IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re C.H., a Person Coming Under the Juvenile Court Law.	**No. S237762**
PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. C.H., Defendant and Appellant.	(First District Court of Appeal No. A146120; Contra Costa Superior Court No. J1100679)

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF and BRIEF OF AMICUS CURIAE LOS ANGELES COUNTY DISTRICT ATTORNEY in support of RESPONDENT The People of the State of California

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Defendant and Appellant.	)

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The Los Angeles County District Attorney hereby applies for permission to file a brief as amicus curiae in the above-entitled matter, pursuant to rule 8.520 of the California Rules of Court, in support of the Respondent, represented by the Attorney General of California.

The underlying case pertains to Appellant's request to have his DNA information expunged from the CODIS[1] database after Appellant successfully applied for re-designation of the charge in his sustained juvenile delinquency petition to a misdemeanor pursuant to Penal Code section 1170.18, subdivisions (f) and (g). The Court of Appeal properly ruled that Appellant is not entitled to such expungement. The amicus curiae brief bound with this application argues:

1. The FBI Combined DNA Index System. (https://www.fbi.gov/services/laboratory/biometric-analysis/codis, last viewed August 7, 2017.)

(1) Penal Code section 299 provides the only procedure in California for expungement from the CODIS database, and neither voters nor the Legislature have chosen to extend such procedure as Appellant desires;

(2) Appellant's DNA information is one of many acceptable biometric measurements of identity to be retained in a state database, and such inclusion causes the offender no harm;

(3) the public benefits from a DNA database that is as broad and inclusive as possible Appellant's DNA information is one of many acceptable biometric measurements of identity to be retained in a state database, and such inclusion causes the offender no harm; and,

(4) Proposition 47's purpose is to save money and to focus those resources on the prosecution of violent offenders and the rehabilitation of other offenders, both of which would be undermined by diverting such savings to proceedings regarding DNA expungement.

The Los Angeles County District Attorney has read the briefs previously filed by the parties and believes that a need exists for additional argument on the points specified above.

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If this Court grants this application, then the Los Angeles County District Attorney, as amicus curiae, requests that this Court permit filing of the brief which is bound with this application.

Respectfully submitted,

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In re C.H., a Person Coming Under the Juvenile Court Law.	**No. S237762**
PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. C.H., Defendant and Appellant.	(First District Court of Appeal No. A146120; Contra Costa Superior Court No. J1100679) **BRIEF OF AMICUS CURIAE**

ISSUE PRESENTED

Is an offender whose conviction is reduced to a misdemeanor pursuant to Penal Code section 1170.18[2], and who is not otherwise required to submit a DNA sample, entitled to expungement of his DNA information from the CODIS database?

STATEMENT OF THE CASE

Amicus curiae (hereafter "amicus") relies upon the Statement of the Case presented by the Respondent in the Opening Brief on the Merits.

STATEMENT OF FACTS

Amicus relies upon the Statement of Facts presented by the Respondent in the Opening Brief on the Merits.

SUMMARY OF ARGUMENT

Current law provides for expungement from the DNA database in certain circumstances. However, expungement is not made newly available for past offenders each time a crime is re-designated from a felony

2. Unless otherwise designated, all statutory references are to the Penal Code.

to a misdemeanor. Proposition 47 sought to preserve resources for the investigation and prosecution of violent crimes, as well as providing funds for the prevention of crimes, victim services, and rehabilitation of certain offenders. The proposition made no express changes to the law regarding the availability of DNA expungement.

Appellant and similar offenders whose convictions are reduced pursuant to Proposition 47 do not suffer by their continued inclusion in the DNA database.

The existence of a large DNA database goes to ensure that investigations and prosecutions of crime are more accurate and efficient, and assists in the exoneration of those innocent persons who are suspected or accused of crimes or who have been wrongfully convicted.

Finally, the goals set forth in Proposition 47 would be undermined if a newly created procedure was made available to a large class of persons whose convictions have been re-designated, due to the resulting court costs and administrative costs.

ARGUMENT

I

SECTION 299 PROVIDES THE ONLY PROCEDURE FOR EXPUNGEMENT FROM THE DNA DATABASE, AND NEITHER VOTERS NOR THE LEGISLATURE HAVE CHOSEN TO EXTEND SUCH PROCEDURE AS APPELLANT DESIRES

Appellant wants the expungement procedures provided in section 299, subdivisions (a) and (b), to apply to Appellant's situation: upon a redesignation of a sustained juvenile charge from a felony to a misdemeanor pursuant to section 1170.18, subdivisions (f) and (g). However, voters have not chosen to extend expungement in that manner, whether via

Proposition 47 or otherwise. The Legislature likewise has chosen not to extend the availability of expungement in the manner that Appellant seeks. Appellant therefore asks this Court to effectively legislate such an extension. It would be improper for this Court to do so.

Section 299 is the only provision of California law that provides for the expungement of information from the DNA database. Subdivision (a) provides as follows:

> A person whose DNA profile has been included in the databank pursuant to this chapter shall have his or her DNA specimen and sample destroyed and searchable database profile expunged from the databank program pursuant to the procedures set forth in subdivision (b) if the person has no past or present offense or pending charge which qualifies that person for inclusion within the state's DNA and Forensic Identification Database and Databank Program and there otherwise is no legal basis for retaining the specimen or sample or searchable profile.

That subdivision directly refers to subdivision (b), of the same statute, which further limits the class of individuals who may seek expungement. Subdivision (b) enumerates four specific scenarios, and clearly states that only a person who fits into one of those scenarios may make a written request to have his or her profile expunged from the database and to have any remaining specimen and sample destroyed. Just prior to listing the four scenarios, the subdivision states "*if any of the following apply*" (emphasis added.) While subdivision (a) refers to persons who have "no past or present offense or pending charge which qualifies that person for inclusion" within the state's DNA database, such reference only provides that such persons may seek expungement if they meet the further restrictions in subdivision (b).

The four scenarios specified in subdivision (b) are as follows:

> (1) Following arrest, no accusatory pleading has been filed within the applicable period allowed by law, charging the

> person with a qualifying offense as set forth in subdivision (a) of Section 296 or if the charges which served as the basis for including the DNA profile in the state's DNA and Forensic Identification Database and Databank Program have been dismissed prior to adjudication by a trier of fact;
> (2) The underlying conviction or disposition serving as the basis for including the DNA profile has been reversed and the case dismissed;
> (3) The person has been found factually innocent of the underlying offense pursuant to Section 851.8, or Section 781.5 of the Welfare and Institutions Code; or
> (4) The defendant has been found not guilty or the defendant has been acquitted of the underlying offense.

Clearly, Appellant fits into none of these scenarios. An accusatory pleading was filed against Appellant, Appellant admitted the felony charge of grand theft (§ 487, subd. (c), disposition was imposed, such disposition has not been reversed, the case was never dismissed, and Appellant was never declared factually innocent of such charge.

The Court of Appeal properly found that Appellant must satisfy both subdivision (a) and subdivision (b) in order to request expungement. (*In re C.H.* (2016) 2 Cal.App.5th 1139, 1147-1148.)

Two published cases may provide support for extending the availability of expungement to Appellant's circumstance. Both were wrongly decided, and one was quickly superseded by the Legislature. In *In re Nancy C.* (2005) 133 Cal.App.4th 508, a minor had admitted a charge in a juvenile delinquency petition for the offense of unlawfully taking a vehicle (Veh. Code § 10851, subd. (a).) Such offense is a wobbler and may be charged as either a felony or a misdemeanor. It was charged in the charging document as a felony. After taking the minor's admission, the court transferred the case to another county for disposition. At the disposition hearing in the second county, the court made an insufficient record as to whether the disposition was imposed as a felony or misdemeanor. The Court of Appeal reversed the

judgment, and ordered that juvenile court to declare the offense either a felony or a misdemeanor. (*Id.*, p. 510.) The minor had also appealed the juvenile court's order requiring the minor to provide a DNA sample. The Court of Appeal wrote, without any analysis, that if the juvenile court on remand declared the offense to be a misdemeanor, and if the minor had already provided a DNA sample, then "the minor may seek relief pursuant to the expungement procedure provided by section 299." (*Id.*, p. 512.)

Nancy C. was wrongly decided because after the minor admitted a felony charge, even if the juvenile court at disposition declared the offense to be a misdemeanor, the minor still would not fit into any of the scenarios enumerated in section 299, subdivision (b). The Court of Appeal made no attempt to fit the case into any of those scenarios, and stated in a conclusory manner that the minor could seek such relief even though the statute provides otherwise. If, as the Court of Appeal suggested, the minor sought such relief, then section 299 would have required the juvenile court to deny the request.

The second case that appeared to provide a judicially created addition to the enumerated scenarios in section 299, subdivision (b), was *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209. There, the minor successfully petitioned pursuant to section 1170.18 to reduce the offense that was the subject of a sustained juvenile petition against him from a felony to a misdemeanor. (*Id.*, p. 1216.) On the related question of DNA expungement, the court recognized that this circumstance was "outside the matters contemplated by the Penal Code DNA expungement statute." (*Id.*, p. 1229.) The court then emphasized that neither the voters nor the Legislature had amended section 299, subdivision (f) to state that such expungement should not be allowed. (*Id.*, pp. 1229-1230.) The Court of Appeal categorically declared that every reduction pursuant to section 1170.18

rendered a defendant or minor eligible for expungement of their DNA information. (*Id.*, p. 1217.)

Alejandro N. improperly overlooked the enumerated circumstances in section 299, subdivision (b). That was made clear when the Legislature quickly amended section 299 after the opinion in *Alejandro N.* was issued[3]. The Court of Appeal had created its addition to the list in subdivision (b) by relying upon the contents of subdivision (f). By amending subdivision (f) to reference section 1170.18 alongside sections 17, 1203.4 and 1203.4a, the Legislature reaffirmed that the availability of expungement should not be extended to a person such as Appellant who pursues a re-designation of a felony offense to a misdemeanor. By adding all persons who sought relief pursuant to section 1170.18 to the class of persons who could seek expungement pursuant to section 299, the court in *Alejandro N.* went against clear statutory provisions and the underlying intent of the Legislature.

Although the court in *Alejandro N.* came to the wrong result, it properly relied upon the intent of the voters and the Legislature as the determinative factors in interpreting section 299. Section 299 was enacted in 1998 by the Legislature as part of AB 1332, and took effect January 1, 1999. (Stats. 1998, ch. 696, § 2.) Section 299 was significantly amended by Proposition 69 in November, 2004. Proposition 69 added most of the content of the current subdivision (b). (Ballot Pamphlet, General Election (November 2, 2004), pp. 141-142 (hereafter "Prop. 69 Ballot Pamp.") Since that time, the enumerated circumstances in subdivision (b) have remained unchanged. The Legislature has shown no intent whatsoever to extend the availability of expungement to the large number of offenders whose convictions have been

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3. The opinion in *Alejandro* N. was issued July 23, 2015. On October 4, 2015, AB 1492 was enacted, to be effective January 1, 2016. That law added the reference to section 1170.18 in section 299, subdivision (f). (Stats. 2015, ch. 487 § 4.)

reduced from felonies to misdemeanors and who otherwise fit into none of the circumstances enumerated in subdivision (b). Most importantly, the voters have shown no such intent either, even when creating a very large new class of such persons when passing Proposition 47. When enacting a proposition, voters are presumed to be aware of existing law. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1048.) By not including an amendment to section 299, subdivision (b) in Proposition 47, the voters clearly stated that they did not desire to make expungement available to Appellant and the large class of similar offenders.

Because neither the voters nor the Legislature have extended the availability of expungement to offenders who benefit from Proposition 47 relief, Appellant is asking this Court to judicially amend the pertinent statutes. This would be wholly inappropriate.

II

APPELLANT'S DNA INFORMATION IS ONE OF MANY ACCEPTABLE BIOMETRIC MEASUREMENTS OF IDENTITY TO BE RETAINED IN A STATE DATABASE, AND SUCH INCLUSION CAUSES THE OFFENDER NO HARM

Appellant's DNA information as retained in CODIS is merely another biometric identifier, like a booking photo, fingerprint, height or weight measurement, eye or hair color description, or a photograph of tattoos, that is collected as part of an arrestee's booking process or after conviction.

> Biometrics involves the scanning or recording of some unique personal characteristic, such as a fingerprint, a retinal print or voice pattern and the comparison of the digitized image or recording against a verified database for positive identification. Digital imaging, the technology involved in

> finger imaging, is already a basic component of a myriad of applications ranging from document management to medical radiology to videoconferencing, and its contribution to the field of biometrics makes the current technology of finger imaging possible. In finger imaging, the technology converts a fingerprint into a highly detailed and exact electronic image that a computer can interpret and compare to other images.

(Note, *Finger Imaging: A 21st Century Solution to Welfare Fraud at our Fingertips* (1995) 22 Fordham Urb. L.J., 1333-1334.)

Other biometric identifiers, especially photographs and prints, have been incorporated for years into a collection or databases. These databases have been used for authenticating the identity of the person in custody and for intelligence in crime solving. When an unknown sample is recovered from a crime scene (fingerprint, hair, blood, video capture, etc.), that sample can be compared to known exemplars by searching available databases.

Booking photos were incorporated into "mug books" long before computers were available to digitize the photographs. In 1900, a defendant challenged the taking of his photograph upon arrest and inclusion of that photo in the "Sheriff's Rogues Gallery." (*State ex rel. Bruns v. Clausmeier* (Ind. 1900) 57 N.E. 541.) The Indiana Supreme Court refused to reject the use of a relatively new invention and held that the sheriff was acting within his lawful authority:

> It would seem, therefore, if, in the discretion of the sheriff, he should deem it necessary to the safe-keeping of a prisoner and to prevent his escape, or to enable him the more readily to retake the prisoner if he should escape, to take his photograph, and a measurement of his height, and ascertain his weight, name, residence, place of birth, occupation and the color of his eyes, hair, and beard, as was done in this case, he could lawfully do so.

(*Id.* at p. 542.) Even booking photos from an illegal arrest were allowed to remain in the "database" or mug book and could result in

a subsequent prosecution if that photograph was selected by another witness in an unrelated crime. (*People v. McInnis* (1972) 6 Cal.3d 821, 825-826.)

For years, fingerprints have been gathered to identify an arrested suspect. Courts have held that fingerprints taken at booking after a felony arrest that are later challenged as illegally seized can still be used to connect defendants to other offenses. (*People v. Clark* (1973) 30 Cal.App.3d 549, 558-559.) In California, after the initiation of the California Identification System ("Cal ID") in 1985, latent prints of an unknown suspect lifted from crime scenes could be compared to a collection of fingerprints.[4] CAL ID provides law enforcement with the ability to use a known exemplar from an arrestee or convicted offender and compare it to unsolved crimes. The technological leap that allowed searching a database with an arrestee's fingerprints in order to determine what, if any, other offenses he or she committed, did not render it necessary to create a new procedure to allow a person to request expungement of their fingerprints from state databases.

Fingerprints, photographs, and other biometric identifiers may be retained in a database and therefore made accessible for intelligence as to other crimes. "However, the use of database searches as a means of identifying potential suspects is not new or novel." (*People v. Johnson* (2006) 139 Cal.App.4th 1135, 1149.) The United States Supreme Court in *Maryland v. King* addressed this point succinctly.

> They [law enforcement] already seek identity information through routine and accepted means: comparing booking photographs to sketch artists' depictions, showing mugshots to potential witnesses, and comparing fingerprints against electronic databases of known criminals and unsolved crimes. The only difference between DNA analysis and fingerprint databases is the unparalleled accuracy DNA provides. DNA is another metric of identification used to connect the arrestee with his or her public

4. See Cal. Pen. Code sec. 11112.1 et seq.

> persona, as reflected in records of his or her actions that are available to the police.

(*Maryland v. King* (2013) ___ U.S.___ [133 S.Ct. 1958, 1963-1964, 186 L.Ed.2d 1, 14].)

DNA is still the most reliable, immutable identifier that exists. As a biometric identifier, DNA is the best available method to establish the identity of the contributor of biological evidence that is found during a criminal investigation.

Furthermore, there is simply no stigma attached to being included in the DNA database, and neither Appellant nor other offenders like Appellant who have had their convictions reduced to misdemeanors suffer in any way from inclusion in the database.

Every member of the United States military, from sailors to the Chairman of the Joint Chiefs of Staff, and every new recruit is required to submit a DNA sample for the military database, also known as a Repository. This is done for two purposes, the identification of remains and criminal investigations.

> The Department of Defense (DOD) began to use DNA samples to identify the remains of service members during the first Gulf War in 1991. "Because of problems with obtaining reliable DNA samples during the Gulf War, the DOD began a program to collect and store reference specimens of DNA from members of the active duty and reserve forces." What was then called the "DOD DNA Registry," program within the Armed Forces Institute of pathology, was established pursuant to a December 16, 1991 memorandum of the Deputy Secretary of Defense. Under this program, DNA specimens are collected from active duty and reserve military personnel upon their enlistment, reenlistment, or preparation for operational deployment. As of December 2002, the Repository, now known as the "Armed Forces Repository of Specimen Samples for the Identification of Remains," contained the DNA of approximately 3.2 million service members. According to a recent DOD directive, the "provision of specimen samples by military members shall be mandatory." The direction

> to a soldier, sailor, airman, or marine to contribute a DNA sample is a lawful order which, if disobeyed, subjects the service member to prosecution under the Uniform Code of Military Justice (UCMJ). If convicted at court-martial for the offense of violating a lawful general order, the service member carries the lifelong stigma of a federal felony conviction, and faces a maximum punishment of a dishonorable discharge, confinement for two years, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. (10 § 1565a. DNA samples maintained for identification of human remains: use for law enforcement purposes (a) Compliance with a court order).[5]

(Ham, *An Army of Suspects: The History and Constitutionality of the U.S. Military's DNA Repository and Its Access for Law Enforcement Purposes*, (July/August 2003) The Army Lawyer, pp. 1-19.) Submitting to the same sampling and analysis procedures to which millions of service men and women are required to participate cannot be considered stigmatizing.

It is well known that in the aftermath of disasters such as Hurricane Katrina, the 9-11 attacks and the tsunami in Japan, DNA is widely used to identify the victims by comparing recovered remains to relatives' toothbrushes and personal effects. (Knoppers et al, *Ethical Issues in Secondary Uses of Human Biological Materials from Mass Disasters* (2006) 34 J.L. Med. & Ethics 352-365.) Such access, affordability and routine use of DNA tests have removed any imagined stigma.

In 1932, Mortimer Kelly was arrested for selling gin and was fingerprinted. He complained that he suffered indignity at being fingerprinted. Judge Learned Hand wrote:

> Finger printing seems to be no more than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations of the criminal laws. It is known to be a very certain means devised by modern science to reach the desired end, and has become especially important in a time when

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5. In 2003, the National Defense Authorization Act expanded the Repository uses to include criminal prosecutions.

> increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification.

(*United States v. Kelly* (2d Cir. 1932) 55 F.2d 67, 69.) Judge Hand went on to note that fingerprinting was becoming widespread in 1932:

> Finger printing is used in numerous branches of business and of civil service, and is not in itself a badge of crime. As a physical invasion it amounts to almost nothing, and as a humiliation it can never amount to as much as that caused by the publicity attending a sensational indictment to which innocent men may have to submit.

(*Id.* at p. 70.) The same can be said for the use of DNA today.

Finally, courts have recognized that inclusion in the DNA database is merely an administrative identifying procedure and is not punitive in any way. (*Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1508.)

The only potential negative consequence for Appellant in the future as a result of inclusion in the DNA database would be if Appellant was identified as being connected to a crime. This is hardly a violation of any privacy right. Furthermore, as will be seen, such identification would further the public's interest in properly and efficiently investigating and preventing future criminal activity.

III

THE PUBLIC BENEFITS FROM A DNA DATABASE THAT IS AS BROAD AND INCLUSIVE AS POSSIBLE

The public has a strong interest in the accurate and prompt investigation of crimes, and the prevention of future crimes. A broad DNA database assists law enforcement in narrowing their investigations, ruling out suspects at an early stage, and exonerating those who have been wrongfully

convicted.

In enacting Proposition 69, the people of the State of California made the following findings and declarations:

> (b) There is critical and urgent need to provide law enforcement officers and agencies with the latest scientific technology available for accurately and expeditiously identifying, apprehending, arresting, and convicting criminal offenders and exonerating persons wrongly suspected or accused of crime.
>
> ...
>
> (d) Expanding the statewide DNA Database and Data Bank Program is:
>
> (1) The most reasonable and certain means to accomplish effective crime solving in California, to aid in the identification of missing and unidentified persons, and to exonerate persons wrongly suspected oraccused of crime;
>
> (2) The most reasonable and certain means to solve crime as effectively as other states which have found that the majority of violent criminals have nonviolent criminal prior convictions, and that the majority of cold hits and criminal investigation links are missed if a DNA database or data bank is limited only to violent crimes[.]

(Prop. 69 Ballot Pamp., §§ II, p. 135.) Retaining offenders such as Appellant in the DNA database can assist in the solving of future violent crimes, and also to assist in the exoneration of persons wrongly suspected, accused or convicted of a crime.

Currently, California law requires the collection of DNA samples for misdemeanor convictions requiring registration as a sex offender or arson offender (§ 296, subd. (a)(3).) 41 other states require the collection of DNA samples for at least some misdemeanor convictions. New York and Wisconsin have the broadest policies, requiring samples from all persons convicted of felonies and misdemeanors. (National Conference of State

Legislatures, Convicted Offenders Required to Submit DNA Samples, http://www.ncsl.org/Documents/cj/ConvictedOffendersDNALaws.pdf, last viewed August 7, 2017.) The experience in New York provides a strong argument in favor of requiring DNA samples for nonviolent offenders. According to slides presented to a National Center for Victims of Crime symposium on July 30, 2013, investigators in New York gained significant benefits after the state's DNA law was changed in 2006 to require DNA samples from offenders convicted of petit larceny. Between 2006 and July 30, 2013, individuals convicted of petit larceny were linked to 1,078 other crimes, including 57 homicides, 137 robberies, 238 sexual assaults, and 457 burglaries. (DNA Stops Crime: The Case for Misdemeanor DNA Collection, http://victimsofcrime.org/docs/DNA%20Trainings/new-york-states-dna-databank-slides.pdf?sfvrsn=2, last viewed August 7, 2017.) Furthermore, as of 2012, when New York considered a further expansion of their DNA database, a legislative memo provided:

> The Databank also plays a significant role in helping to determine who did not commit a crime. There have been 27 individuals exonerated in New York through DNA evidence, as well as countless suspects who have been excluded and cleared most often at the earliest stages of an investigation.

(*People v. Husband* (2012) 954 N.Y.S.2d 856, 859.)

The United States Court of Appeal for the 2nd Circuit Court has summarized the benefits of a large DNA database as follows:

> One, the DNA index has the potential to help society catch the perpetrator of crimes that otherwise would remain unsolved forever. Two, maintaining the DNA database offers unparalleled speed and, more importantly, accuracy in solving crimes. Three, and of particular importance, the database not only allows for the rapid identification of the actual perpetrator, but also prevents misidentification and, thereby, permits innocent individuals to be excluded, rapidly and without being forced to suffer the indignity of being suspected of crimes that

> they did not commit. Critically, one of the fundamental characteristics of the database is that it can be used to exonerate individuals that could or do stand accused of crimes for which they are innocent.

(*United States v. Amerson* (2d Cir. 2007) 483 F.3d 73, 83.)

The argument in favor of expanding the database in order to catch future violent offenders is clear. Mark Helprin, writing very recently in the Wall Street Journal, argued in favor of expanding DNA collection to include all misdemeanor offenders. (Helprin, *How to Save Lives with DNA Testing*, Wall Street Journal, August 2, 2017.) He describes two notorious offenders in Charlottesville, Virginia, whose crime sprees would have been significantly curtailed had their DNA been collected upon earlier misdemeanor convictions. Jesse Matthew, Jr., abducted and murdered Hannah Graham, an 18-year-old student at the University of Virginia. Previously, he had committed another murder and a separate rape. While he left behind DNA evidence in the rape, neither crime had been connected to him at the time of the Graham abduction. In the meantime, however, he had been convicted of misdemeanor trespass. Had he provided a DNA sample at that time, he very likely would have been incarcerated for his earlier crime and not able to abduct and murder Graham. (*Ibid.*) Also, a serial rapist in Charlottesville in the late 1990s had been convicted of a misdemeanor after committing one rape but before going on to commit six more. Had DNA been collected at the time of the misdemeanor conviction, he would likely have been connected to the biological evidence from the first rape and the later victims could have been spared. (*Ibid.*)

While it is critically important to be able to use the database to catch future offenders, it is just as compelling to rationally expand the DNA database in order to unlock prison doors for the innocent.

> DNA databases have proven remarkably effective in exonerating the innocent. According to the Innocence Project, there have been

> 273 post-conviction DNA exonerations in the United States since 1989. In 123 of the cases, the true suspects or perpetrators were also identified. The case of David Allen Jones is a powerful illustration of the benefits of arrestee DNA sampling. Jones, a mentally disabled janitor, was wrongly convicted in 1995 for three murders in the Los Angeles area. See Andrew Blankstein, et al., DNA Analysis Links Inmate to 12 Slayings, L.A. Times, Oct. 23, 2004, at A1. Jones spent nearly nine years in prison. He was released in 2004, after DNA collected at two of the murder scenes was linked to the DNA profile of Chester Dwayne Turner. Although Turner had been arrested 20 times between 1987 and 2002, his DNA sample was not collected until after he was convicted of rape in 2002. *Id.* Had the 2004 Amendment been in effect in 1995, it is likely that Jones never would have been imprisoned because police would have had access to Turner's DNA profile. There are few greater injustices than the wrongful imprisonment of an innocent person.

(*Haskell v. Harris* (9th Cir. 2012) 669 F.3d 1049, 1064-1065, sub. opn. 745 F.3d 1269.)

Expansion of the DNA database to include a larger number of offenders can only help further the efforts of groups such as Project Innocence to exonerate the wrongfully convicted.

> Showing that DNA evidence does not match a convicted offender is often not enough to exonerate him. In an interview with the Council for Responsible Genetics, Peter Neufeld, co-founder of the Innocence Project, described how DNA databases help exonerate wrongly-convicted individuals: "There are occasions where we get a DNA test result on a material piece of evidence from a crime scene which would exclude our client, but prosecutors still resist motions to vacate the conviction. In some of those cases, what then tipped the balance in our favor was that the profile of the unknown individual [whose DNA was found at the crime scene] was run through a convicted offender database and a hit was secured. Once we were able to identify the source of the semen or blood... we were then able to secure the vacation of the conviction for our client." He went on to add, "There's no question that there would be fewer wrongful convictions if there was a universal DNA databank." (CRG Staff, 2011) In 2007, Barry Scheck, the other co-founder of the Innocence Project, told

> the New York Times that "many of the people his organization had helped exonerate would have been freed much sooner, or would not have been convicted at all" if state databases included profiles from all convicted offenders. (McGeehan, 2007)

(Doleac, *The Effects of DNA Databases on Crime*, p.9 Footnote 8, http://siepr.stanford.edu/sites/default/files/publications/Doleac_DNADatabases_0_5.pdf, last viewed August 7, 2017.)

Jerry Hobbs spent five years in jail in Illinois for the 2005 murder of his 8-year-old daughter and her 9-year-old friend. His charges were based on a confession he later retracted, claiming his confession had been coerced. One of the girls had semen on her body that did not match Hobbs. Another man in Virginia, Jorge Torres, was arrested for the murder of a woman. His DNA was entered into the database after his arrest and matched the semen on the dead girl. Torres was an acquaintance of the murdered 9-year-old girl's brother. Hobbs was freed and Torres was convicted of the murders of the two children. In one respect Hobbs was fortunate. Torres was arrested in Virginia, which tested arrestees' DNA unlike Illinois which did not at that time. (*Hobbs v. Cappelluti*, (N.D. Ill. 2012) 899 F. Supp. 2d 738, 747-752.)

Such exonerations will be more likely to occur in California with a large DNA database. Presently, California has entered more profiles into CODIS than any other state. As of May, 2017, California has entered 1,932,072 offender profiles, and 698,878 arrestee profiles. (CODIS – National DNA Index Statistics as compiled by the FBI, https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics, last viewed August 7, 2017.) Most importantly, in California the CODIS database has aided 59,290 investigations. This is many more than any other state; Florida has the second highest number of investigations aided, with 36,467. (*Ibid.*)

The People of the State of California in passing Proposition 69 directed government officials to accurately and expeditiously identify, apprehend, arrest, and convict criminal offenders and exonerate persons wrongly suspected, accused, or convicted of a crime. Appellant would like to extend the availability of DNA expungement to Appellant and the large class of similarly situated offenders. In order to focus investigative resources in the most accurate manner possible, this Court should refrain from extending expungement so far beyond what has been provided to date by the voters and the Legislature.

IV

PROPOSITION 47'S PURPOSE IS TO SAVE MONEY AND FOCUS THOSE RESOURCES ON THE PROSECUTION OF VIOLENT OFFENDERS AND THE REHABILITATION OF OTHER OFFENDERS, BOTH OF WHICH WOULD BE UNDERMINED BY DIVERTING SUCH SAVINGS TO DNA EXPUNGEMENT HEARINGS

Proposition 47 had a clear purpose: to reduce the costs of prosecuting and incarcerating persons who committed certain felonies that were then re-classified as misdemeanors, and to spend that savings "on school truancy and dropout prevention, mental health and substance abuse treatment, and victim services." (Ballot Pamphlet, General Election (November 4, 2014) §§ 5-13, pp. 71-73 (hereafter "Prop. 47 Ballot Pamp.")) The language of the Proposition, in Section 3 entitled "Purpose and Intent," stated, in part, as follows:

> (6) This measure will save significant state corrections dollars on an annual basis. Preliminary estimates range from $150 million to $250 million per year. This measure will increase investments in programs that reduce crime and improve public

> safety, such as prevention programs in K–12 schools, victim services, and mental health and drug treatment, which will reduce future expenditures for corrections.

(*Ibid*, p. 70.) Further unanticipated court proceedings that erode these anticipated savings would result in the loss of the financial benefits of Proposition 47, and the frustration of the voters' intent and expectations. (See, generally, *Harris v. Superior Court* (2016) 1 Cal.5th 984, 992.)

The financial benefits of Proposition 47 are just now being realized. While the proposition was passed in November, 2014, and became effective the day after the election, distribution of the anticipated savings by the state began only in the spring of 2017. (Ulloa, *Prop. 47 Got Thousands Out of Prison. Now, $103 Million in Savings Will Go Towards Keeping Them out*, L.A. Times (March 29, 2017), http://www.latimes.com/politics/la-pol-sac-prop-47-grant-awards-20170329-htmlstory.html, last viewed August 7, 2017.) The state expects to spend $103 million over the next 3 years for the programs described in Proposition 47. As of March, 2017, there had been almost 280,000 petitions filed for re-sentencing or re-designation of prior convictions pursuant to Proposition 47. The total estimated number of eligible offenders in Los Angeles County as of that date was 500,000. (*Ibid.*)

It is important to closely examine just what procedures would be required if the class of eligible persons for DNA expungement were expanded to include the many thousands of persons who provided DNA samples due to felony offenses that may now be reduced to misdemeanors.

Section 299, subdivision (c)(1) requires that a person requesting expungement send a copy of their request to (1) the court that entered the disposition, (2) the DNA Laboratory of the Department of Justice, (3) and the prosecuting attorney of the county in which the person had been convicted or adjudicated. The subdivision further provides that the court has

discretion to grant or deny the request, and that any denial is a nonappealable order and shall not be reviewed by petition for writ.[6]

Section 299, subdivision (c)(2) requires that any order of expungement must be made after a noticed hearing. Section 1170.18, subdivisions (f) and (g), however require no hearing for applications brought to re-designate past conviction offenses to misdemeanors where the applicant has completed their sentence. This means that, if DNA expungement is extended by this Court to all persons who had their offenses reduced and who had completed their sentence prior to applying for relief, then noticed hearings would be required for the first time in all such cases. While it is not possible to truly estimate the costs of such hearings to the courts, prosecuting offices, and government-provided counsel, it is undeniable that there could be many thousands of petitions placed on court calendars just for this purpose. In the description of the fiscal impacts of Proposition 47, no consideration at all was given to such proceedings.

In addition, the California Department of Justice must process any expungement order received from the court, only after determining themselves whether there is any other reason for the offender's information to remain in the database. (§ 299, subd. (c)(2).) The California Department of Justice describes their procedure, in part, as follows:

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6. Should Proposition 47 beneficiaries be added to the class of persons able to request expungement, it is not at all clear what the proper standard should be for the trial court to rule upon such request. Appellant, the dissenting Justice in *In re C.B.* (2016) 2 Cal.App.5th 1112, and the court in *Alejandro N., supra*, all appear to assume that the trial court would have no discretion in ruling upon a request for expungement, and that the only barrier to expungement should be if the offender is required to provide a sample due to another case or arrest. Given the inconsistency with the clear discretion provided to the court in ruling upon requests by the classes of persons actually enumerated in section 299, subdivision (b), this would cause enormous confusion for courts.

> If CAL-DNA receives sufficient documentation showing that an individual meets the criteria for expungement of his or her DNA sample, CAL-DNA will review and research the request and issue a response to the petitioner indicating that the expungement was completed and the sample destroyed, or notify the petitioner of the legal reason the Department is required to retain the sample and profile.
>
> If all of the documentation is provided or readily available, expungements using this expedited procedure are generally completed within 2 to 4 weeks.

(California Department of Justice, Bureau of Forensic Sciences, Frequently Asked Questions, https://oag.ca.gov/bfs/prop69/faqs#mechanics, last viewed August 7, 2017.) The costs to the California Department of Justice of processing potentially tens of thousands of additional expungement requests is not mentioned at all in the fiscal impacts presented in the ballot statement describing Proposition 47.

Any additional costs would take away from the savings that would otherwise go for the particular purposes specified in Proposition 47. The Los Angeles District Attorney's Office has a particular interest in the clarity of procedures related to any such newly created proceeding. The enactment in November 2012 of Proposition 36, made significant changes to the "Three-Strikes Law." Specifically, it added section 1170.126, which provided that persons serving an indeterminate "third-strike" sentence could petition the court for recall of that sentence. This resulted in the creation of brand new procedures to process the many resulting petitions. This placed a large burden on the Los Angeles Superior Court, and caused our office to create a new unit and devote several prosecutors only to the processing of such petitions. Section 1170.126 spells out the required procedures in general, and it fell on our office, other prosecutors, defense counsel, and the courts to work out a number of details. By contrast, Appellant asks that a large class of people be rendered newly eligible for DNA expungement,

without any statute specifying the standard for the courts to apply and setting forth the required procedures. The resulting burden on courts, prosecutors and government-appointed attorneys would be significant. It would detract from the ability of courts to administer their regular caseload, and would detract from our ability to focus resources on violent offenders as requested by the voters in enacting Proposition 47.

Future unintended consequences could be even more widespread. Appellant argues that equal protection requires that offenders who had been convicted of a crime that has now been deemed to be a misdemeanor pursuant to Proposition 47 be treated the same as offenders who commit such a misdemeanor today. If expungement is extended to offenders benefiting from Proposition 47 reductions, and if Appellant's equal protection argument is accepted, then any future change in the law that reclassifies a felony offense as a misdemeanor could trigger a new wave of offenders making requests for DNA expungement that they would be newly eligible to make. For example, if unlawfully taking or driving a vehicle pursuant to Vehicle Code section 10851 were amended in the future to be only a misdemeanor crime, all offenders who have been convicted of the offense as a felony and have provided DNA samples as a result of that conviction would be newly eligible to request DNA expungement. Furthermore, the mere redefinition of a felony offense could trigger such a new wave of requests and noticed hearings. For example, if the definition of grand theft is changed in the future so that the minimum amount of the required theft is increased to $2,000, all offenders previously convicted of felony grand theft for stealing property valued between $950 and $2,000 could argue that they suddenly are eligible to request DNA expungement.

The better approach, and that most clearly conforming to the language and intent behind the DNA statutes as enacted by the Legislature and the voters in Proposition 69, is this: offenders convicted of a felony as it

is defined on the date of conviction must submit a sample of their DNA. Such definitions may change from time to time, in ways that cannot be anticipated. If an offense is re-designated as either a felony or a misdemeanor, or the definition of the offense otherwise is changed, only an express statutory provision should give past offenders the ability to seek expungement from the database. There is no legal reason to require that definitional changes automatically trigger large additions to the classes of persons made eligible for expungement by the Legislature and the voters. This is especially true given the benefits of a large DNA database to the prosecution of violent offenders and the exoneration of the innocent, and the lack of harm that inclusion in the database inflicts on persons who commit no future offenses.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that this Court affirm the trial court's order denying Appellant's request for expungement from the DNA database.

Respectfully submitted,

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District Attorney of
Los Angeles County

By

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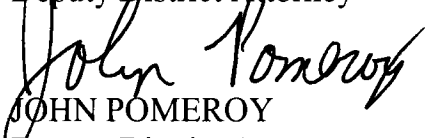

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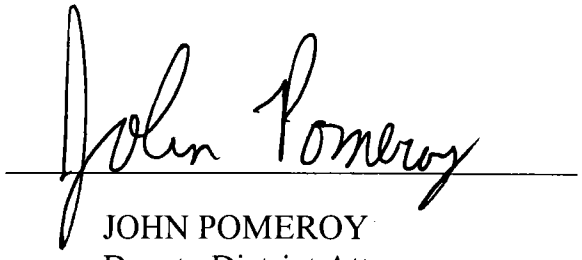
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that the enclosed Brief of Amicus Curiae is produced using 13-point Times New Roman type and contains approximately 7,117 words, including footnotes and excluding the Table of Contents and Table of Authorities, cover information, signature block, certificate of compliance, and notice of filing by mail. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: August 9, 2017



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DECLARATION OF SERVICE BY MAIL

In re C.H.; Case No. S237762; Contra Costa SC J1100679

The undersigned declares under the penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause, and employed in the Office of the District Attorney of Los Angeles County with offices at 320 West Temple Street, Suite 540, Los Angeles, California 90012. On the date of execution hereof I served the attached document entitled **Application for Permission to File Amicus Curiae Brief and Brief of Amicus Curiae Los Angeles County District Attorney** by depositing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail in the City and County of Los Angeles, California, addressed as follows:

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