and Data Bank Act of 1998, as amended (§ 295 et seq.) is that the databank should include DNA samples from persons committing felonies and certain specified misdemeanors and not from persons who have not committed any such offense. 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. 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.

I therefore conclude that insofar as the denial of minor's request to expunge his DNA sample from the state databank was based on the ground that the offense redesignated as a misdemeanor was previously a felony, the trial court erred in denying the request. Absent some other statutory basis for retention, minor's DNA sample should be expunged from the state databank.

Pollak, Acting P.J.

Trial Court:	Contra Costa County Superior Court
Trial Judge:	Hon. Thomas M. Maddock
Counsel for Defendant and Appellant:	By appointment of the Court of Appeal under the First District Appellate Project's independent-case system. Anne Mania
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In re C.B., A146277