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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

When the voters enacted Proposition 47, they mandated that a select number of former felony offenses, including appellant's theft offense of property worth less than $950, "shall be considered a misdemeanor for all purposes except that such resentencing shall not permit that person to [own a firearm or be avoid being punished for being a felon in possession of a firearm]." (Pen. Code § 1170.18, subd. (k).) And, the voters created a mechanism whereby people with past convictions for reclassified offenses can make those convictions misdemeanors consistent with current law. (Pen. Code § 1170.18, subd. (a), (b), (f) & (g).) Petitioner successfully petitioned to have his offense reclassified and he is now asking that the court give full meaning to that order by granting his request to have his DNA expunged from the state's DNA database.

ARGUMENT

SUMMARY OF APPELLANT'S CONTENTIONS

Appellant contends that the juvenile court erred when it denied his request to have his DNA expunged from the state's DNA database following the reclassification of his adjudicated offense to misdemeanor petty theft pursuant to Proposition 47. The enactors of Proposition 47 mandated that reclassified offenses be considered misdemeanors for all purposes but gun possession. In identifying that one exception to misdemeanor treatment of reclassified offenses, the voters signaled their intent to preclude all other exceptions to that misdemeanor treatment

of reclassified offenses. The denial of appellant's request for DNA expungement creates a second, unauthorized exception to the misdemeanor treatment of his reclassified offense.

Appellant further contends that reclassification of an offense as a misdemeanor pursuant to Penal Code section 1170.18 is not analogous to the discretionary reduction of a felony to a misdemeanor under Penal Code section 17. That is because offenses reclassified as misdemeanors by Proposition 47 are now misdemeanors as a matter of law – unlike the wobbler offenses to which section 17 is addressed. The electorate has statutorily removed those offenses from the category of crimes requiring DNA submission. Because of the differences between the two statues, the case law and analysis governing expungement requests under Penal Code section 17 should not govern expungement requests under Proposition 47.

The established law in place at the time appellant requested the DNA expungement, as articulated in *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209 made it clear that appellant, whose offense had been reclassified to a misdemeanor, was entitled to expungement of his DNA sample. Because AB 1492 changed that law, AB 1492's subsequent amendments to Penal Code section 299, subdivision (f) are not applicable to appellant's case. In addition, AB 1492 was an impermissible amendment to Proposition 47 because it countervailed, rather than furthered the purposes of the statute.

A grant of appellant's request for expungement is consistent with the public

policy behind the DNA collection statutes and Proposition 47. The legislature has made it clear that people arrested for and/or convicted of misdemeanors do not have to submit DNA samples to the state's database. Proposition 47, in turn, statutorily reclassified a number of non-violent drug and theft offenses as misdemeanors, bringing those offenses into the class of crimes that do not require submission of DNA samples. Granting appellant's request for expungement is thus consistent with the public policy behind both Proposition 47 and Proposition 69 and harmonizes the two statues. Requiring expungement is also consistent with California's strong public policy of privacy protections.

SUMMARY OF RESPONDENT'S CONTENTIONS

Respondent contends that people who have their offenses reclassified under Proposition 47 are not entitled to DNA expungement because Penal Code section 299, subdivision (f) bars that expungement. Respondent argues that it is the original conviction/adjudication that is determinative as to a person's right to DNA expungement and if that original conviction/adjudication was for an offense requiring DNA submission, later reclassification of that offense does not entitle a person to expungement. Respondent also asserts that reclassification does not fall within the circumstances allowing for expungement in Penal Code section 299, subdivision (b), that list is exclusive, and that is another bar to expungement.

According to respondent, section 1170.18's mandate that a reclassified offense "shall be considered a misdemeanor for all purposes except" for permitting gun possession should be interpreted identically to requests for

expungement under Penal Code section 17, and DNA is retained following resentencing under section 17.

Respondent asserts AB 1492's amendment to Penal Code section 299 is applicable to appellant's case because it clarified, rather than changed, existing law. For that same reason, it was not inconsistent with the intent behind Proposition 47.

Finally, Respondent argues that prohibiting expungement is consistent with the public policy seeking to maximize opportunities to obtain and retain DNA samples from people involved in the criminal justice system.

I. BECAUSE THE PLAIN LANGUAGE OF PENAL CODE SECTION 1170.18 MANDATES THAT RECLASSIFIED 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 RECLASSIFIED AS A MISDEMEANOR.

Proposition 69, on which respondent relies throughout her brief, states that people convicted of, and adjudicated for, almost all misdemeanors should *not* be required to submit DNA samples to the state's DNA databank. (Pen. Code § 296, subd. (a)(1) & (a)(3).) The electorate specifically singled out only two classes of misdemeanor convictions that require DNA submission - sex offense and arson registrants. (Pen. Code § 296, subd. (a)(3).) Thirteen years after Proposition 69

was passed, people convicted of the overwhelming majority of misdemeanors still do not have to submit their DNA to the state's databank.

In enacting Proposition 47, the electorate decided that a specific set of non-violent, non-serious theft and drug related offenses should be statutorily converted from felonies (or wobblers) to misdemeanors. (Proposition 47 §§ 3, subd. (3) 5-14, Voter Information Guide, Gen. Elec. (Nov. 4, 2014), pp. 70-73.) And, the electorate created a mechanism by which people *previously* convicted of those particular offenses could convert their past convictions from felonies to misdemeanors. (Pen. Code § 1170.18, subd. (a), (b), (f) & (g).) Proposition 47 thus mandated that certain offenses move from the category of offenses requiring DNA submission (felonies) to the category of offenses not requiring DNA submission (misdemeanors). And, the Proposition enabled people both serving current sentences and those who had already completed their sentences prior to passage of the act to ask to have their offenses reclassified as misdemeanors, not requiring DNA submission. Appellant's theft offense is now a misdemeanor as a matter of law under this statutory scheme. His offense therefore falls within the category of offenses not requiring DNA submission. He is therefore entitled to have his DNA expunged.

A. RESPONDENT MISINTERPRETS THE APPLICATION AND EFFECT OF PROPOSITION 47.

Respondent improperly narrows the scope of Proposition 47's reclassification provisions. Respondent's arguments are predicated on the assertion that reclassification of an offense under Proposition 47 is nothing more than a prospective re-sentencing statute, akin to Penal Code section 17.[1] (Respondent's Brief on the Merits ("RBM") 36-42.) In so asserting, respondent misinterprets the mandatory and categorical nature of the provisions of Section 1170.18.

If a person meets the criteria for reclassification laid out in Proposition 47, that reclassification is mandatory. (Pen. Code §§ 1170.18, subd. (b) ["If the petitioner satisfied the criteria in subdivision (a) the petitioner's felony sentence *shall be* recalled and the petitioner resentenced to a misdemeanor" absent a finding that resentencing would pose an unreasonable risk to public safety] & subd. (g) [If the application satisfies the criteria in subdivision (f), the court *shall* designate the felony offense or offenses as a misdemeanor] emphasis added.) And, reclassification is available regardless of when the original conviction took place. (Pen. Code § 1170.18, subd. (a), (b), (f), (g).) Appellant met the criteria for reclassification and his application was granted as required by law and without objection from the people. (RT 9-11; CT 289-290; Pen. Code §1170.18, subd. (b)

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

& (g).) [2]

Despite the mandatory language in section 1170.18 and the categorical and retroactive reclassification of offenses under Proposition 47, respondent asserts that Proposition 47 should be viewed as a discretionary resentencing statute akin to Penal Code section 17. (RBM 36-44.) It is not. As stated in *In re Alejandro N.* (2105) 238 Cal.App.4th 1209, 1224-1226 "Proposition 47 changes "the *very definition of the offenses themselves*." (*Id.*, emphasis in original.)

Section 17, subdivision (b), in contrast, addresses the discretionary reduction of "wobbler" offenses - offenses that can be punished either as a misdemeanor or a felony – to misdemeanors. (Pen. Code § 17, subd. (b).) Section 17 lists a number of circumstances where a court can sentence a wobbler offense as a misdemeanor. (Pen. Code § 17, subd. (b)(1)-(b)(5).) None of those circumstances, however, change the nature of the underlying offense as a matter of law. The offenses themselves remain punishable either as felonies or misdemeanors today.

Offenses reclassified under Proposition 47, in contrast, are indisputably misdemeanors today. And, as discussed above, reclassification for eligible

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[2] It is unclear from the record which provision the court relied on in this matter. Appellant did not cite a particular subdivision of section 1170.18 in his request for reclassification (II CT 289-290), and no opposition was filed to that request. At the hearing, there was no discussion of future dangerousness and the District Attorney acknowledged "The reduction of the 487 subsection (c)felony to the misdemeanor 490.2 appears appropriate because the value of the stolen property appears to be under 950. The People agree that the total custody time for that charged should be reduced to six months[.]" (See RT 9-11.)

offenders who have already completed sentences imposed for former felonies is mandatory. (Pen. Code §1170.18, subd. (f) & (g).) Thus, Proposition 47 is not simply a resentencing statutory scheme as respondent asserts; it is a statutory scheme which changed the nature of certain felonies to misdemeanors. (See Dissent at 6-7 [discussing why reclassification of an offense under section 1170.18 is not analogous to reduction of charges under section 17.]; OBM 33-37.)

Respondent also misconstrues the scope of Proposition 47 as prospective only. If Proposition 47 reclassification were, as respondent contends, simply a resentencing statute intended to apply prospectively, subdivisions (f) and (g) – which enable people who have completed their sentences to have their offenses reclassified as misdemeanors - would not be included in the statute. Inclusion of those subdivisions demonstrates the voters' intent to have section 1170.18 apply retroactively and prospectively. The only purpose for including those retroactive provisions is to relieve those with reclassified offenses of the liabilities associated with having a past felony conviction, including having a DNA sample in the state's DNA database. (See OBM at 36; *People v. Evans* (2016) 6 Cal.App.5th 894, 900-901, review granted 2/2/17 S239635.)

Finally, respondent asserts that proper interpretation of provisions codified by Proposition 69 requires that appellant's request for DNA expungement be denied. That assertion is incorrect. Proposition 69, a voter initiative passed ten years before Proposition 47, added to the categories of persons required to provide their DNA to the state (Pen. Code § 296) and added provisions permitting

expungement of DNA – the destruction of DNA samples and the removal of DNA identifying profiles from the state database. (Pen. Code § 299) Proposition 69 ensured that expungement is available to individuals who have previously and legally submitted their DNA to the state, but who no longer have a qualifying conviction or adjudication.(Pen. Code § 299, subd. (a) & (b).) Appellant now falls within that category. Therefore, granting appellant's request to have his DNA expunged can, and should be, read as entirely consistent with the intent of Proposition 69.

Respondent repeatedly emphasizes that Proposition 69 reflected a recognition that non-violent offenders may have committed violent crimes yielding DNA evidence in arguing that DNA expungement is barred. (See RBM at 45-46.) Respondent also, however, repeatedly ignores the fact that Proposition 69 did not require collection of DNA from persons convicted or adjudicated of almost all misdemeanor offenses. The voters who enacted Proposition 69 thus did not view misdemeanor offenders as raising significant public safety concerns. Appellant now stands adjudicated of a misdemeanor offense and falls into the category of offenses deemed not to raise a public safety concern under Proposition 69.

Respondent's assertion that granting appellant's request for DNA expungement will somehow endanger California's crime fighting abilities also misunderstands the scope of the statute. There is only a small subset of people who are eligible for DNA expungment under Proposition 47. That is because

adults arrested for felonies are required to submit DNA samples upon arrest. (Pen. Code § 296, subd. (a)(2)(C).) That means that the only people eligible for expungement will be juveniles who were adjudicated for one of the reclassified offense before enactment of Proposition 47 and who have no prior or subsequent felony adjudications, or subsequent adult arrests for felonies.[3] Granting expungement requests for that small subset of cases will not endanger California's crime fighting capabilities, but it will ensure that reclassified offenses are treated "as misdemeanors for all purposes," consistent with the intent of the voters in enacting Proposition 47.

B. PRINCIPLES OF STATUTORY CONTSTRUCTION SUPPORT APPELLANT'S INTERPRETATION OF PENAL CODE SECTION 1170.18, SUBDIVISION (K).

The parties agree that the issues in this case involve statutory construction and that this is a question of law, reviewed de novo. As outlined in the Opening Brief on the Merits (OBM), courts look first to the plain language of a statute as "the most reliable indicator of legislative intent" and where language is clear, there is no need for further statutory construction. (*People v. Gardley* (1996) 14 Cal.4th 605, 621.) The plain language of section 1170.18, subdivision (k) states that a reclassified offense "shall be considered a misdemeanors for all purposes" except

[3] Another class of people possibly eligible for expungement would be adults who were arrested for a misdemeanor but convicted of one of the reclassified offenses as a felony. That seems an unlikely scenario.

for one. That language reflects the voters' intent that "the redesignated misdemeanor offenses should be treated exactly like any other misdemeanor offense, except for firearm restrictions." (*Alejandro N. supra*, 238 Cal.App.4th at 1227.)

Indeed, 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 ("expression of some things in a statute necessarily means the exclusion of other things not expressed" [*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852, citations omitted]; see also *In re Alejandro N. supra*, 238 Cal.App 4th 1227; Dissent at 3.)

Respondent does not acknowledge the above principles of statutory interpretation and instead argues that inclusion of the exception to misdemeanor treatment of reclassified offenses for firearm possession does not preclude other exceptions because specific statues control over more general statutes. (RBM 41-42.) Respondent asserts that the firearm possession exception to misdemeanor treatment of reclassified offenses is included, not as an indication that all other exceptions are barred, but because the prohibition on gun possession requires the current status of being convicted of a felony. Respondent argues that including that exception "reflects the voters' intent to apply the section 17 paradigm while imposing additional public safety oriented restrictions on an offender who will be resentenced to a misdemeanor prospectively." (RBM 42.) Inclusion of the firearm

exception is unrelated to the issue of prospective or retroactive application of Proposition 47.

Regardless of whether reclassification only applies prospectively, or retroactively and prospectively, a person with a reclassified offense will have the status of not being convicted of a felony from the time of reclassification forward. Therefore, inclusion of the exception for gun possession statues for the misdemeanor treatment of reclassified offenses does not show that the voters intended reclassification of offenses to be prospective only. Rather, it shows that the voters intended only one exception to the misdemeanor treatment of reclassified offenses. (*Alejandro N., supra* at p. 1228; see also Dissent at 3.)

Respondent also asserts that because Proposition 47 is silent on the issue of DNA collection and retention, the legislature and the courts are free to create additional exceptions to the misdemeanor treatment of reclassified offenses. (RBM 48-49.) She points to the principle that specific statues control over general sttues as support for that contention and asserts that because section 299, subdivision (f) is a specific statute, it should control over the more general language in section 1170.18. (RBM 47-48.) As stated in the Opening Brief, taken to its logical conclusion, respondent's interpretation would enable courts and/or the legislature to nullify any and all collateral benefits flowing from reclassification of an offense under Proposition 47 by passing statutes specifically targeting those benefits, because Proposition 47 is "silent" as to the exact nature of those benefits. That reasoning violates "[w]ell-established canons of statutory construction [that]

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.)

C. THE RECLASSIFICATION OF AN OFFENSE UNDER SECTION 1170.18 RESULTS UNAMBIGUOUSLY IN A MISDEMEANOR ADJUDICATION. IT IS THEREFORE NOT ANALAGOUS TO REDUCTION OF A WOBBLER FROM A FELONY TO A MISDEMEANOR UNDER SECTION 17.

Proposition 47 is not simply, as respondent asserts, "a determination that section 17 type relief is available in another post-conviction context to allow a trial court to redesignate a qualifying felony conviction or adjudication as a misdemeanor." (RB 44.) There are clear and categorical differences between reclassification of an offense under section 1170.18 and reduction of a wobbler from a felony to a misdemeanor under section 17. Yet, a fundamental premise underlying all of respondent's arguments is that because both section 17 and section 1170.18, subdivision (k) use the language "misdemeanor for all purposes," section 1170.18 cannot be read to authorize DNA expungement because expungement is barred under section 17. (RBM 36-44.) That argument ignores the foundational differences between the two statutes.

As a preliminary matter, respondent appears to argue that reclassification under section 1170.18 is discretionary in making the above analogy. As discussed in argument I.A., above, it is not. It is mandatory for any person who meets the statutory criteria. More fundamentally, section 17 only applies to "wobbler" offenses that, once charged as felonies, may be reduced to misdemeanors at

different junctures in the criminal conviction process at the discretion of the district attorney or the court. (Pen. Code §17, subd. (b)(1)-(b)(5).) Resentencing under section 17 does not, however, change the nature of the underlying statutory offenses, which remain chargeable as felonies as a matter of law.

Reclassification under section 1170.18, in contrast, statutorily moves an offense out of the felony category. It is thus a recognition that the applicant's past offense is no longer a felony as a matter of law and makes that conviction consistent with the present state of the law. DNA expungement is consistent with that recognition because a person with a reclassified offense no longer has a conviction for a misdemeanor, or a wobbler.

Respondent nonetheless takes the position that the phrase "misdemeanors for all purposes" in section 1170.18 should be interpreted identically to the same language in section 17, and expungement of appellant's DNA is therefore barred. (RBM 35-40.) Respondent's reasoning is flawed because the two statutes are not dealing with the same subject, and because the context for the phrase is different in the respective statutes.

1. The Use of The Phrase "For All Purposes" in Section 1170.18, Subdivision (k) Does Not Mandate That Courts Interpret It Identically to the Phrase In Section 17 Because The Two Statutes are Not Addressing the Same Subject.

Respondent contends that because courts have interpreted the phrase "misdemeanor for all purposes" in section 17, subdivision (b) to mean that DNA

expungement is tied to the original finding of guilt, use of that same phrase in section 1170.18, subdivision (k) also means that DNA expungement is barred when an offense is reclassified under section 1170.18. (RBM 36-42.)

Respondent's argument is premised on the idea that reclassification under section 1170.18 and reduction of a wobbler from a felony to a misdemeanor under section 17 are analogous. As discussed in above and in the Opening Brief (pp. 33-37), that premise is flawed because a section 17 subdivision (b) reduction does not categorically remove the underlying offense altogether from the felony category. Instead, section 17 enables different functionaries in the criminal process to reduce the punishment for wobblers "because the court determines in its discretion that the particular circumstances of a case justify treating the offense as less serious than a felony." (Dissent at 6.) It is that difference that mandates a different analysis of the right to DNA expungement.

The cases on which Respondent relies do not support a finding that section 1170.18 is properly analogized to section 17. In *People v. Harrison* (1989) 48 Cal.3d 321, 329, the court was considering the point at which the crime of sexual penetration is completed. (*Id.*) The court held that because multiple other sex offense statutes determined that a crime is committed upon penetration no matter how slight, the same interpretation should apply to the definition of the offense in section 289. (*Id.* at 328-329.) Similarly, in *People v. Lopez* (2005) 34 Cal.4th 1002, the court was considering the scope of offenses defined by the phrase "punishable within the state prison for life" in section 186.22. (*Id.* at 1006.) In both of those

cases, the court was considering identical language defining the scope of offenses in statutory schemes covering the same category of crimes. That is not the case here. As discussed above, the nature of the offenses targeted by section 17(b) differs foundationally from those targeted by section 1170.18. They are not the same category of offenses and the use of the phrase "misdemeanor for all purposes" needs to be analyzed within the context of the different statutory schemes.

In *People v. Rivera* (2015) 233 Cal.App.4th 1085, also relied on by respondent, the Sixth District Court of Appeal addressed the issue of the effect of reclassification of an offense on appellate jurisdiction. The court held that jurisdiction of the appeal of a case with a reclassified offense remains with the courts of appeal and not the appellate division of the superior court, because the event triggering jurisdiction in the court of appeal is the *charging* of the offense as a felony, not the finding of guilt. (*Id.* at 1098.) In its analysis, the court noted the similarities in language between section 17, subdivision (b) and section 1170.18 and that courts had held that reduction of a felony to a misdemeanor under section 17 only applies prospectively and does not alter the basis for appellate jurisdiction. (*Id.* at 1100.) The court then stated that it found nothing in Proposition 47 showing that section 1170.18, subdivision (k) "was intended to change preexisting rules regarding appellate jurisdiction. (citations) We therefore *presume* that the phrase 'shall be considered a misdemeanor for all purposes' in section 1170.18 subdivision (k) does not apply retroactively." (*Id.* at 1100, emphasis added.)

The court in *Rivera* was deciding the issue of appellate jurisdiction, not DNA expungement. And, it based its decision on specific statutes and rules governing appellate jurisdiction. (*Id.* at 1095, Cal. Rule of Court 8.304, Pen. Code § 691.) The court was thus not considering the scope of the voters' intent to relieve people with reclassified offenses of the liabilities associated with past convictions, but instead whether there was an intent to change the rules of appellate jurisdiction for reclassified offenses. Importantly, in reaching its decision, the court explicitly "presumed," but did not actually decide, that the "misdemeanor for all purposes" language in section 1170.18, subdivision (k) did not apply retroactively. (*Id.* at 1100.) Indeed, the bulk of the court's analysis of the effect of section 1170.18, subdivision (k) came after the court made its holding in the opinion. (*Id.* at 1096, 1098-1101.)

Respondent also extrapolates procedural similarities between section 17 and section 1170.18, such as the fact that both statutes require some discretionary determinations, and argues on that basis that the "for all purposes" language in both statutes should be interpreted identically. (RBM 40-41.) Again, respondent chooses not to recognize the substantive difference between the two statues. That is, offenses listed in section 1170.18, subdivision (a) "have permanently been removed from the felony category and are no longer subject to DNA collection." (Dissent at 7)

Proposition 47 has a substantively different purpose than section 17, where the nature of the underlying offense remains untouched and no remedy is available

to people who have completed their sentences. Proposition 47 changes the nature of the underlying offenses and enables even those who have completed their sentences to ask for reclassification to a misdemeanor offens. It is that difference, along with the addition of the exception to misdemeanor treatment for firearm possession that differentiate the two statutes and mandate a different analysis of the issue of DNA expungement.

2. The Language In Section 1170.18 Should Not Be Interpreted Identically to the Language in Section 17 Because Section 1170.18 Contains An Exception That Is Absent From Section 17 And That Exception Shows That The Electorate Intended to Preclude Any Other Exceptions to the Misdemeanor Treatment of Reclassified Offenses.

Even if respondent's assertion that section 17 and section 1170.18 are analogous were persuasive, courts have consistently held that the same language in two different statutes should only be interpreted in a similar way "unless a contrary intent clearly appears" in the statute. (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437.) A contrary intent appears here.

As discussed above and in the Opening Brief on the Merits, section 1170.18, subdivision (k) contains an exception to the misdemeanor treatment of reclassified offenses that is absent from section 17, the exception for gun possession offenses. (Pen. Code §1170.18, subd. (k).) As recognized in the dissent below, application of established rules of statutory construction shows that the

electorate did not intend any other exceptions to the misdemeanor treatment of reclassified offenses. (OBM 22.) When the legislature includes one exception to the application of a statute, that shows it intends to preclude all others, or *expressio unius est esclusio alterius.* (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852, citations omitted, Dissent at 3.) There is no exception to the "misdemeanor for all purposes" language in section 17, subdivision (b). Thus, the inclusion of the exception for gun possession statues shows that the voters intended a different interpretation of the "misdemeanor for all purposes" language in section 1170.18, subdivision (k). They intended to preclude all other exceptions to the misdemeanor treatment of reclassified offenses.

D. EXPUNGEMENT OF APPELLANT'S DNA IS CONSISTENT WITH THE PROVISIONS OF PROPOSITION 69 AND NOT PRECLUDED BY THE VERSION OF SECTION 299, SUBDIVISION (F) THAT WAS IN EFFECT WHEN APPELLANT'S OFFENSE WAS RECLASSIFIED AS A MISDEMEANOR.

As discussed above, in enacting Proposition 69 over a decade ago, the voters determined that the large majority of misdemeanor convictions, including theft related misdemeanors like appellant's, did not require DNA submission. (Pen. Code §§ 296, 296.1.) There is no dispute that if appellant were convicted of a violation of Penal Code section 490.2 today, he would not have to submit his DNA to the state's DNA database.[4] He therefore no longer has an offense

[4] That is in contrast of course, to a person who was arrested for, or plead guilty to a wobbler charged as a felony. That person would have to submit his DNA to the state's DNA database

qualifying for DNA submission under Proposition 69, and is entitled to expungement of his DNA from the state's database under the plain language of section 299.

1. Appellant Is Entitled to Expungement 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.

As discussed in the Opening Brief, appellant is now a person who "has no past or present offense or pending charge which qualifies [him] for inclusion within the state's [DNA database] and there otherwise is no legal basis for retaining the specimen or sample or searchable profile." (Pen.Code § 299, subd. (a).) He therefore falls squarely within the class of people eligible for expungement under the plain language of Penal Code section 299, subdivision (a).

Respondent asserts that 1) appellant does not fall within the specific circumstances permitting expungement in section 299, subdivision (b) and therefore he is ineligible for expungement and 2) that expungement is barred by the language in section 299, subdivision (f). (RBM 32-35.) Respondent fails to acknowledge that 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 [*Coffey v. Superior Court* (2005) 129 Cal.App.4th 809, 817.) As the Court stated in *Alejandro N.*,

> The grounds for expungement listed in section 299 concern circumstances where an alleged offender is charged with an offense that qualifies for DNA collection, and then the case is not pursued or is dismissed, or the alleged offender is found not guilty or innocent. . . . In these circumstances, the charged offense retains its qualification for DNA collection, but expungement of the DNA is warranted because the particular defendant is not guilty of that offense. In contrast here, under Proposition 47 *the 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).)

Respondent also does not address the fact that even under the circumstances outlined in section 299 subdivision (b), the legality of the initial collection of the DNA sample has no bearing on the right to expungement. (See OBM at 32-33.) It is events after the initial lawful taking of the DNA sample that give rise to the right to expungement under section 299, subdivision (b).

Moreover, reclassification of an offense under section 1170.18, that is, a determination that a person should no longer be deemed to have been convicted of a felony offense, is akin to reversal of a conviction under section (b)(2) or a finding of not guilty under section (b)(4). In all three circumstances, there has been a judicial determination that a defendant is no longer guilty of the offense which triggered the initial DNA submission requirement. In all three circumstances, the defendant no longer has an offense qualifying for DNA

submission under subdivision (a). In all three circumstances, the applicant is entitled to expungement.

Finally, respondent asserts that in enacting Proposition 47, the voters were presumed to know that under section 299, DNA samples are broadly retained "nothwithstanding any other provision of law," and because the voters did not address expungement, they intended that appellant's DNA sample be retained. (RBM 48-49.) That argument assumes that the issue of the interplay between the yet to be enacted section 1170.18 and section 299 was a simple matter and easily understood at the time Proposition 47 was passed. It was not. As discussed in Argument II below, it was not at all clear that section 299 applied to reclassification under section 1170.18 when the statute was enacted. Therefore respondent's assertion that the voters were presumed to agree with the her interpretation of the law at the time Proposition 47 was passed is speculative at best.

2. The Version of Section 299, Subdivision (f) in Place At the Time Appellant Requested Expungement Did Not Bar His Request.

As outlined in the Opening Brief on the Merits, by its plain language section 299, subdivision (f) applies to the duty to provide DNA, not expungement. (OBM 50-52; Dissent at 7-8.) Even if that were not the case, however, it is undisputed that section 299, subdivision (f) did not identify reclassification of offenses under Proposition 47 as one of the circumstances barring expungement either at the time appellant filed his request or at the time it was granted. Under the

law in place at the time appellant requested expungement, he was entitled to that expungement. (See OBM 48-50.)

Respondent asserts that section 299 subdivision (f) barred expungement any time "an originally qualifying offense is reduced to a nonqualifying offense in the courts or judicial proceedings" and therefore applied to reclassification under section 1170.18. (RBM at 34, citing *In re J.C.* (2016) 246 Cal.App.4th 1462, 1475.) Again, that argument presumes that reclassification under Proposition 47 is analogous to reduction of an offense under section 17. It is not. Appellant's offense was not "reduced" from a qualifying offense to a nonqualifying offense, as is the case for wobblers under section 17. It instead was changed to a statutorily separate misdemeanor offense and is no longer an offense qualifying for DNA submission under section 299, subdivision (a). Section 299, subdivision (f) addresses cases where the offense of which the defendant was found guilty remains a qualifying offense today. (Pen. Code § 299, subd. (f) [DNA expungement prohibited"[i]f a person has been found guilty or was adjudicated a ward...of a qualifying offense" as defined in subdivision (a)].) Appellant's offense is no longer a felony as a matter of law, and is therefore no longer a "qualifying offense" under section 299, subdivision (a). He is thus entitled to expungement.

II. AB 1492'S AMENDMENT TO SECTION 299, SUBDIVISION (F) IS NOT APPLICABLE TO APPELLANT'S CASE BECAUSE IT WAS NOT A CLARIFICATION OF EXISTING LAW, BUT INSTEAD A SUBSTANTIVE CHANGE IN THE LAW. IT WAS ALSO AN IMPERMISSIBLE AMENDMENT TO PROPOSITION 47 BECAUSE IT WAS INCONSISTENT WITH THE INTENT OF THE PROPOSITION.

As shown in the Opening Brief, to the extent that the AB 1492's recent amendment to Penal Code section 299, subdivision (f) was intended to prohibit that expungement of appellant's DNA, that amendment: 1) does not apply to appellant's case because his offense was reclassified as a misdemeanor prior to the enactment of the amendment; and 2) was inconsistent with the intent of the electorate in enacting Proposition 47 and was therefore impermissible. (OBM 44-54.)

A. AB 1492, ENACTED AFTER APPELLANT'S REQUEST FOR EXPUNGEMENT, CHANGED EXISTING LAW. THEREFORE, RETROACTIVE APPLICATION OF THAT STATUTE IS PROHIBITED.

AB 1492's amendment to section 299, subdivision (f) should not apply to appellant's case because the amendment was made after appellant's request for expungement and changed, rather than clarified, existing law. (See OBM 48-53.) Under established principles of statutory construction, retroactive application of a change in the law is prohibited. (*Id.*)

Respondent asserts that AB 1492 was merely a clarification of existing law,

and retroactive application is therefore proper. (RBM 53-55.) As with respondent's other assertions, that argument is premised on the idea that reclassification of an offense under section 1170.18 is no different than reduction of a misdemeanor under section 17, and even before the passage of AB 1492, DNA expungement was precluded for appellant. (*Id.*) The flaw in that reasoning was recognized and articulated in *Alejandro N.*, *supra*, 238 Cal.App.4th 1228-1229 and the dissent below in addressing the applicability of section 299, subdivision (f). (See dissent at 6-7, OBM 35-36.) As the court stated in *Alejandro N.* "Under Proposition 47 *the reclassified misdemeanor offense itself no longer qualifies as an offense permitting DNA collection.* This circumstances is outside the matters contemplated by the Penal Code DNA expungement statute." (*Id.*, emphasis in original.) Because Proposition 47 statutorily removed reclassified offenses from the category of offenses requiring submission of DNA, AB 1492 changed the law by bringing those offenses back into the category of offenses requiring DNA submission. The amendment to 299 is thus a substantive change in the law that cannot retroactively be applied to appellant's case.

B. AB 1492'S AMENDMENT TO SECTION 299, SUBDIVISION (F) WAS CONTRARY TO THE INTENT OF THE VOTERS IN ENACTING PROPOSITION 47. THEREFORE, IT WAS AN IMPERMISSIBLE AMENDMENT TO PROPOSITION 47.

The parties agree that the legislature may only amend Proposition 47 in a manner that is consistent with its purpose. (Prop 47, §15; OBM 53-54.) The parties

disagree as to whether AB 1492 amended Proposition 47 and if it did, whether that amendment was consistent with the purpose of the statute. (RBM 56-59; OBM 53-57.) Proposition 47 explicitly intended "to require 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 offenses." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47 §2, p. 70, emphasis added.) And, as discussed above, Proposition 47 identified only one exception to the misdemeanor treatment of reclassified offenses. (Pen. Code §1170.18, subd. (k).) Settled rules of statutory construction show that by identifying that one exception, the voters signaled their intent to preclude any other exceptions. (*Gikas v. Zolin* (1993) 6 Cal.4th 841; *Alejandro N., supra*, 238 Cal.App.4th at 1226-1228; Dissent at 3.) The voters thus unambiguously intended to change reclassified offenses to misdemeanors and take them out of the category of offenses requiring DNA submission. If AB 1492's amendment to section 299, subdivision (f) is interpreted to preclude expungement, that statute created an additional exception to the misdemeanor treatment of reclassified offenses and amended Proposition 47 in a manner inconsistent with its intent. Such an amendment is barred. (OBM 53-57.)

Respondent argues that because Proposition 47 is silent on DNA retention and expungement, the legislature was free to preclude DNA expungement for people whose offenses are reclassified and AB 1492 does not run afoul of the intent of the voters in enacting Proposition 47. (RBM 56-59.) Respondent argues

that only if Proposition 47 was somehow found to have amended Proposition 69, could AB 1492 be found an improper amendment of Proposition 47. (RBM 58.) Again, respondent's argument assumes that expungement of appellant's DNA was precluded under section 299, subdivision (f) prior to enactment of AB 1492. It was not precluded.

AB 1492 amended Proposition 47 in a manner that was inconsistent with the intent of the voters, who: 1) identified offenses to be reclassified as misdemeanors, which do not require DNA submission; 2) directed that people already adjudicated for the reclassified offenses be able to have their convictions converted to misdemeanors consistent with that changed statutory classification, and 3) mandated that the reclassified offenses be "considered a misdemeanor for all purposes" except one. By retaining felony treatment of those offenses for the purposes of DNA retention, AB 1492 amended Proposition 47 in a manner inconsistent with its intent. Therefore, AB 1492 is an invalid amendment to Proposition 47 and cannot be applied to appellant's case.

III. RECOGNITION THAT THE EXPUGEMENT OF DNA IS AUTHORIZED WHEN THE COURT RECLASSIFIES 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.

A. GRANTING APPELLANT'S REQUEST FOR DNA EXPUNGEMENT HARMONIZES PROPOSITION 69 AND PROPOSITION 47.

"A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions. [Citations.] This rule applies although one of the statutes involved deals generally with a subject and another relates specifically to particular aspects of the subject.' [Citation.] (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955.) Respondent asserts that denying expungement is the only way to harmonize Proposition 47 with Proposition 69. In fact the opposite is true; granting appellant's request for expungement harmonizes Proposition 47 with Proposition 69.

As already discussed in detail, the voters' intent in enacting the reclassification provisions of Proposition 47 was to reduce the severity of the punishment and the collateral consequences for nonserious and nonviolent, drug possession and theft offenders by designating or redesignating the crimes as

misdemeanors. (Proposition 47, §3.) And, the voters chose to address any public safety concerns by making certain classes of people ineligible for relief under the act. (Pen. Code § 1170.18, subd. (b), (c) & (i).)

Proposition 69, in 2004, 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. (Pen. Code §§ 296, 296.1.) The voters' concerns with public safety did not, however, require collection of DNA from people convicted of/adjudicated for most misdemeanors. (Pen. Code § 296.) Granting appellant's request for expungement is thus consistent with both Proposition 47 and Proposition 69. Appellant is now a person adjudicated for a misdemeanor pursuant to Proposition 47. Under the provisions of Proposition 69, he is no longer required to provide a DNA sample.

Respondent argues that the public policy behind Proposition 69 requires retention of appellant's DNA sample because "[t]he state's interest in identification of offenders goes beyond the list of crimes requiring DNA sample collection set forth in Proposition 69." (RBM 45.) If the state truly had a compelling interest in obtaining DNA from every person who is convicted of a misdemeanor, either the legislature or the electorate presumably would have amended section 296 to include that collection. They did not. Therefore, respondent's assertion that California's policy is to obtain DNA from as many people as possible without regard for the nature of their offense is unsupported by

the law.

In addition, the people who presumably would pose the greatest risk to public safety are precluded from obtaining reclassification of their offenses under Proposition 47. As respondent acknowledges, people with past convictions for serious or violent offenses cannot obtain reclassification and people who are serving sentences are barred from reclassification if they are found to pose a risk to public safety. (Pen. Code §1170.18, subd. (b) & (i).)

B. EXPUNGEMENT IS CONSISTENT WITH CALIFORNIA'S PUBLIC POLICY OF PRIVACY PROTECTION.

California also has a strong public policy in favor of privacy protection, and expungement of appellant's DNA is consistent with that policy. (See OBM at 41-43.) Respondent characterizes this argument as a challenge to the constitutionality of DNA retention. Appellant does not raise a constitutional challenge to the retention of his DNA, but instead asserts that retention of his DNA has substantial privacy implications and conversely that expungement of his DNA is consistent with California's strong privacy protections. (OBM 42-43.) That is particularly true in light of the fact that California's stated policy *today*, as articulated by Proposition 47, is to not obtain DNA from people convicted of a violation of Penal Code section 490.2, the offense of which appellant has now been adjudicated.

Respondent cites to several statutory requirements regarding use of DNA and asserts that those statutory protections sufficiently address any privacy interest that appellant may have. Those protections do not change the fact that appellant's

DNA, which contains information that goes far beyond his identification, is still stored within a publicly maintained database, accessible to multiple public agencies. In an age where data breaches are becoming more and more common statutory protections are not a guarantee of privacy. Appellant retains a strong privacy interest in having his DNA removed from the state's database, especially in light of the fact that he has now been adjudicated for an offense not requiring DNA submission.

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: July 3, 2017

Respectfully submitted,

/S/ Anne Mania
ANNE MANIA
Attorney for Appellant

CERTIFICATE OF WORD COUNT

Counsel for C.B. hereby certifies that this brief consists of 8133 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).)

July 3, 2017

/s/ Anne Mania
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. On July 3, 2017 I served the following:

APPELLANT'S REPLY BRIEF

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 South Kingstown Rhode Island, to the following

Attorney General 455 Golden Gate Ave., #11000 San Francisco, CA 94102	First District Appellate Project 475 Fourteenth Street, Suite 650 Oakland, CA 94612

:

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