# In the Supreme Court of the State of California

| |
|---|
| **In re C.B., a Person Coming Under the Juvenile Court Law.** |
| **THE PEOPLE OF THE STATE OF CALIFORNIA,**<br>Plaintiff and Respondent,<br>**v.**<br>**C.B.,**<br>Defendant and Appellant. |

Case No. S237801



First Appellate District Division Three, Case No. A146277
Contra Costa County Superior Court, Case No. J1301073
The Honorable Thomas M. Maddock, Judge

## RESPONDENT'S BRIEF ON THE MERITS

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
ERIC D. SHARE
Supervising Deputy Attorney General
ENID A. CAMPS
Deputy Attorney General
State Bar No. 113183
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5976
Fax: (415) 703-1234
Email: Enid.Camps@doj.ca.gov
*Attorneys for Respondent*

## TABLE OF CONTENTS

**TABLE OF CONTENTS**
**(continued)**

**Page**

## TABLE OF AUTHORITIES

**Page**

**CASES**

## TABLE OF AUTHORITIES
## (continued)

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

## TABLE OF AUTHORITIES
## (continued)

**Page**

## TABLE OF AUTHORITIES
## (continued)

**Page**

## TABLE OF AUTHORITIES
**(continued)**

**Page**

## TABLE OF AUTHORITIES
## (continued)

**Page**



**STATUTES**

## TABLE OF AUTHORITIES
## (continued)

**Page**

## TABLE OF AUTHORITIES
## (continued)

**Page**



**CONSTITUTIONAL PROVISIONS**



**OTHER AUTHORITIES**

## TABLE OF AUTHORITIES
## (continued)

**Page**

## ISSUE

Whether an offender who has a felony adjudication reduced to a misdemeanor under Proposition 47 is entitled to have his DNA database sample expunged even though the DNA Act expressly bars sample expungement after a sentence reduction "notwithstanding" any provision of law.

## INTRODUCTION

At issue in this case are the scope and operation of two voter-enacted criminal justice initiatives. In 2004, Proposition 69 expanded the use of DNA in the criminal justice system to help make communities safer, and the identification of criminal offenders more accurate. (§ 295 et seq.)[1] Section 299, subdivision (f), of Proposition 69 expressly bars DNA sample expungement from the state's forensic identification database when a felony conviction is later reduced to a "misdemeanor for all purposes" under section 17, and "notwithstanding" any other provision of law. Section 299, subdivision (f), predicates DNA sample retention on the initial finding of guilt, rather than the ultimate status of the conviction or sentence.

Proposition 47, the Safe Neighborhoods and Schools Act, passed in 2014, reduces certain nonviolent felonies to misdemeanors.[2] It also provides a postconviction procedure to enable qualifying offenders to have a prior felony conviction resentenced as a "misdemeanor for all purposes."

---

[1]See DNA and Forensic Identification Database and Data Bank Act of 1998 (§ 295, et seq.), as modified by voter initiative, the DNA Fingerprint, Unsolved Crime and Innocence Protection Act (Prop. 69, Gen. Elec. (Nov. 2, 2004) ("DNA Act"). Unless otherwise designated, further statutory references are to the Penal Code.

[2] Ballot Pamp., Gen. Elec. (Nov. 4, 2014) §§ 5-13, pp. 71-73 (hereafter "Prop. 47 Ballot Pamp.").

(§ 1170.18.) Proposition 47 is silent about expungement of DNA identification samples, which are neither punishment nor part of any sentencing choice.

The Court of Appeal correctly concluded that the two initiatives are fully compatible and that section 1170.18 did not affect, let alone impliedly amend, section 299, subdivision (f)'s DNA expungement prohibition. Section 1170.18's "misdemeanor for all purposes" language has a well-established meaning in the context of postconviction resentencing procedures—the reduction of a felony to a misdemeanor is forward-looking in its effect. As with section 17, a sentence reduction under section 1170.18 does not negate the original finding of guilt for the qualifying offense and does not bar application of section 299, subdivision (f)'s limitation on DNA sample expungement. The appellate court also correctly harmonized the public safety goals of both state propositions. To the extent the two initiatives may conflict, section 299, subdivision (f), as the more specific statute addressing DNA expungement, controls over the more general section 1170.18.

Additionally, the Legislature has clarified that postconviction resentencing under Proposition 47 does not entitle an offender to DNA sample expungement. Effective 2016, the Legislature added section 1170.18 to section 299 subdivision (f)'s nonexhaustive list of circumstances prohibiting DNA expungement, thus confirming that denial of a request for DNA sample expungement based on Proposition 47 is a correct interpretation of law.

## STATEMENT

### A. Court Proceedings

In 2013, appellant broke into an apartment and stole the resident's cell phone, wallet, and Nintendo game. When leaving the apartment, appellant

was confronted by the resident, who began assaulting him. In response, appellant brandished a knife in self defense. (*In re C.B.* (2016) 2 Cal.App.5th 1112, 1116, fn. 2, review granted, Nov. 9, 2016, S237801.) Later, in juvenile court, appellant admitted felony grand theft (§ 487, subd. (c)) and misdemeanor burglary (§§ 459, 460, subd. (b)) in exchange for the dismissal of allegations of second degree robbery (§§ 211, 212.5) and first degree residential burglary (§§ 459, 460, subd. (1)). (1CT 3, 8.) The court adjudged him a ward with no termination date, directed an out-of-home placement, and ordered him to submit DNA samples for the state DNA database. (1CT 10-12.)

In July 2015, appellant petitioned to have the felony grand theft redesignated a misdemeanor pursuant to section 1170.18. The court granted the petition, set aside the placement order, and terminated probation as unsuccessful. (2CT 289-290, 351-352.) The court, however, denied appellant's request under Proposition 47 to expunge his DNA sample collected after his felony adjudication. (2CT 290, 294-295; see §§ 295, subd. (b)(2), 296, subd. (a)(1), 296.1, subd. (a)(2) [referencing juveniles].)[3] The court concluded: "Prop 47 does not mention DNA" and does not "embod[y] a change to the DNA rules."[4] (2RT 18.) The court said,

---

[3] The parties stipulated that the briefs and argument, and the court's ruling, on the DNA expungement issue in *In re S.B.*, Contra Costa County case No. J13-01068, be incorporated as part of the record in this case. (2CT 295; 1RT 10.) The same ruling applied in both this case and *In re C.H.* (2016) 2 Cal.App.5th 1139, review granted Nov. 16, 2016, S237762. The reporter's transcript from *S.B.* is designated "2RT." A defense motion for reconsideration of the court's DNA ruling in *In re Lamont P.*, Contra Costa County case No. J12-00947, filed on August 25, 2015, is also part of the record in this case. The reporter's transcript in *Lamont P.* is designated "3RT."

[4] The "DNA rules" in Proposition 69 include section 299, subdivision (f), which when enacted read: "*Notwithstanding any other*

(continued...)

"[W]hat we are doing here today is the equivalent of a Section 17 [sentence reduction]," which is specifically referenced in the DNA Act. (2RT 18.) It cited *Coffey v. Superior Court* (2005) 129 Cal.App.4th 809, which held that reclassification of a felony to a "misdemeanor for all purposes" under section 17 does not authorize DNA database sample expungement pursuant to section 299, subdivision (f). (*Id.* at pp. 821-823.) The court recognized that the collection and retention of DNA samples is ordered as an "administrative" requirement akin to fingerprinting, rather than as punishment for the crime. (2RT 18-19; see *Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1508-1510 [upholding DNA collection from misdemeanant sex offender registrants regardless of conviction date, noting the DNA Act involves an administrative identification procedure like fingerprinting and is not punishment].) The court later declined to reconsider its ruling, finding unpersuasive *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, which held a Proposition 47 sentence reduction also compels DNA sample expungement. (3RT 9-10.)

---

(...continued)
*provision of 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, 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." (Italics added.) The three statutes cited in section 299, subdivision (f)'s nonexhaustive list of circumstances that prohibit DNA sample expungement encompass reduction of felonies to misdemeanors, dismissal of charges after a guilty verdict, and release from penalties and disabilities attending a former conviction.

The Court of Appeal affirmed. (*C.B.*, *supra*, 2 Cal.App.5th at pp. 1116, 1128.)[5] It held, "Proposition 47 construed in conjunction with the DNA and Forensic Identification Database and Data Bank Act of 1998 (DNA Database Act), section 295 et seq., supports the juvenile court's decision to deny minor's [DNA sample] expungement request in this case. Moreover, and confirming this conclusion, our Legislature recently enacted Assembly Bill No. 1492 (2015-2016 Reg. Sess.) (Assembly 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." (*Id.* at p. 1116.) Analyzing the DNA Act's language, the court stated that "[u]nder 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." (*Id.* at p. 1127.)

The court deemed "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." (*C.B.*, *supra*, at p. 1121.) It rejected appellant's argument that "section 17 is distinct from section 1170.18" and concluded that an offense reduced to a misdemeanor under either section is deemed a misdemeanor for all purposes "only going forward" from the date of the sentence reduction. (*Id.* at pp. 1122-1123.)

---

[5] Although a trial court's finding of expungement ineligibility in an individual case is ordinarily not appealable (§ 299, subd. (c)(1)), an appellate court has the discretion to review a challenge to an expungement denial that raises only a question of law regarding interpretation of the applicable statutes (see, e.g., *People v. McCray* (2006) 144 Cal.App.4th 258, 264-265; *Coffey v. Superior Court*, *supra*, 129 Cal.App.4th at pp. 809, 816-817).

The court also explained that its interpretation promotes harmony between the two initiatives, which are both intended to promote public safety. (*Id.* at pp. 1125-1126.) As a clarification of existing law, the court concluded that AB 1492's amendment to section 299, subdivision (f) applies to expungement requests predating the amendment. (*Id.* at pp. 1127-1128.)

A dissenting justice found it "doubtful" that section 299, subdivision (f) "bears upon the right to an expungement" instead of the "duty to *provide*" a DNA sample. (*C.B.*, *supra*, at p. 1133 (dis. opn. of Pollack, J.).) Regardless, the dissent concluded, "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." (*Id.* at p. 1135.)

This Court granted review on November 9, 2016.[6]

## B. Legal Background

### 1. Proposition 69

California's DNA Act is the product of both legislation and ballot initiative. The Legislature enacted the DNA Act in 1998, by amending a 1983 statute, and authorizing DNA sample collection for identification purposes from an expanded class of convicted violent felony offenders.[7] On November 2, 2004, California voters, weighing the privacy of criminal

---

[6] The Court granted review in *In re C.H*, *supra*, 2 Cal.App.5th 1139, on similar claims. Respondent's answering briefs in both cases contain essentially the same arguments and analysis on overlapping issues.

[7] See former § 290.2, added by Stats. 1983, ch. 700, repealed and replaced by The DNA and Forensic Identification Data Base and Data Bank Act of 1998, § 295 et seq., added by Stats. 1998, Ch. 696, § 2; (A.B. 1332); amended by Prop. 69, Gen. Elec. (Nov. 2, 2004).

offenders and the compelling public interest in safer communities, overwhelmingly passed Proposition 69, the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, amending and clarifying the forensic DNA database law.[8] Voters saw Proposition 69 as the blueprint for a criminal justice system anchored in the best "scientific technology" for "accurately and expeditiously" identifying criminal offenders and exonerating the innocent within the context of a circumscribed statutory program. (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. 69, § II, Findings and Declarations, at p. 135) (hereafter "Prop. 69 Findings"); § 295.1 [California Department of Justice ("DOJ") shall perform DNA analysis "only for identification purposes"]; § 299.5 [setting forth confidentiality and privacy protections].) To this end, voters established DNA collection as an "administrative requirement" equivalent to fingerprinting—part of the routine processing of an offender who has come under the jurisdiction of the criminal justice system. (§ 295, subd. (d) ["Like the collection of fingerprints, the collection of DNA samples, pursuant to this chapter is an administrative requirement to assist in the accurate identification of criminal offenders"]; *Good v. Superior Court*, *supra*, 158 Cal.App.4th at p. 1508 [DNA sample collection is "not punitive . . . but is confined to a simple administrative identifying procedure akin to fingerprinting"]; see also *Maryland v. King* (2013) 569 U.S. __ [133 S.Ct. 1958, 1972, 1976] [DNA is an identification metric and the only difference

---

[8] Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. 69, § II, Findings and Declarations, at p. 135; see also *People v. Robinson* (2010) 47 Cal.4th 1104, 1116-1121 [discussing background of DNA Act and finding collection of DNA database samples from convicted offenders constitutional]; *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 497-98, 505-513 [rejecting state constitutional challenge to collection of DNA database samples from convicted offenders]; *Haskell v. Brown* (N.D. Cal. 2009) 677 F. Supp.2d 1187, 1190-1191, 1203.)

between fingerprints, photographs, and DNA collected at booking is "the unparalleled accuracy DNA provides"].) This Court has acknowledged the compelling state interest in accurately identifying criminal offenders. (See *People v. Robinson*, *supra*, 47 Cal.4th at p. 1121.)

Recognizing that the "majority of violent criminals have non-violent criminal prior convictions" (Prop. 69 Findings, *supra*, § II), voters in Proposition 69 also expanded the collection of forensic identification DNA database samples to adults arrested for any felony offense, and to both adults and juveniles convicted or adjudicated of all felony and enumerated misdemeanor crimes.[9] (See *C.H.*, *supra*, 2 Cal.App.5th at p. 1150 [noting voters' view that "the majority of cold hits and criminal investigation links are missed if a DNA database or data bank is limited only to violent crimes"].) The limitation on crimes included in the database for collection is a technical one, having to do with the capacity of the California DOJ to process samples and administer the program. (See § 297, subd. (f) [limitation on qualifying felonies and misdemeanors is "for the purpose of facilitating the administration of the chapter by the Department of Justice and shall not be considered cause for dismissing an investigation or prosecution or reversing a verdict or disposition"].) Proposition 69 also makes clear that the DNA identification sample requirement for convicted and adjudicated offenders exists "regardless of sentence imposed" or "disposition rendered." (§ 296, subd. (b).)

---

[9] See § 295, subd. (b)(2) [referencing misdemeanors]; § 296, subd. (a)(2) [requiring samples for misdemeanor offense with a prior felony conviction/adjudication of record]; § 296, subd. (a)(3) [requiring samples for misdemeanors resulting in sex or arson registration]; § 299, subd. (f); see also §§ 296, subd. (a)(1), (d) & (f), 296.1 subd. (a)(2)(A), 299.5, subd. (i)(1)(A) [referencing juveniles]; *Coffey*, *supra*, 129 Cal.App.4th at pp. 809, 815.

At the same time that Proposition 69 expanded the list of qualifying offenses, it replaced blood draws with less intrusive buccal swabs for sample collection, imposed more stringent use and disclosure restrictions, and clarified the limited circumstances warranting sample expungement (i.e., destruction of the sample and deletion of the searchable DNA identification profile). (§§ 299, subd. (e), 299.5, subd. (h); see *People v. Travis* (2006) 139 Cal.App.4th 1271, 1286-1287; *Alfaro*, *supra*, 98 Cal.App.4th at pp. 504-505, 508.) By statute, the DOJ DNA Laboratory is "responsible for the management and administration" of the state's DNA database program (§ 295, subd. (g)) and cannot expunge DNA identification samples from convicted and adjudicated offenders who lawfully qualified for collection, except when specified by law (§ 299). Section 299, subdivision (b) authorizes expungement of a DNA database sample from convicted or adjudicated offenders only when a conviction or disposition is "reversed and the case dismissed," when a person is "factually innocent," or when a person has been "acquitted," and then only when no other legal basis for sample retention exists.

Proposition 69 also clarified that broad categories of criminals do not qualify for expungement despite a change in their offender status. Sex and arson offenders who have their duty to register terminated do not qualify to have their DNA samples expunged from the database. (§ 299, subd. (e).) Proposition 69 also precludes courts from ordering expungement of a sample from an offender who "has been found guilty or was adjudicated a ward of the court . . . of a qualifying offense," "[n]otwithstanding any other provision of law, including Sections 17, 1203.4, and 1203.4a" that may enable a change in sentence or consequences of conviction. (§ 299, subd. (f).) Therefore, sample expungement is barred even if a qualifying offender's felony conviction is reduced to a misdemeanor "for all purposes" (§ 17) or later dismissed with "release from all penalties and disabilities"

(§§ 1203.4, 1203.4a). That DNA sample retention is broadly permitted when a felony is reduced to a misdemeanor is consistent with voters' intent to expand the use of DNA to accurately identify recidivist criminal offenders and exonerate the innocent. (See *People v. Robinson, supra,* 47 Cal.4th at p. 1123, fn. 19 [recognizing state interest in accurate DNA identification information from criminals convicted of offenses beyond those listed in the DNA Act as qualifying offenses]; cf. *Loder v. Municipal Court* (1976) 17 Cal.3d 859, 864-865 [fingerprint and photograph information taken at booking may be retained and used in identifying arrestee even where an arrest is unlawful].)

### 2. Proposition 47—the Safe Neighborhoods and Schools Act

On November 4, 2014, voters approved Proposition 47 reclassifying certain nonviolent felonies and "wobblers" as misdemeanors and implementing several changes to sentencing law as codified in section 1170.18. (Prop. 47 Ballot Pamp., *supra,* §§ 5-14, at pp. 71-74.) Two of section 1170.18's resentencing provisions apply to individuals who, at the time of Proposition 47's enactment, had convictions for the property and theft-related felony crimes redesignated as misdemeanors by the initiative. (See § 1170.18, subds. (a) & (f); *People v. Morales* (2016) 63 Cal.4th 399, 403.)

Under section 1170.18, subdivision (a), offenders who have not yet completed their sentences for enumerated theft and drug-related felonies may petition for recall of their sentence and request resentencing of their offenses as misdemeanors. Prior to resentencing, the court must determine whether the petitioner poses an "unreasonable risk of danger to public safety," to commit a violent offense based upon the petitioner's criminal history, rehabilitation while incarcerated, and other factors the court deems relevant. (§ 1170.18, subd. (b).) Under section 1170.18, subdivision (d) a

person who benefits from Proposition 47 "by receiving a reduced sentence and given credit for time served" under subdivision (b) is "subject to a one-year parole period after completion of the reduced sentence, subject to the court's discretion to release the person from that parole." (*Morales*, *supra*, 63 Cal.4th at p. 403; Prop. 47 Ballot Pamp., *supra*, at pp. 34-37 [analysis of Legis. Analyst].)

Section 1170.18 subdivision (f) permits an individual who has completed the sentence for a qualifying nonviolent felony to apply for a redesignation of that offense. "A person who has completed his or her sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] had [Proposition 47] 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." (§ 1170.18, subd. (f).) Individuals with one or more prior convictions for certain violent offenses (§ 667, subd. (e)(2)(C)(iv)) or for offenses requiring sex offender registration (§ 290, subd. (c)) are ineligible for Proposition 47 sentence reduction (§ 1170.18, subd. (i)). Once an offense is reduced to a misdemeanor, section 1170.18 subdivision (k) provides that the crime "shall be considered a misdemeanor for all purposes" except that resentenced offenders still cannot own or possess a firearm, unlike many misdemeanants. (§ 1170.18, subd. (k); see *C.H.*, *supra*, 2 Cal.App.5th at pp. 1144-1145.)

"One of Proposition 47's primary purposes is to reduce the number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative." (*Harris v. Superior Court* (2016) 1 Cal.5th 984, 992; accord, *People v. Romanowski* (2017) 2 Cal.5th 903, ___ [391 P.3d 633, 635].) The initiative's ballot title page stated that Proposition 47 "[r]equires

misdemeanor sentence instead of felony for certain drug and property offenses," and that it would potentially save the state and counties "hundreds of millions of dollars annually." (Prop. 47 Ballot Pamp., *supra*, at p. 34 [official title and summary].) The ballot arguments in favor of Proposition 47 likewise informed voters that "Proposition 47 is sensible" and that it "focuses law enforcement dollars on violent and serious crime while providing new funding for education and crime prevention programs that will make us all safer." (Prop. 47 Ballot Pamp., *supra*, at p. 38 [argument in favor of Prop. 47].) The proposition's "Findings and Declarations" similarly referenced cost savings from reclassified offenses and use of funds.[10]

Proposition 47 is silent on the topic of DNA sample collection and retention. Neither the text of initiative nor the supporting ballot materials referenced or considered any impact on the state's administrative retention of an offender's identification information, like fingerprints, photographs, or forensic identification DNA samples collected pursuant to Proposition 69.

### 3. *Alejandro N.*

On July 23, 2015, the Fourth District Court of Appeal held that Proposition 47 requires the expungement of a DNA sample when the felony punishment for a prior conviction is reduced and resentenced as a misdemeanor, absent any specific provision to the contrary. (*Alejandro N.*,

---

[10] The "Safe Neighborhoods and Schools Act is enacted to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment. This act ensures that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed." (Prop. 47 Ballot Pamp., *supra*, § 2, at p. 70.)

*supra*, 238 Cal.App.4th at pp. 1209, 1231.) The court stated that following reduction under Proposition 47 the prior conviction "no longer qualifies as an offense permitting DNA collection" and is therefore "outside the matters contemplated by the Penal Code DNA expungement statute." (*Id.* at p. 1229.) *Alejandro N.* reasoned that because section 1170.18 only excepts firearm restrictions from "the otherwise all-encompassing misdemeanor treatment of the offense," courts should not "carve out other exceptions" "absent some reasoned statutory or constitutional basis for doing so." (*Id.* at p. 1227.) *Alejandro N.* concluded that "[u]nlike the circumstances in *Coffey*, there is no statutory provision [e.g., section 299, subd. (f)'s reference to section 17] 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." (*Id.* at pp. 1229-1230.)

**4. Assembly Bill 1492**

Two months after the *Alejandro N.* decision, on September 23, 2015, the Legislature overwhelmingly passed Assembly Bill No. 1492 (AB 1492).[11] AB 1492 specifically prohibits expungement of DNA database samples collected for felony crimes subsequently reduced to misdemeanors under Proposition 47. Effective January 1, 2016, the revised section 299, subdivision (f) provides: "Notwithstanding any other law, including Sections 17, *1170.18*, 1203.4, and 1203.4a, a judge is not authorized to relieve a person of the separate administrative duty to provide specimens, samples, or print impressions required by this chapter if a person has been

[11] AB 1492 was passed by a collective legislative vote of 116-1, and was signed by the Governor on October 4, 2015. (Cal. Leg. Bill History (2015) AB 1492 <http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_1451-1500/ab_1492_bill_20151004_history.html> (visited March 29, 2017).) Both Proposition 69 and Proposition 47 allow legislative amendment. (See 48 West's Ann. Pen. Code (2014 ed.) foll. § 295, pp. 202-203 [Hist. & Stat. Notes, Sec. V, subd. (d)]; Prop. 47 Ballot Pamp., *supra*, § 15, at p. 74.)

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." (Italics added.)[12]

The effect of AB 1492 on section 1170.18 was analyzed in *In re J.C.* (2016) 246 Cal.App.4th 1462. The court concluded that AB 1492 clarified existing law that convicted offenders are not entitled to expungement of their DNA samples when their offense is reduced from a felony to a misdemeanor. (*Id.* at pp. 1467-1468, 1480.) *J.C.* also noted the legislative history of a similar bill (AB 390) addressing the issue provides some evidence that the addition of section 1170.18 to section 299 subdivision (f) is a clarification of existing law. (See *id.* at pp. 1481-1482, citing Sen. Com. on Public Safety, Analysis of Assem. Bill 390, as amended July 6, 2015, p. 8.) In any event, *J.C.* rejected the claim that AB 1492 reflected an impermissible amendment to Proposition 47, which "neither requires nor prohibits the expungement of DNA records . . . ." (*J.C.*, *supra*, at p. 1482.) It added that, even if AB 1492 was "an amendment, rather than a clarification, of Proposition 47, it would satisfy the proposition's requirement that any amendment be consistent with and further its intent." (*Ibid.*)

---

[12] AB 1492 primarily addresses procedures related to DNA sample collection from adult felony arrestees, in response to *People v. Buza* (2014) 231 Cal.App.4th 1446, review granted Feb. 18, 2015, S223698, in the event the lower court decision is upheld, and revisions to law become necessary. However, the Legislature expressly decoupled its statutory clarification of section 299, subdivision (f)'s expungement provision from the rest of the bill, and specifically drafted it to remain in effect regardless of the outcome in *Buza*.

## SUMMARY OF ARGUMENT

Criminal offenders who have their felony adjudications or convictions reduced to misdemeanors under Proposition 47 are not entitled to DNA sample expungement. Under the DNA Act, section 299, subdivision (f) requires retention of lawfully collected DNA database samples "[n]otwithstanding any other law" that may authorize a prior felony conviction or adjudication to be resentenced as a misdemeanor or set aside. Section 299, subdivision (f) ties DNA sample retention to the initial finding of guilt, rather than the ultimate status of the conviction—regardless of whether there is a postconviction sentence reduction under statutes such as section 17 or section 1170.18. Proposition 47's "general language" deeming an offense a misdemeanor for all purposes is not a "legislative grant of authority to a judge to disregard the restrictions placed upon his or her authority by section 299, subdivision (f)." (*In re C.B.*, *supra*, 2 Cal.App.5th at p. 1124.)

Proposition 47 resentencing is neither an exception to, nor an implied repeal of, Proposition 69's prohibition on DNA expungement after a sample has been collected as an administrative requirement based on a finding of guilt for a qualifying felony offense. First, there is no mention in Proposition 47 that criminal offenders who are resentenced to misdemeanors are entitled to expungement of DNA identification samples that the DNA Act requires be collected after every felony conviction "regardless of sentence imposed" or "disposition rendered" in the case. (§ 296, subd. (b).) Second, section 1170.18 of Proposition 47 is analytically similar to section 17, with both addressing the effect of reducing a felony to a "misdemeanor for all purposes." Proposition 47 is a determination that section 17-type relief is available in another postconviction context to reduce adjudicated felonies to misdemeanors from the time of resentencing forward. Inclusion of a "misdemeanor for all

purposes" clause in a statute does not bar the exceptions to those "purposes" from being set forth in other provisions of law. Third, the retention of DNA database samples is consistent with both Propositions 69 and 47 given their shared public safety goals. Fourth, even if the two propositions were viewed as conflicting, Proposition 69's specific DNA sample retention requirement (§ 299, subd. (f)) would control over Proposition 47's general language.

The enactment of AB 1492 likewise forecloses a claim that Proposition 47 requires expungement of DNA identification samples. AB 1492 expressly added Proposition 47 crimes resentenced as misdemeanors under section 1170.18, to the nonexhaustive list of resentencing provisions in section 299, subdivision (f) that do not qualify for expungement under the DNA Act. Even if viewed as a change in the law, AB 1492 is constitutionally valid because Proposition 47 does not specifically authorize DNA sample expungement, or even address the retention of criminal identification information. Thus, the Legislature was free to address this separate and distinct subject by legislation.

## ARGUMENT

### I. A CRIMINAL OFFENDER IS NOT ENTITLED TO EXPUNGEMENT OF HIS DNA DATABASE SAMPLE AFTER HIS FELONY ADJUDICATION OR CONVICTION IS REDUCED TO A MISDEMEANOR UNDER PROPOSITION 47

A criminal offender who successfully petitions to have a felony conviction or adjudication reduced to a misdemeanor under section 1170.18 is not entitled to DNA sample expungement. Section 299, subdivision (f) of the DNA Act requires retention of lawfully collected DNA database samples "notwithstanding any other provision of law" authorizing a prior felony conviction or adjudication to be resentenced as a misdemeanor.

Section 299, subdivision (f) expressly ties sample retention to the *initial* finding of guilt for a qualifying offense, rather than the ultimate status of the conviction or sentence. At the time appellant filed his petition, section 299, subdivision (f) provided in relevant part: "Notwithstanding any other provision 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 ...." (Italics added; see also § 296, subd. (b) [requirements for sample collection after felony conviction or adjudication apply "regardless of sentence imposed" and "regardless of the disposition rendered"]; accord, *Rusheen v. Drews* (2002) 99 Cal.App.4th 279, 285-286.)

Appellant disagrees, claiming that his Proposition 47-based request for DNA sample expungement should be granted regardless of Proposition 69. Appellant argues that: (1) section 299, subdivision (f) governs the collection, not expungement, of DNA samples and so does not prohibit the expungement of DNA samples (OBM 9, 50); (2) the plain language of section 1170.18, subdivision (k) directing that "offenses redesignated as misdemeanors should be treated as misdemeanors 'for all purposes' except firearm restrictions," precludes the retention of his sample in the state's felony-based DNA program (OBM 7, 23-28); (3) the "for all purposes" clauses in sections 17 and 1170.18 are not analogous, because section 17 has a firearms restriction that evidences an intent to preclude other exceptions, while section 1170.18 is a categorical resentencing mandate for a class of offenders, not one based upon individual factors, and appellant no longer has a past offense qualifying him for inclusion in the DNA database (OBM 8, 29-37); (4) the Court of Appeal erred in harmonizing Propositions 47 and 69 consistent with public safety concerns, because public safety is

not a concern for individuals resentenced under Proposition 47; likewise, Proposition 69 reflects a view "that persons who were found to have committed . . . more serious offenses" are the "ones likely to commit violent crimes yielding DNA evidence" (OBM 8-9, 38-41); and (5) appellant's constitutional "privacy interest" "should trump any interest the state may assert in retaining his DNA sample" (OBM 43). All of appellant's arguments are unavailing.

### A. Standard of Review

The interpretation of a statute is a question of law reviewed de novo. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) The same rules apply in construing a statute whether enacted by the Legislature or by ballot initiative. (*People v. Morales*, *supra*, 63 Cal.4th at p. 406; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1212.)

The primary task is to determine the voters' intent. (*People v. Jones* (1993) 5 Cal.4th 1142, 1146.) A court turns first to the words of the provisions adopted by the voters, giving the language its ordinary and plain meaning. (*Ibid.*; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.) The language is not construed in isolation but in the context of the statute as a whole and within the overall scheme, keeping in mind the scope and purpose of the provision in light of the voters' intent. (*Robert L.*, *supra*, 30 Cal.4th at p. 901; see *People v. Shabazz* (2006) 38 Cal.4th 55, 67-68.) A court attempts "to reconcile or harmonize conflicting statutory provisions in an effort to give effect to all provisions if it is possible." (*Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.* (1990) 51 Cal.3d 744, 764; see *People v. Honig* (1996) 48 Cal.App.4th 289, 327-328.) Literal construction does not prevail if it conflicts with the voters' apparent intent. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

Where the language is ambiguous, the court also looks to "other indicia of the voters' intent, particularly the analyses and arguments

contained in the official ballot pamphlet." (*People v. Birkett* (1999) 21 Cal.4th 226, 243; *People v. Floyd* (2003) 31 Cal.4th 179,187-188.) Consideration is given to the consequences that will flow from a particular interpretation where uncertainty exists, as well as the wider historical circumstances of the enactment. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387; see *People v. Cruz* (1996) 13 Cal.4th 764, 782.)

### B. Section 299, subdivision (f) of the DNA Act Is a Specific Prohibition on DNA Sample Expungement When a Felony Is Reduced to a Misdemeanor Crime in Postconviction Proceedings

The DNA Act requires retention of a lawfully collected DNA identification sample when a felony conviction or adjudication that qualified an individual for sample collection is later reduced to a misdemeanor in a postconviction proceeding. (§ 299, subd. (f).) Relying on the dissenting opinion in *C.B.*, *supra*, appellant reads section 299, subdivision (f) as imposing no restrictions whatsoever on expungement of DNA samples. (See *C.B.*, *supra*, 2 Cal.App.5th at pp. 1133-1134 (dis. opn. of Pollack, J.).) Instead, appellant construes the subdivision as addressing only the duty of offenders to provide identification samples in appropriate cases. (OBM 9, 50-51.) Appellant's position is contrary to the structure of the DNA Act and the cases interpreting and applying section 299's expungement provisions. Section 299, subdivision (f) must be read in conjunction with section 299, subdivision (b) and with the DNA Act as a whole. (See *Good*, *supra*, 158 Cal.App.4th at p. 1506 ["we construe the words in question in context, keeping in mind the statutes' nature and obvious purposes"]; see also *J.C.*, *supra*, 246 Cal.App.4th at p. 1475.) When that is done, the foundational premise for appellant's arguments, and the bulk of his claims, collapse.

The "clear intent of the voters" in Proposition 69 "was to maximize the available DNA database to aid in the identification, arrest, and conviction of offenders, as well as to exonerate the innocent." (*Good*, *supra*, 158 Cal.App.4th at p. 1509.) The "polestar of Proposition 69" is section 296, which mandates that certain "listed categories" of offenders provide buccal swab samples and fingerprint impressions for "law enforcement identification analysis" and do so "regardless of sentence imposed" or "disposition rendered." (*Id.* at pp. 1507-1508; § 296, subd. (b).) The offenders who must provide a DNA sample include individuals convicted of a felony offense, misdemeanants who have a past felony conviction but do not have a sample in the state database, and misdemeanants who must register as sex or arson offenders. (§ 296, subds. (a)(1) & (a)(3); § 296.1, subd. (a)(2).) The trial court is responsible for verifying that the samples have been obtained prior to final disposition or sentencing. (§ 296, subd. (f).)

The conditions for expunging DNA database samples are set forth separately and explicitly in "Article 5: Expungement of Information," which contains section 299, entitled "Reversal, dismissal, or acquittal, request for expungement of information . . . ." Section 299, subdivision (b) expressly limits the right to seek expungement to persons with "no past or present qualifying offense" whose cases fall within one of four 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).) An offender such as appellant, who was adjudicated guilty of an offense that qualified him for DNA sample collection, falls within none of the statutory categories that allow DNA sample expungement.

To further clarify the DNA Act's narrow Article 5 expungement criteria, voters in Proposition 69 added section 299, subdivision (f) to the law. Section 299, subdivision (f) specifies that a judge who is authorized or obligated by law to alter punishment or disabilities associated with a qualifying conviction or adjudication cannot also relieve the individual of inclusion in the state's forensic identification DNA database. The voters underscored the restriction by listing sections 17, 1203.4, and 1203.4a in section 299, subdivision (f) as examples of postconviction resentencing procedures that do not authorize sample expungement. This list "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." (*J.C.*, *supra*, 246 Cal.App.4th at p. 1475; accord, *Coffey*, *supra*, 129 Cal.App.4th at p. 821; Chin et al., Forensic DNA Evidence (The Rutter Group 2017) § 8.10(3).) These restrictions are consonant with the voters' intent to maintain a permanent record of accurate identification information for lawfully convicted and adjudicated offenders so that Californians are better protected from recidivist crime, and innocent persons are not wrongly investigated or imprisoned. (See Prop. 69 Findings, *supra*, § II; § 296, subd. (b); see generally *Robinson, supra*, 47 Cal.4th at pp. 1121, 1134 [DNA establishes only a record of the convicted offender's identity but with "far greater precision" than other methods]; *People v. King* (2000) 82 Cal.App.4th 1363, 1374-1376 .) Ensuring retention of forensic identification samples from convicted and adjudicated offenders in this manner comports with the voters' recognition that the "majority of violent criminals have non-violent criminal prior convictions." (See Prop. 69 Findings, *supra*, § II, subd. (d)(2); see also § 295, subd. (b)(2); *C.H.*, *supra*, 2 Cal.App.5th at pp. 1147-1150.)

Accordingly, when a court resentences a felony to a misdemeanor, relieves a defendant of disabilities associated with a misdemeanor or felony

conviction, or a successful probationer has his felony or misdemeanor conviction or adjudication set aside, or even when a convicted misdemeanant successfully petitions to dismiss the underlying accusatory pleading based upon "an honest and upright life," section 299, subdivision (f) makes clear that DNA sample expungement is unavailable "notwithstanding" these or other circumstances which later may alter the original conviction. (§ 299, subd. (f); cf. *Gebremicael v. California Com. on Teacher Credentialing* (2004) 118 Cal.App.4th 1477, 1483, 1484-1489 [recognizing that Legislature can continue treating a felony reduced to a misdemeanor under section 17 as a felony for certain purposes].) The juvenile court and the Court of Appeal correctly recognized that section 299, subdivision (f) is not a collection provision, but a prohibition on DNA sample expungement regardless of the reduction of a felony to a misdemeanor. (Accord, *Coffey*, *supra*, 129 Cal.App.4th at p. 821 [section 299, subdivision (f) "confirm[s] that a reduction in a charge pursuant to section 17 does not obviate the defendant's obligation to provide DNA samples"].)

### C. Section 1170.18 Does Not Abrogate the DNA Act's Specific Requirement for Retention of DNA Identification Samples When a Felony Is Reduced to a Misdemeanor

The Court of Appeal correctly ruled that Proposition 47's resentencing relief does not include the expungement of DNA database samples. The phrase "misdemeanor for all purposes" in section 1170.18 has an established meaning in the context of felony-to-misdemeanor sentence reductions. Because section 1170.18 is a functional and analytic counterpart to section 17, the phrase "misdemeanor for all purposes" used in each must be interpreted similarly as granting misdemeanor status to an individual prospectively from the date of resentencing. And as with section 17, the prospective effect of the reduction from felony to misdemeanor

under section 1170.18 does not alter the original finding of guilt or adjudication of wardship for a qualifying felony offense that triggers the limitations on expungement under section 299, subdivision (f). The retention of lawfully collected DNA samples from individuals resentenced prospectively under section 1170.18 harmonizes the voters' intent in Propositions 47 and 69 and is consistent with the public safety goals of each initiative.

### 1. The phrase "misdemeanor for all purposes" in section 1170.18 is framed in the language of section 17 and thus must be interpreted consistently with it under the DNA Act to preclude DNA sample expungement

It is a fundamental rule of statutory interpretation that "[w]here a statute is framed in language of an earlier enactment on the same or an analogous subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction." (*People v. Harrison* (1989) 48 Cal.3d 321, 329; see also *People v. Lopez* (2005) 34 Cal.4th 1002, 1007 [after courts have construed meaning of a word or expression, and legislature uses exact words in same connection, "the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts"].)

Appellant's argument that Proposition 47 requires DNA expungement is predicated on a construction of the phrase "misdemeanor for all purposes" in section 1170.18, subdivision (k) that discounts the use and interpretation of the identical phrase in section 17. Section 1170.18, subdivision (k) cannot be construed in isolation from section 17, however. Section 1170.18 employs the same language as section 17 in accomplishing the same task of reducing a felony to a misdemeanor. The parallel phrasing of the two statutes must be interpreted consistently, with the language given the same effect of granting misdemeanor status to an individual

prospectively from the date of resentencing without altering the original felony conviction. When the established meaning of the phrase "misdemeanor for all purposes" in section 17 is applied to section 1170.18, it is clear that a Proposition 47-based sentence reduction has no impact on DNA sample retention.[13]

Under section 17, a court can reduce a felony to a "misdemeanor for all purposes" after conviction at a sentencing hearing. (See, e.g., *People v. Banks* (1959) 53 Cal.2d 370, 375-376; *Coffey*, *supra*, 129 Cal.App.4th at pp. 812, 818, 820; see also *Gebremicael*, *supra*, 118 Cal.App.4th at pp. 1477, 1482-1487; § 17(b)(3).) Significantly, under section 17, if "ultimately a misdemeanor sentence is imposed, the offense is a misdemeanor from that point on, but not retroactively." (*People v. Feyrer* (2010) 48 Cal.4th 426, 439; *People v. Brown* (2012) 54 Cal.4th 314, 324 [a statute that is ambiguous with respect to retroactive application is construed to be unambiguously prospective]; *People v. Banks*, *supra*, 53 Cal.2d at pp. 390-391; *In re C.B.*, *supra*, 2 Cal.App.5th at p. 1122-1123; see generally § 3 [no part of the Penal Code "is retroactive, unless expressly so declared"].)

Section 1170.18 purposefully uses the same "misdemeanor for all purposes" language as section 17. Because the phrase "misdemeanor for all purposes" has a "well-defined meaning" in California criminal law, a presumption exists that the use of the same phrase in the two provisions carries the same meaning of prospective operation of the court's authority

---

[13] This Court is currently considering the meaning of section 1170.18, subdivision (k)'s requirement that the former felony "shall be considered a misdemeanor for all purposes" in three other pending cases: *People v. Guiomar*, review granted Jan. 25, 2017, S238888; *People v. Valenzuela*, review granted Mar. 30, 2016, S232900; and *People v. Buycks*, review granted Jan. 20, 2016, S231765.

to reduce a sentence without altering the original status of the felony conviction. (See *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1096-1101; see *Harrison*, *supra*, 48 Cal.3d at p. 329.)

*People v. Rivera*, *supra*, 233 Cal.App.4th 1085 specifically recognized that the language of Proposition 47 is "not significantly different from the language in section 17(b)." (*Id.* at p. 1100.) *Rivera* considered whether the "shall be a misdemeanor for all purposes" language required that an appeal following sentence reduction be brought in the local appellate division rather than the Court of Appeal. Finding no contrary intent by the electorate, *Rivera* concluded that Proposition 47's broad "misdemeanor for all purposes" provision, like the provision in section 17, operates prospectively and does not reach back to retroactively negate the original designation of a felony charge necessary for establishing the court's subsequent appellate jurisdiction. (*Id.* at pp. 1095-1096, 1100.) *Rivera*'s analysis applies equally here.

Appellant instead relies upon *People v. Evans* in an attempt to distinguish the "for all purposes" clauses in section 1170.18 and section 17. (OBM 8, 26-27, 36; *People v. Evans* (2016) 6 Cal.App.5th 894, 904-905, review granted Feb. 22, 2017, S239635 [held for *Valenzuela*, *supra*, S232900, as lead case].) *Evans*, however, does not advance appellant's claims. *Evans* does not take issue with the prospective operation of statutes or with the analytical similarity between section 17 and section 1170.18. (*Id.* at pp. 901-904.) *Evans* held that section 1170.18 prospectively prohibits use of a felony conviction that has been reduced to a misdemeanor as the basis for a prior prison term enhancement for punishment if the enhanced sentence is not final. (*Evans*, *supra*, 6 Cal.App.4th at pp. 900-904 & fn. 3; contra, *People v. Diaz* (2017) 8 Cal.App.5th 812, 822-823 [disagreeing with *Evans*], review granted May 10, 2017, S240888.) *Evans* cites as support for its holding the "similar language" of sections 17 and

1170.18 and applies the "rule of statutory construction that identical language should receive the same interpretation when the statutes cover the same or analogous subject matter." (*Evans*, *supra*, at pp. 901-902.) *Evans* mentions sentence enhancements together with "being required to provide biological samples to law enforcement for identification purposes (§ 296, subd. (a)(1))" as consequences of a felony conviction, and asserts, without analysis of Proposition 69, that the "for all purposes" clause in section 1170.18 indicates "the voters intended it to apply to all collateral consequences except firearm possession." (*Id.* at p. 901.) That language is dicta. In any event, *Evans* does not support appellant's claim that Proposition 47 makes a redesignated felony adjudication a nullity as of the time of charging so that sample retention is precluded. (See also *C.H.*, *supra*, 2 Cal.App.5th at p. 1146 ["a court's declaration of misdemeanor status renders an offense a misdemeanor for all purposes, not at all times"].)[14]

Appellant also argues that the presumption of consistent interpretation of statutory language is inapplicable because sections 17 and 1170.18, subdivision (k) are "fundamentally different." (OBM 8.) Appellant attempts to distinguish section 1170.18 from section 17 on the basis that

---

[14] Appellant's claim that he no longer has a past felony offense that qualifies his sample for inclusion in California's DNA database under section 299, subdivision (a) (OBM 8, 28-33), evidences a similar misunderstanding of the law. As the court below observed, "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." (*C.B.*, *supra*, at p. 1124.) In addition, appellant misreads section 299, subdivision (a)'s general statement regarding the necessity for a "past or present" qualifying offense for DNA sample retention, to the exclusion of the rest of section 299, spelling out the DNA database expungement criteria. (See *id.* at p. 1125.)

section 17(b) recognizes incarceration in state prison may not be appropriate for some defendants—not a class of offenders—who commit wobbler offenses. (OBM 34-36.) He claims that, unlike section 17, section 1170.18 is a "categorical" reclassification of certain offenses." (OBM 36.) Appellant's claims fail because both statutes apply to a class of offenses and offenders. Both statutes have a component that requires an individualized determination by the court in the exercise of its discretion for the purpose of reducing a felony to a misdemeanor and a component that requires mandatory sentence reduction.

Section 17 sentence reduction is available to the class of offenses that the Legislature made punishable by either a prison term or county jail. (§ 17, subd. (b)(1).) It is also available to the class of offenders convicted of a wobbler and either immediately sentenced or placed on probation without imposition of sentence and who successfully complete probation. (§ 17 subd. (b)(3); *People v. Tran* (2015) 242 Cal.App.4th 877, 885-886). For those defendants who meet the eligibility requirements, the court exercises its discretion in light of traditional sentencing criteria, including consideration of the defendant's criminal history and the need to protect society through continued incarceration of the defendant. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978 & fn.5.) Section 17, subdivision (c), however, categorically requires individuals who have been discharged from the Division of Juvenile Justice to have their criminal offenses prospectively redesignated as a "misdemeanor for all purposes," without the exercise of court discretion.

Section 1170.18 likewise identifies a designated list of offenses for which sentence reduction is available (§ 1170.18, subd. (a) & (f)). It demarcates the class of offenders who are not excluded from sentence reduction, i.e., those without "super strikes" or subject to registration pursuant to section 290 (§ 1170.18, subd. (i)). There is a class of offenders

for which resentencing is subject to the court's discretion (§ 1170.18, subd. (a) [offenders serving a felony sentence]), and a class for which resentencing is mandatory (§ 1170.18, subd. (f) [offenders who have completed their sentence]). For eligible defendants, who are currently serving a felony sentence (§ 1170.18, subd. (a)), the court must conduct an individualized determination of future dangerousness, which includes a consideration of the defendant's history and any evidence showing a risk to public safety. (§ 1170.18, subd. (b) [explaining the court's discretion and identifying factors to guide the exercise of discretion].)

While there are differences between section 17 and section 1170.18 as to the breadth of the two categories and standards for exercising discretion, these differences are ones of degree, not of kind. More importantly, the differences do not implicate the central function of each, which is the same -- reduction of a felony to a "misdemeanor for all purposes." Given the equivalent purpose and structure of the "for all purposes" language in section 17 and section 1170.18, the language should be given the same effect in both: They operate prospectively, without affecting legal determinations based on the earlier felony status. To hold otherwise would call into question the jurisdiction of the Courts of Appeal to hear cases, such as this one, brought by defendants pursuant to Proposition 47, to challenge the effect of a sentence reduction. (See *People v. Rivera*, *supra*, 233 Cal.App.4th at pp. 1099-1101.)

Appellant also claims that section 1170.18 is analytically distinct from section 17 because section 1170.18, subdivision (k), contains an express exception to the misdemeanor for all purposes language to preserve a firearms restriction for resentenced offenders, and this is intended to preclude other exceptions. (OBM 12, 16, 20-26.) The flaw in this argument is that the firearm exception is designed to address a consequence of the prospective effect of sentence reduction, and offers no basis for

viewing the "for all purposes" language as retroactively nullifying the original proceedings or as affecting the application of the DNA Act. The different statutory triggers for applying the firearms restriction and the DNA expungement prohibition highlight this distinction. (Cf. *People v. Park* (2013) 56 Cal.4th 782, 794 [explaining that section 17 reduction is prospective, and indicating that effect of reduction on other statutes turns on whether those statutes focus on initial felony adjudication or on the subsequent convicted status].)

The statutory prohibition on gun possession requires the individual to have the current status of being "convicted of a felony" at the time of the gun offense. (§ 29800.) Just as with section 17, the effect of a sentence reduction under section 1170.18 is to prospectively eliminate an offender's status as a convicted felon. (*People v. Gilbreth* (2007) 156 Cal.App.4th 53, 57-58.) Once that status is eliminated, the gun possession limitation is lifted. Therefore, to keep the gun possession bar in effect going forward after a Proposition 47 sentence reduction, voters had to enact an express exception limiting the prospective ameliorative effect of reducing the felony to a misdemeanor. The inclusion of the firearms exception in section 1170.18 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.[15]

---

[15] The Legislature has enacted other exceptions to section 17 that retain the consequences of a felony conviction after an individual is otherwise resentenced to a "misdemeanor for all purposes." These exceptions are likewise put in place for public safety purposes when the consequences of a criminal act are statutorily tied to the present status of being a convicted felon. (See, e.g., § 1203.4, subd. (a)(2) [maintaining gun restriction]; § 17, subd. (e) [prohibiting a court from relieving an offender convicted of a § 290 qualifying sex offense of registration requirement

(continued...)

In contrast to the prohibition on gun possession, the DNA Act ties the preclusion of expungement to the initial *finding of guilt* of a qualifying felonious offense, notwithstanding any other law that may subsequently reduce that offense to a misdemeanor, such as section 17. As *Coffey* observed, the DNA Act's sample collection and expungement program is primarily focused on the finding of guilt for a qualifying offense regardless of the subsequent disposition. (*Coffey*, *supra*, 129 Cal.App.4th at pp. 821-822.) Therefore, while a prospective change to an offender's status from convicted felon to misdemeanant would impact the firearm possession ban, thereby necessitating a specific exception, it would not impact the provision precluding DNA sample expungement. (See *ibid.*; *Rusheen v. Drews*, *supra*, 99 Cal.App.4th at pp. 285-286.) If voters enacting Proposition 47 had wanted to excuse convicted felony offenders from the DNA sample retention requirement, they would have had to override the provisions of section 299, subdivision (f). The decision not to override section 299, subdivision (f) reflects voter concern about public safety when resentencing felonies to misdemeanors under section 1170.18.

---

(...continued)
when the underlying offense is reduced from a felony to a misdemeanor]; §§ 667, subd. (d)(1), 1170.12, subd. (b)(1).

Moreover, contrary to appellant's suggestion, such exceptions need not be included in the text of the felony sentence reduction statute to be effective, nor is the absence of a parallel and redundant exception in the sentence reduction statute somehow fatal. Rather, such exceptions are properly placed within the code provisions governing the limitation to be maintained. (See, e.g., Bus. & Prof. Code, § 6102, subd. (b) [felony reduced to a misdemeanor under § 17 properly treated as a current felony for purposes of suspension from practicing law]; see generally *Gebremicael*, *supra*, 118 Cal.App.4th at pp. 1477, 1487; *People v. Camarillo* (2000) 84 Cal.App.4th 1386, 1390 [noting that if the Legislature wanted to list a Vehicle Code exception to § 17 "it could do so by amending the language" of the Vehicle Code].)

Accordingly, Proposition 47 understood in its most essential terms is a determination that section 17-type relief is available in another postconviction context to allow a trial court to redesignate a qualifying felony conviction or adjudication as a misdemeanor. (Cf. § 1170.18, subd. (o) [designating a reduction hearing as a "post-conviction release proceeding" for Marsy's Law]; *C.B.*, *supra*, 2 Cal.App.5th at p. 1119 [noting section 17's similarity to section 1170.18 in providing "postconviction relief from punishment"].) In framing section 1170.18 subdivision (k) using the language of section 17, voters necessarily intended the phrase "misdemeanor for all purposes" to be interpreted in the same manner as section 17 with respect to the expungement provisions in the DNA Act: (1) the sentence reduction and resentencing do not alter the status of the original felony guilt determination so as to negate it entirely from the time of charging, but only prospectively from the time of sentence reduction; (2) the original felony determination maintains its character for the separate administrative purpose of retaining an individual's identification record in the state's DNA database; and (3) given section 299, subdivision (f)'s nonexhaustive list of postconviction circumstances prohibiting expungement, the postconviction reduction of a felony under section 1170.18, like a sentence reduction under section 17, does not entitle an individual to DNA sample expungement.

### 2. DNA sample retention after sentence reduction harmonizes Propositions 47 and 69 consistent with their common public safety goals

DNA sample retention after the reduction of a felony to a misdemeanor under section 1170.18 promotes harmony between the two criminal justice reform initiatives by giving "force and effect to all of their provisions," consistent with voters' intent. (See generally *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 940, 955

[discussing canons of interpretation]; see also *McLaughlin v. State Board of Education* (1999) 75 Cal.App.4th 196, 221-222.) Sample retention is consistent with the purpose of sections 296 and 299 to accurately identify recidivist criminals, and the purpose of section 1170.18 to reduce punishment and permit a felony to be a misdemeanor for all future purposes. (See *C.H., supra*, 2 Cal.App.5th at pp. 1149-1150.)

Appellant's contention notwithstanding (OBM 37), both propositions are rooted in a concern for public safety, though they address it in different ways. Proposition 69 focuses on making communities safer by the prompt identification of recidivist offenders through DNA matching. (See Prop. 69 Findings, *supra*, § II, subd. (f) [recognizing "a compelling state interest in the accurate identification of criminal offenders"].) Proposition 69 specifically recognizes collection of DNA identification samples as an "administrative requirement" equivalent to fingerprinting. (§ 295, subd. (d) ["Like the collection of fingerprints, the collection of DNA samples, pursuant to this chapter is an administrative requirement to assist in the accurate identification of criminal offenders"].) Because DNA collection and retention are part of the routine administrative processing of an offender who has come under the jurisdiction of the criminal justice system, it is "not a punishment," and is not considered a "sentencing choice." (*People v. McCray*, supra, 144 Cal.App.4th at pp. 263-264; *Good v. Superior Court*, *supra*, 158 Cal.App.4th at p. 1508 [use of DNA in the criminal justice system is "not punitive . . . but is confined to a simple administrative identifying procedure akin to fingerprinting"].)

The state's interest in identification of offenders goes beyond the list of crimes requiring DNA sample collection set forth in Proposition 69. (*People v. Robinson*, *supra*, 47 Cal.4th at pp. 1122, 1141 ["it cannot be disputed that DNA analysis is as close to an infallible measure of identity as science can presently obtain," and that the state's "compelling" interest

in identifying criminal offenders is not confined to the statutory list]; see § 297, subd. (f) [limitation on crimes requiring collection is "for the purpose of facilitating the administration of the chapter by the [DOJ] and shall not be considered cause for dismissing an investigation or prosecution or reversing a verdict or disposition"].)

Consistent with voter recognition that the majority of violent crime is committed by persons previously convicted of nonviolent offenses, Proposition 69 expanded the state's DNA database to include collection and retention of samples from persons convicted of nonviolent felony offenses. (Prop. 69 Findings, *supra*, § II, subd. (d)(2).) Thus, Proposition 69 mandated retention of DNA database samples from adults and juveniles convicted or adjudicated of qualifying felony and misdemeanor offenses "notwithstanding any other provision of law" and "regardless of sentence imposed" or "disposition rendered." (§ 296, subds. (b) & (f); *People v. Travis*, *supra*, 139 Cal.App.4th at pp. 1271, 1278-1279.)

Proposition 47 promotes public safety through programs aimed at crime prevention and education, paid for with funds saved by reclassifying felony drug and theft crimes as misdemeanors, and reducing incarceration costs. Although Proposition 47, unlike Proposition 69, *is* a statute that regulates punishment for certain offenses, it does not "reflect a policy determination" that "persons convicted of less serious offenses ... need not have their DNA sample included in the data bank." (See *C.B.*, *supra*, 2 Cal.App.5th at pp. 1137-1138 (dis. opn. of Pollack, J.); see also OBM 40.) To the contrary, voters were informed that resentencing under Proposition 47 is qualified and "[r]equire[s] a thorough review of criminal history and risk assessment of any individuals to ensure that they do not pose a risk to public safety." (Prop. 47 Ballot Pamp., *supra*, § 3, at p. 70.) In addition, Proposition 47 excludes offenders with past convictions for violent crimes from obtaining postconviction sentencing relief. It establishes a one-year

parole period for eligible offenders who are still serving their sentences, and prohibits all persons who are resentenced from owning or possessing a gun. (§ 1170.18.)

In enacting Proposition 47, voters balanced public safety concerns with fiscal considerations and concluded that money spent on incarceration for certain crimes formerly classified as felonies is better disbursed to prevention and education programs to stem future recidivism. In this way, Proposition 47 augments, but does not supplant or override DNA identification systems that likewise represent a cost-effective, nonpunitive means of keeping neighborhoods safe from crime. (See Doleac, *The Effects of DNA Databases on Crime* (2017) 9 American Economics Journal: Applied Economics 165-201 <https://doi.rog/10.1257/app.20150043> (visited April 14, 2017) [documenting DNA databases as a cost-effective way to improve public safety by deterring crime].)

Proposition 47's sentencing reform did not encompass any change to Proposition 69's DNA sample retention provisions, which are not a form of punishment. These initiatives walk separate paths to common goals of cost-effective means of enhancing public safety. The Court of Appeal properly reconciled any arguable tension between Propositions 47 and 69 by harmonizing the initiatives' common goal of enhancing public safety.

### D. Proposition 69 Is a Specific Act Prohibiting DNA Sample Expungement "Notwithstanding Any Other Law," Which Controls Over Proposition 47's General Resentencing Provisions

Even if Proposition 47 could not be harmonized with Proposition 69, established principles of statutory interpretation make clear that section 299, as a specific statute expressly defining DNA expungement eligibility, controls over a general resentencing statute like Proposition 47, even though Proposition 47 was passed after Proposition 69. (*State Dept. of Public Health v. Superior Court*, *supra*, 60 Cal. 4th at pp. 960-961

[discussing canons of statutory interpretation and explaining that "the rule that specific provisions take precedence over more general ones trumps the rule that later-enacted statutes have precedence" and that "the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment"].)

Section 299, subdivision (f) specifically prohibits DNA sample expungement "notwithstanding" any other provision of law. It did so before AB 1492 incorporated, for purposes of clarification, section 1170.18 into the DNA Act's nonexhaustive list of postconviction resentencing statutes that do not affect the retention of identification records. "The word 'notwithstanding' is defined as '[i]n spite of.' [Citation]. 'When the Legislature intends for a statute to prevail over all contrary law, it typically signals this intent by using phrases like "notwithstanding any other law" or "notwithstanding other provisions of law." [Citations.]'" (*In re G.Y.* (2015) 234 Cal.App.4th 1196, 1201 [interpreting Proposition 21's amendment to statute, and finding phrase "notwithstanding any other provision of law" plainly prohibits court from sealing records].) That section 299, subdivision (f) uses the term "notwithstanding " any other provision of law evidences a legislative intent to construe the statute broadly and account for later additions to the law, such as Proposition 47. (*Ni v. Slocum* (2011) 196 Cal.App.4th 1636, 1647 [noting that "notwithstanding any other provision of law" expresses a legislative intent to have the specific statute control despite other law which might otherwise govern].)

In contrast, section 1170.18, subdivision (k) is a general resentencing statute. It does not employ the phrase "notwithstanding any other provision of law." It simply states: "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under

subdivision (g) shall be considered a misdemeanor for all purposes, except [for certain gun-related matters]."

Appellant's argument that voters intended Proposition 47 to abrogate Proposition 69's specific language when they did not include specific authorization for DNA sample expungement in section 1170.18 (OBM 7, 23-24), relies upon the weakest kind of interpretive inference: one drawn from legislative silence. (*People v. Morales*, *supra*, 63 Cal.4th at p. 406; cf. *People v. Daniels* (1969) 71 Cal.2d 1119, 1127 fn. 4.) This inverts basic principles of statutory interpretation. Voters tasked with knowing the law would have understood that the DNA Act authorizes the retention of samples from misdemeanants who were previously convicted of qualifying felony offenses. They would have understood that section 299, subdivision (f) focuses on the prior finding of guilt as the basis for sample retention. They would have been aware that DNA database samples are broadly retained "notwithstanding any other provision of law" permitting or requiring a postconviction sentence reduction.

In light of the ballot statements and arguments, voters would reasonably assume that: (1) Proposition 47, which permits trial courts to reduce sentences under certain circumstances, does not intersect with Proposition 69, which applies "regardless of sentence imposed" or "disposition rendered"; (2) Proposition 47's goal of cost savings from punishing fewer felons with incarceration, does not implicate, let alone require modification of, a statutory scheme such as Proposition 69 that does not impose punishment for crimes; and (3) Section 299, subdivisions (b) and (f) clearly define the category of offenders who can have DNA samples expunged (overwhelmingly, only the exonerated), and section 299 would remain unchanged in light of Proposition 47's silence on that discrete subject.

A court should "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)." (*C.B.*, *supra*, 2 Cal.App.5th at p. 1124.)

### E. Retention of DNA Samples Is Consistent with State Constitutional Privacy Guarantees

California's retention of DNA samples from convicted and adjudicated offenders in a confidential, use-restricted database comports with state constitutional privacy guarantees. (See Cal. Const., art. I, § 1.) Appellant contends that expungement of his DNA sample is consistent with California's "strong public policy of privacy protections" and that his "privacy interest should trump any interest the state may assert in retaining his DNA sample." (OBM 41, 43.) Appellant argues that "long term access to his stored DNA sample, which could potentially be mined for personal information for years to come, implicates [his] reasonable privacy interest." (OBM 43.) As a threshold matter, appellant failed to raise a constitutional privacy claim below, and his argument is therefore waived on appeal. (See *Medical Board of California v. Chiarottino* (2014) 225 Cal.App.4th 623, 632; *People v. Saunders* (1993) 5 Cal.4th 580, 590.)

Regardless, neither fact nor law supports appellant's claim that the state constitution requires return of his forensic identification DNA database sample. Although appellant's felony adjudication was reduced to a misdemeanor, he remains adjudicated of a criminal offense. Convicted offenders have a reduced expectation of privacy in both the collection and retention of their identification information under both the state and federal Constitutions. (See, e.g., *Robinson*, *supra*, 47 Cal.4th at pp. 1120-1127, 1141 [convicted offenders cannot claim privacy in their identification information]; *People v. King*, *supra*, 82 Cal.App.4th at p. 1374 [recognizing

state interest in maintaining permanent record of identification of convicted offenders]; *Alfaro v. Terhune*, *supra*, 98 Cal.App.4th at pp. 497-498, 505-513; see also *Maryland v. King*, *supra*, 133 S.Ct. at p. 1972; accord § 295, subd. (d); § 295.1 [DOJ shall perform DNA analysis "only for identification purposes"].) Thus, this Court already has held the state's convicted offender DNA database constitutional. (*Robinson*, *supra*, 47 Cal.4th at pp. 1116-1121; see also *id.* at p. 1123, fn. 19 [upholding the constitutionality of sample collection from a misdemeanant]; accord, *Alfaro*, *supra*, at pp. 497-498, 505-513; *People v. Adams* (2004) 115 Cal.App.4th 243, 255-259).

The state's retention of forensic DNA identification information from both felons and misdemeanants is consistent with its retention of other criminal identification records. (See, e.g., § 299, subd. (f); *Loder v. Municipal Court*, *supra*, 17 Cal.3d at pp. 864-865; *Robinson*, *supra*, at p. 1121; see also *Boroian v. Mueller* (1st Cir. 2010) 616 F.3d 60, 65 ["Under the DNA Act, DNA profiles currently function as identification records not unlike fingerprints, photographs, or social security numbers"]; *cf. United States v. Kriesel* (9th Cir. 2013) 720 F.3d 1137, 1139-1140 [rejecting challenge to federal DNA sample retention].)

Likewise, California law specifically prohibits the kind of information mining appellant fears. (See, e.g., § 295.2 [prohibiting use of the DNA database as a "source of genetic material for testing, research, or experiments, by any person, agency, or entity seeking to find a causal link between genetics and behavior or health"].) The DNA Act also imposes stringent use and disclosure restrictions and sets civil and criminal penalties as deterrents against DNA sample misuse. (§ 299.5, subd. (i)(1)(A); see *Alfaro*, *supra*, at pp. 504-505; *People v. Travis*, *supra*, 139 Cal.App.4th at pp. 1286-1287.)

Federal confidentiality restrictions and penalties also apply to California by virtue of the state's participation in the FBI's Combined DNA Index System (CODIS). (See 42 U.S.C. § 14132, et seq.; *Maryland v. King*, *supra*, 133 S.Ct. at pp. 1979-1980; *Alfaro*, *supra*, at p. 508.) DNA profiles run through CODIS are compared anonymously—without offender names or other information which might identify the person to whom the profile belongs. (See *United States v. Mitchell* (3d Cir. 2011) 652 F.3d 387, 399-400; *United States v. Kincade* (9th Cir. 2004) 379 F.3d 813, 819.) Only after a database hit does the originating laboratory associate a name with the profile. (See 61 Fed. Reg. 37496 (July 18, 1996).) Therefore, unlike the GPS case appellant cites, where access to information and the scope of the information derived are not limited, the content and use of DNA identification information are expressly limited by statute and regulation, with stringent penalties for misuse.

Cases addressing information privacy also rebut appellant's claim that the state's long term retention of identification information in its databases is impermissible. (See *Loder*, *supra*, 17 Cal.3d at pp. 864-877; *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 30, 37-38 [balancing "legally authorized and socially beneficial activities of government" against privacy interests, and explaining that privacy concerns can be assuaged by use and confidentiality restrictions]; accord, *NASA v. Nelson* (2011) 562 U.S. 134, 155-156 [observing a "statutory or regulatory duty to avoid unwarranted disclosures" is ordinarily sufficient to allay any privacy concerns created by government "accumulation" of "personal information" for "public purposes"].) Accordingly, even if appellant's privacy claim were not forfeited or waived, there is no merit to an assertion that retention of DNA identification samples from convicted and adjudicated offenders is inconsistent with constitutional guarantees in California.

## II. THE LEGISLATURE'S CLARIFICATION OF EXISTING LAW IN AB 1492 PRECLUDES EXPUNGEMENT OF AN OFFENDER'S DNA DATABASE SAMPLE FOLLOWING THE REDUCTION OF A FELONY CONVICTION TO A MISDEMEANOR UNDER PROPOSITION 47

Two months after *Alejandro N.*, the Legislature passed AB 1492, confirming the statutory authority to retain DNA samples following a grant of postconviction relief under Proposition 47, just as with other postconviction relief provisions. Specifically, the Legislature added section 1170.18 to the nonexhaustive list of resentencing provisions in section 299, subdivision (f) that do not permit sample expungement from the state's DNA database.

AB 1492 is a clarification of existing law rather than a change to the DNA Act's expungement provisions. (*In re J.C.*, *supra*, 246 Cal.App.4th at pp. 1474-1475.) As *J.C.* notes, the court in *Coffey* concluded, over a decade earlier, that the enactment of section 299, subdivision (f) was itself a clarification of existing law. (*Ibid.*; *Coffey*, *supra*, 129 Cal.App.4th at p. 822.) *Coffey* explained that, even before the enactment of Proposition 69, the then-existing DNA collection statute focused on the finding of guilt "prior to sentencing," and "regardless of sentence imposed or disposition rendered" as the trigger for DNA sample collection and retention. (*Coffey*, *supra*, at p. 821 [italics omitted].) The enactment of section 299, subdivision (f), which provided for sample retention based on the finding of guilt for a qualifying offense notwithstanding a later sentence reduction under section 17, was fully consonant with the operation of the then-existing collection system and thus, properly viewed as a reiteration of existing law. (*Id.* at p. 822.)

*J.C.* similarly observed that AB 1492's inclusion of section 1170.18 in the nonexhaustive list of postconviction resentencing statutes that do not authorize DNA sample expungement aligned with the approach recognized

in *Coffey*. (*J.C.*, *supra*, at pp. 1474-1475; see generally *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 923-927 [reviewing statutory language and intent to include amendment was a clarification of existing law]; *Satyadi v. West Contra Costa Healthcare District* (2014) 232 Cal.App.4th 1022, 1029 [to answer question of whether an amendment clarifies or changes the law "we must ascertain the state of California law prior to the Legislature's recent amendments"]; *Borden v. Division of Medical Quality* (1994) 30 Cal.App.4th 874, 882.)

In addition, the enactment followed promptly on the heels of the *Alejandro N.* decision. (See *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243-244, 252 [noting a prompt legislative response to a novel judicial interpretation is a circumstance in favor of finding clarification]; *Carter*, *supra*, 38 Cal.4th at p. 930.) Notably, unlike other portions of AB 1492, which remain contingent upon the outcome of *Buza*, *supra*, the Legislature provided that the amendment to section 299, subdivision (f) would take effect on January 1, 2016. (See AB 1492, §§ 4 & 5.)

That AB 1492 does not explicitly refer to *Alejandro N.* by name (OBM 52-53) does not alter the analysis. (See *Negrette v. California State Lottery Com.* (1994) 21 Cal.App.4th 1739, 1744; *Borden v. Division of Medical Quality, supra,* 30 Cal.App.4th at pp. 874, 882.) 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." (*People v. Harrison*, *supra*, 48 Cal.3d at p. 329; *People v. Yartz* (2005) 37 Cal.4th 529, 538.) The amendment to section 299, subdivision (f) removes any possible ambiguity about DNA sample expungement relative to section 1170.18.

As a clarification, AB 1492's inclusion of section 1170.18 in section 299, subdivision (f) controls this case, even though appellant requested

sample expungement prior to this legislative amendment. "An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute." (*Western Security Bank*, *supra*, 15 Cal.4th at p. 243, internal quotation marks and citation omitted; *Carter*, *supra*, 38 Cal.4th at pp. 922, 929-930; see also *City of Redlands v. Sorensen* (1985) 176 Cal.App.3d 202, 211.) An intervening legislative clarification of a statute therefore applies to correct an already issued judicial determination inconsistent with the clarified law. (See *Carter*, *supra*, 38 Cal.4th at pp. 929-930; *Satyadi*, *supra*, 232 Cal.App.4th at p. 1032-1034; *Bowen v. Bd. of Retirement* (1986) 42 Cal.3d 572, 575-576.)

The clarification in AB 1492 is consistent with existing law and the intent of Proposition 69 for law enforcement to retain forensic identification samples following an individual's conviction—much like fingerprint records are retained from the same individual regardless of the sentence imposed or disposition rendered. (Accord, *Loder v. Municipal Court, supra,* 17 Cal.3d 859, 864-865; *People v. McInnis* (1972) 6 Cal.3d 821, 825-826.)

Significantly, the legislative clarification provides exactly what the *Alejandro N.* court believed was lacking—an express statutory articulation "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 N.*, *supra*, 238 Cal.App.4th at pp. 1229-1230.) Recognition that AB 1492 is a clarification of existing law resolves the claim raised by appellant and the concerns identified in *Alejandro N.*

## III. AB 1492 ADDRESSES RETENTION OF DNA IDENTIFICATION INFORMATION IN PROPOSITION 69 AND IS NOT AN UNCONSTITUTIONAL AMENDMENT OF PROPOSITION 47

The Legislature did not unconstitutionally impair or alter Proposition 47 when it clarified Proposition 69 in AB 1492. Appellant nonetheless claims that if AB 1492 is interpreted to prohibit DNA expungement after successful redesignation of a felony to a misdemeanor, it is an unconstitutional amendment to Proposition 47." (OBM 53-54.) AB 1492 does not violate the California Constitution. As explained above, AB 1492 clarifies existing law related to prohibitions on DNA sample expungement in section 299, subdivision (f), a part of Proposition 69.

An amendment is "a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision. [Citation.] But this does not mean that any legislation that concerns the same subject matter as an initiative, or even augments an initiative's provisions, is necessarily an amendment for these purposes. The Legislature remains free to address a related but distinct area . . . or a matter that an initiative measure does not specifically authorize *or* prohibit." (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571, quotation marks omitted.) Thus, when evaluating legislative actions challenged as invalid amendments to initiatives, courts look carefully at what voters did and did not specifically consider in passing the initiative. (See, e.g., *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 22-28 [rejecting challenge that statute addressing rights of domestic partners was an unlawful amendment to an initiative defining marriage]; see also *Pearson*, *supra*, 48 Cal.4th at pp. 572-573 [recognizing distinction in statutory purpose between initiative and subsequent law]; *People v. Cooper* (2002) 27 Cal.4th 38, 44 [legislative limitation on presentence conduct credits did not amend

1978 Briggs Initiative].) An examination of both enactments shows AB 1492 did not amend Proposition 47.

Proposition 47 addresses reduction in punishment for specified crimes and cost savings related to sentence reduction, while emphasizing public safety goals. Nowhere in Proposition 47 or in the accompanying ballot materials is the subject of DNA sample expungement mentioned, much less "specifically authorize[d]." (See *Pearson*, *supra*, 48 Cal.4th at p. 571; see also Gov. Code, § 88002 [requiring, in part, that "[t]he text of the [ballot] measure shall contain the provisions of the proposed measure and the existing provisions of law repealed or revised by the measure"].) AB 1492's clarification of DNA expungement provisions in section 299, subdivision (f) validly focuses on the separate and distinct subject of retaining DNA identification information properly collected pursuant to Proposition 69—a matter the Legislature was "free to address." (*Pearson*, *supra*, at p. 571.)

Appellant's argument to the contrary rests on the assertion that Proposition 47 regulates the subject of DNA expungement. That assertion is incorrect, and thus his claim is unavailing. (See Argument I, *ante*.) Appellant's promotion of Proposition 47's resentencing provisions as an omnibus tool for erasing criminal identification records extends well beyond the language of the proposition and disregards its public safety goals.

Appellant's argument also assumes Proposition 47 silently changed the operation of section 299. As explained above, section 299, subdivision (b) authorizes forensic identification sample expungement only when a conviction or disposition is "reversed and the case dismissed," when a person is "factually innocent," or when a person has been "acquitted," and there exists no other legal basis for sample retention. None of those situations applies to an offender such as appellant who

remains adjudicated of a crime. (See *Coffey*, *supra*, 129 Cal.App.4th at pp. 823-824 [recognizing section 299 does not permit DNA sample expungement "merely because" a felony charge is reduced to a misdemeanor and that "the DNA Database Act permits expungement only on limited grounds"]; cf. *People v. Baylor* (2002) 97 Cal.App.4th 504 [no right to return of DNA profile where specimen was lawfully collected].)

Consequently, appellant's argument cannot prevail unless Proposition 47 amended Proposition 69 in the first place without mentioning it—although all legal presumptions are otherwise. (See *People v. Morales*, *supra*, 63 Cal.4th at p. 406 [observing in the context of Proposition 47's new parole requirement, "no reason appears to assume the voters believed the proposition would include what it did *not* state"]; *Western Oil and Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 419-420 [implied repeal requires *undebatable* evidence of intent to supersede].) Nor can his argument prevail unless Proposition 69's DNA expungement criteria are essentially rewritten to conform to Proposition 47, even though a "court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language." (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540, 543; see also *Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 350.)

If voters had intended Proposition 47 to extend to DNA sample expungement, they "easily and effectively could have accomplished that goal" by using specific language stating that intention. (See *Knight*, *supra*, 128 Cal.App.4th at p. 24.) It is hard to imagine voters upending Proposition 69 and deciding such significant legal and public policy matters, all without any mention or analysis in the ballot materials. (See *In re Christian S.* (1994) 7 Cal.4th 768, 782.)

Lastly, even if AB 1492 amounted to a change of Proposition 47, it was a permissible change. A statute "enacted by voter initiative may be

changed only with the approval of the electorate unless the initiative measure itself permits amendment or repeal without voter approval." (*People v. Cooper*, *supra*, 27 Cal.4th at p. 44, citing Cal. Const. art II, § 10, subd. (c).) Proposition 47 expressly allows for amendment, provided the amendment is "consistent with and further[s] the intent of the Act," and is passed by a two-thirds vote of each house of the Legislature. (Prop. 47 Ballot Pamp., *supra*, § 15.) Here, AB 1492 passed nearly unanimously in both houses and is consistent with Proposition 47's intent to protect the public, keep neighborhoods safe, and save money. Proposition 47 was concerned with the costs of incarceration and was directed at reducing punishment. The postconviction remedy set out in section 1170.18 did not purport to preclude any further collateral effects stemming from the initial finding of guilt. Adding a provision that clarifies the existing requirement to retain a validly collected DNA sample for identification purposes—a requirement that is not additional punishment and is consistent with the cost saving goals of the initiative—is fully consonant with the purpose and intent of Proposition 47. (*J.C.*, *supra*, 246 Cal.App.4th at p. 1482 ["Yet even if we treated Bill No. 1492 as an amendment, rather than a clarification, of Proposition 47, it would satisfy the proposition's requirement that any amendment be consistent with and further its intent"].)

## CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: May 22, 2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
ERIC D. SHARE
Supervising Deputy Attorney General

ENID A. CAMPS
Deputy Attorney General
*Attorneys for Respondent*

SF2016401035
20982837.doc

## CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 13,768 words.

Dated: May 22, 2017

XAVIER BECERRA
Attorney General of California

ENID A. CAMPS
Deputy Attorney General
*Attorneys for Respondent*

## DECLARATION OF SERVICE

Case Name: **In re C.B., a Person Coming Under the Juvenile Court Law**

No.: **S237801**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On May 22, 2017, I served the attached **RESPONDENT'S BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

| | |
|---|---|
| Anne Hanson Mania<br>Attorney at Law<br>1946 Embarcadero, Suite 220<br>Oakland, CA 94606<br>(2 copies) | Superior Court of California<br>County of Contra Costa<br>Wakefield Taylor Courthouse<br>725 Court Street<br>Martinez, CA 94553-1233 |
| The Honorable Mark Peterson<br>District Attorney<br>Contra Costa County District Attorney's Office<br>900 Ward Street<br>Martinez, CA 94553<br>(BY E-MAIL: by transmitting a PDF version of this document via electronic mail to: appellate.pleadings@contracostada.org | Attn.: Executive Director<br>First District Appellate Project<br>475 Fourteenth Street, Suite 650<br>Oakland, CA 94612<br>(BY E-MAIL: by transmitting a PDF version of this document via electronic mail to: eservice@fdap.org) |
| First Appellate District<br>Division Three<br>Court of Appeal of the State of California<br>Division Three<br>350 McAllister Street<br>San Francisco, CA 94102<br>(served via TrueFiling) | |

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 22, 2017, at San Francisco, California.

| J. Wong | J Wong |
| --- | --- |
| Declarant | Signature |

SF2016401035
20980875.doc