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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

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Deputy

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

PETITION FOR REVIEW

After Decision of the First Appellate District, Division ~~Two~~ Three, Filed August 30, 2016.

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By Appointment of the Court
Under the First District Appellate Project Independent Case System

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PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE TANI G. CANTIL-SAKAUYE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, C. H., respectfully petitions this Court to grant review in this case pursuant to California Rules of Court, rule 8.500, subdivision (b) (1). A copy of the opinion of the Court of Appeal, First Appellate District, Division Three, (per Siggins, J.), filed August 30, 2016, affirming the juvenile court's order denying petitioner's request to expunge his DNA sample pursuant to Penal Code section 1170.18[1] is attached to this petition as Appendix A.

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

ISSUES PRESENTED FOR REVIEW

1. Do the reclassification procedures of Proposition 47[2] alter a crime's status as a felony to a misdemeanor offense, thereby requiring the expungement of a reclassified misdemeanant's DNA sample or do Proposition 69's[3] specific DNA provisions control and require the retention of a reclassified misdemeanant's DNA sample based on the original felony finding/plea?

2. Does the recently enacted Assembly Bill 1492 ["AB 1492"], adding section 1170.18 to section 299, subdivision (f) to the list of those who may not be relieved of the requirement to provide DNA where the qualifying charge is reduced under another law, preclude DNA expungement where the original qualifying felony offense is reclassified as a misdemeanor under section 1170.18 and if so, is AB 1492 an unconstitutional amendment of Proposition 47?

3. Is the denial of a request pursuant to section 1170.18 to expunge DNA a violation of the equal protection clause of the California and federal Constitutions?

WHY REVIEW SHOULD BE GRANTED
(Cal. Rules of Court, rule 8.500.)

This petition for review is presented to settle an important question of law and to secure uniformity of decisions. (Cal. Rules of Court, rule 8.500, subd. (b) (1).)

A misdemeanant, after serving a sentence, suffers no further obligation, disability,

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[2] Proposition 47 is the Safe Neighborhoods and Schools Act enacted by voters in 2014 and is found at section 1170.18.

[3] Proposition 69 is the DNA Fingerprint, Unsolved Crime and Innocence Protection Act ["DNA Act"] passed by voters in the 2004 general election. See sections 295-302.2 for the codified version.

or loss of civil rights. (*People v. Moreno* (2014) 231 Cal.App.4th 934, 942.) This is not so for the typical felon: convicted felons are "uniquely burdened by a collection of statutorily imposed disabilities" such as the loss of the right to vote and the right to own/possess firearms. (Cal. Const., art. II, sec. 4 [right to vote]; sec. 29800, subd. (a) (1) [gun ownership]; *People v. Moreno*, *supra*, 231 Cal.App.4th at p. 942, citing *In re Valenti* (1986) 178 Cal.App.3d 470, 475.) DNA collection and retention is an additional disability which felons experience due to their status as a felon. (*People v. Travis* (2006) 139 Cal.App.4th 1271, 1295; sec. 296.) For juveniles the collection of DNA is applicable for a felony offense or for those juveniles who are subject to registration for the commission of a sex or arson offense. (Sec. 296, subds. (a) (1) and (3).) Thus, the collection of DNA samples is not authorized based solely on the commission of a misdemeanor. (*Alejandro N. v. Superior Court (San Diego)*(2015) 238 Cal.App.4th 1209, 1226-1227 (pet. rev. den. 10/14/2015) ["*Alejandro N.*"].)

Here, C. H. took a pair of $46.00 jeans from a store and now stands guilty of a misdemeanor petty theft, section 490.2, as a result of a petition filed pursuant to section 1170.18. The collection and retention of his DNA sample stems not from this misdemeanor offense but from C.H.'s provision of a DNA sample resulting from his felony offense prior to its reclassification.

With the passage of Proposition 47 the electorate determined that petitioner's behavior in this case was a low-level crime that merited misdemeanor treatment and reduced punishment. While the collection of a DNA sample is not penal in nature, it is a disability resulting from the felony treatment of petitioner's offense which will follow

petitioner throughout his adult life absent expungement. Retention of petitioner's DNA sample under these circumstances is an unwarranted disability for a misdemeanor, including reclassified misdemeanors, under section 1170.18.

In the case at bar the Court of Appeal found that the redesignation of a felony offense as a misdemeanor pursuant to section 1170.18 had no effect on previously obtained DNA. The Court reasoned that the original felony status of the offense with its required DNA submission did not change when the felony was reclassified as a misdemeanor "for all purposes" pursuant to section 1170.18, subdivision (k). (Opinion of the Court, pp. 1-2, 4, 8.) Further, the Court held that the DNA expungement provisions of the DNA Act controlled over the more general provisions of Proposition 47. (Opinion of the Court, pp. 2, 8.) The Court concluded that the retention of petitioner's DNA sample after redesignation as a misdemeanor supported the purpose of both Proposition 47 and 69 to protect public safety. (Opinion of the Court, pp. 2, 8-10.) The Court also held there was no equal protection violation stemming from the retention of petitioner's DNA. (Opinion of the Court, pp. 10-12.)

The Court of Appeal agreed with the holding in *In re J.C.* (2016) 246 Cal.App.4th 1462 (pet. rev. den. 8/10/2016) on the DNA expungement issue [affirming juvenile court order denying expungement of DNA following reclassification pursuant to Proposition 47 and relying on the recent amendment to section 299, subdivision (f) prohibiting the juvenile court from relieving the requirement to submit DNA]. The Court of Appeal disagreed with *Alejandro N. v. Superior Court (San Diego)*, *supra*, 238 Cal.App.4th 1209 [finding redesignation of a felony as a misdemeanor under section 1170.18 requires

expungement of an offender's DNA and profile from the state database]. (Opinion of the Court, p. 10.)

See also *In re C. B.* (August 30, 2016, A146277) ___ Cal.App.4th ___ (WL 4529208) (Jenkins, J.) an Opinion of the First District Court of Appeal, Division Three, following *In re J.C., supra*, 246 Cal.App.4th 1462.

The Court's Opinion in this case is in conflict with the decision of the Fourth District Court of Appeal, Division One, in *Alejandro N. v. Superior Court (San Diego), supra,* 238 Cal.App.4th 1209 and with Justice Pollak's Dissent in *In re C. B., supra,* ___ Cal.App.4th ___, supporting DNA expungement and citing with approval *Alejandro N. v. Superior Court (San Diego), supra,* 238 Cal.App.4th 1209.

Petitioner's case is just one example of the confusion and inconsistent decisions that have issued in the California trial courts and courts of appeal on the important question of law whether a juvenile with a qualifying offense for DNA submission under Proposition 69 which is redesignated as a misdemeanor pursuant to Proposition 47 is entitled to have his DNA expunged.

Thus, this Court now has before it a case which presents for resolution the type of question which will permit the Court to secure uniformity of decisions and to settle an important question of law. (Cal. Rules of Court, rule 8.500, subd. (b) (1).)

STATEMENT OF THE CASE

On April 19, 2011, Clayton H., petitioner here, was charged with a second degree robbery (sec. 211/212.5, subd. (c)) and an assault by force likely to produce great bodily injury (sec. 245, subd. (a)). (CT 1-3.) On July 15, 2011, petitioner admitted committing

an amended count three, felony grand theft. (Sec. 487, subd. (c).) (CT 22.)

The disposition hearing took place on August 19, 2011. (CT 25-27.) Wardship was declared with no termination date. (CT 25.) A $500.00 restitution fine was imposed. (CT 26.) Pursuant to section 296.1 petitioner was required to submit to the collection of specimens, samples and print impressions. (CT 26.)

On June 5, 2015 petitioner filed a petition for modification pursuant to Welfare and Institutions Code section 778 based on the voter initiative Proposition 47, now part of the Penal Code at section 1170.18. The petition sought reduction of petitioner's felony grand theft offense (sec. 487, subd. (c)) to a misdemeanor petty theft where the loss amounted to less than $950.00. (Sec. 490.2) (CT 100-101.)

Petitioner requested recalculation of his confinement time to six months, his fine to an amount in accordance with the misdemeanor offense, and expungement of his DNA from the state database. (CT 100-101.)

The court granted petitioner's petition in all respects except the DNA expungement request. Petitioner's offense was reduced to a misdemeanor petty theft (sec. 490.2), his fine reduced to $50.00 and his maximum time recalculated to six months. (CT 104; RT pp. 2-4.)

The parties stipulated that the briefing, argument and the court's decision from the Santino-B-W matter, J13-01068, heard by the court on June 4, 2015, would be incorporated into the decision in petitioner's case.[4] (CT 105, RT 4.) The court denied

[4] Petitioner's request for judicial notice of the briefing in the Santino B-W case was granted. (Opinion of the Court, p. 2, n. 3.)

petitioner's DNA request on the basis of the arguments and decision made in the Santino B-W. case. (RT 4; RT 6/4/2015 pp. 1-21 [hearing on petition in Santino-B-W matter, J13-01068].)

On August 14, 2015, petitioner filed a motion for reconsideration of the court's denial of his DNA request based on the recent case, *Alejandro N. v. Superior Court (San Diego)*, *supra*, 238 Cal.App.4th 1209. (CT 117-118.) The parties again agreed to submit petitioner's request on the pleadings and arguments presented in another juvenile case heard by the court, the Lamont P. case, J12-00947, including the prosecution brief in the matter of Jaelonda C., J12-00416. (RT 8; CT 124-126 [Jaelonda C. brief].) On August 25, 2015, the court denied petitioner's reconsideration request without prejudice. (CT 121; RT 8-9; RT 8/25/2015 pp. 1-11 [hearing on reconsideration request on DNA denial in Lamont P. case, J12-00947].)

A timely notice of appeal was filed on August 27, 2015. (CT 129-130.) On August 30, 2016, the Court of Appeal filed its Opinion in this case in which it affirmed the juvenile court's denial of petitioner's request to expunge his DNA sample. (Appendix A, Opinion of the Court at pp. 1-2, 10.)

STATEMENT OF FACTS

On January 26, 2011, petitioner and two friends went into the Kohl's Department Store in Brentwood, California. According to the loss prevention officer, Michael Pardini, the boys left Kohl's with merchandise that was not paid for. Clayton selected a pair of $46.00 jeans, went into a dressing room, then left the store through a different exit wearing the jeans. (CT 31.)

A fight ensued between petitioner's two friends and a loss prevention officer who tried to stop the boys outside Kohl's. (CT 31, 32, 33.) During the fight Clayton approached wearing the jeans. Clayton kicked Pardini in the forehead. All three boys rode away on their bicycles. (CT 32, 34.)

Clayton was arrested a few weeks later. (CT 32.) He said that his sister worked at Kohl's and he planned to put a pair of jeans on hold at the register so his sister could buy the jeans with her employee discount. (CT 34.) While in the dressing room Clayton got a call from one of his friends saying a loss prevention officer had stopped him outside. Clayton panicked and accidentally left the store wearing the jeans. (CT 34.)

Neither Kohl's nor Mr. Pardini sought restitution in this matter. (CT 33.)

ARGUMENT

I. THE RECLASSIFICATION PROCEDURES OF PROPOSITION 47 ALTER A CRIME'S STATUS AS A FELONY TO A MISDEMEANOR OFFENSE, THEREBY REQUIRING THE EXPUNGEMENT OF A RECLASSIFIED MISDEMEANANT'S DNA SAMPLE.

A. Background And Standard Of Review.

The original basis for DNA collection in petitioner's case was Penal Code 296, subdivision (a), due to a felony adjudication for grand theft. That felony adjudication no longer exists – it has been re-designated as a misdemeanor "for all purposes." (Sec. 1170.18, subd. (k).) If petitioner were adjudicated today, Penal Code 296, subdivision (a) would not apply. (Sec. 296.)

Proposition 47 does not contain an exception to the DNA collection and retention rules for offenders whose offense has been reclassified as a misdemeanor under its provisions. Therefore lawful authority no longer exists to collect or retain petitioner's DNA sample. When petitioner's offense was reclassified as a misdemeanor, the juvenile court was also required to order petitioner's sample expunged. It was error for the Court of Appeal to affirm the juvenile court's order denying expungement.

This is a question of statutory interpretation and so this Court reviews the decision of the juvenile court de novo. (*People v. Taylor* (1992) 6 Cal.App.4th 1084, 1090-1091.)

B. Petitioner's Reclassified Offense Is Now A Misdemeanor For All Purposes Thereby Requiring The Expungement Of His DNA Sample.

The Court's Opinion in petitioner's case is flawed. The collection of DNA samples is not authorized based solely on the commission of a misdemeanor, including petty theft. (Sec. 296; *Alejandro N. v. Superior Court (San Diego)*, *supra*, 238 Cal.App.4th at pp. 1226-1227, *Coffey v. Superior Court* (2005) 129 Cal.App.4th 809, 818; *In re J.C.*, *supra*, 246 Cal.App.4th at p. 1470.)

Alejandro N. held that section 1170.18, subdivision (k) provided that once reclassified, the affected offense shall be treated exactly like any other misdemeanor offense. Pursuant to section 1170.18 the offense is deemed a misdemeanor for all purposes except for firearms restrictions, and so the Court found Alejandro N. was entitled to an order expunging his DNA. The Court found that because only the firearm restriction was included as an exception to the misdemeanor reclassification, "the enactors effectively directed the courts not to carve out other exceptions to the misdemeanor treatment of the reclassified offense absent some reasoned statutory or constitutional basis for doing so." (*Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at p. 1227.)

Instead, the Court of Appeal in petitioner's case added an additional exception, that petitioner's DNA should be retained, to the reclassified misdemeanor treatment of his offense. (Opinion of the Court, p. 10.)

In concluding that section 1170.18 did not require DNA expungement for reclassified misdemeanors the Court of Appeal initially observed that "[a]ll of

Proposition 47, including section 1170.18, is silent on whether the redesignation of a felony as a misdemeanor requires that a defendant's DNA be expunged" (Opinion of the Court, p. 4.)

The Legislature presumably was aware of the then-existing DNA expungement provisions of the Penal Code and enacted Proposition 47 in light of this knowledge. The Court in *In re C. B., supra*, ___ Cal.App.4th ___ recognized that "[w]e decline to read any significance into the Legislature's silence on [another] matter. (See *People v. Harrison* (1989) 48 Cal.3d 321, 329 ['The Legislature . . . is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof.']" (*In re C. B., supra*, ___ Cal.App.4th ___ at p. 15, n. 7.)[5] Likewise, it is not possible to determine the significance of legislative silence on the issue of DNA expungement in Proposition 47.

1. Section 17 And Section 1170.18 Are Not Analogous.

The Court of Appeal disagreed with *Alejandro N.'s* interpretation of the statutory language "for all purposes". The Court analogized to section 17, subdivision (b) which employs similar language in finding that the phrase "a misdemeanor for all purposes" has "a well-defined meaning that does not relate back to alter a crime's original status for events occurring before the crime was reduced to a misdemeanor." (Opinion of the Court, p. 4.)

The Court of Appeal reasoned that

[5] The citations to *In re C. B.* are to the 17 page Opinion of the Court and 13 page Dissenting Opinion by Justice Pollak.

> because Proposition 47 and section 17 both address the effect to be given the redesignation of a felony (or a wobbler that starts out as a felony) as a misdemeanor, we are presumptively obligated to construe the phrase 'misdemeanor for all purposes' under Proposition 47 to mean the same as it does under section 17-namely, that a felony offense redesignated as a misdemeanor under Proposition 47 retains its character as a felony prior to its designation, and is treated as a misdemeanor only after the time of designation.

(Opinion of the Court, pp. 5-6.)

The Court thus held that the reclassification to a misdemeanor offense under Proposition 47 precluded expungement of petitioner's DNA sample. (Opinion of the Court, pp. 5-6.)

While the two code sections employ similar language, "for all purposes", the effect of the language is not the same. Under section 17, subdivision (b), when an offense is reduced from a felony to a misdemeanor, the offense is thereafter deemed a misdemeanor offense. The original offense remains a felony offense. (*People v. Park* (2013) 56 Cal.4th 782, 795.) When a felony offense is reclassified under section 1170.18 the nature of the offense is changed from a felony to a misdemeanor.

The Court explained in *Alejandro N.* that the reclassification of a felony offense under section 1170.18 removes the offense from the felony category permanently. It is as though the felony offense never occurred making DNA collection and retention unavailable. (*Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at p. 1230.

Justice Pollak, Dissenting in *In re C. B., supra*, ___ Cal.App.4th ___ agreed with *Alejandro N.* Justice Pollak pointed out that, under section 17, reduction of a wobbler offense to a misdemeanor offense requires a court to exercise discretion in determining

that the circumstances of a particular case justify treatment of the offense as less serious than a felony. (*Id.* at p. 6.) However, the plea or finding remains a felony offense. (*Ibid.*) In contrast, under section 1170.18, upon reclassification of a felony offense to a misdemeanor, the nature of the offense changes and the offense is removed from the felony category. (*Id.* at pp. 6-7, citing *Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at p. 1230.)

The Court of Appeal in petitioner's case observed that the language "for all purposes" should be accorded the same interpretation when used in statutes that "cover the same or an analogous subject matter." (Opinion of the Court, p. 5.) However, section 17 and Proposition 47 do not cover the same or analogous subject matters. Section 17 directs the court to exercise its discretion to determine if a particular offender and offense merit reduction of a felony to a misdemeanor. With Proposition 47 the voters enacted a statutory scheme where less serious felony crimes were determined to merit misdemeanor treatment and penalties were reduced accordingly. Assuming the offender qualified, the reclassification under section 1170.18 is automatic as it was in petitioner's case. (Sec. 1170.18, subds. (f), (g).)

Moreover, the language of section 1170.18, subdivision (k) is not completely identical to the language used in section 17 to describe the effect of a judicial declaration that a wobbler offense-which is punishable as a felony until designated a misdemeanor-is to be considered a misdemeanor. (See sec. 17, subds. (b) [where a crime is a wobbler, "it is a *misdemeanor for all purposes*...(b) (1) after judgment . . . .(b) (2) When the court, upon committing the defendant to the Division of Juvenile Justice, designates the offense

to be a misdemeanor (b) (3) When the court grants probation to a defendant . . . and declares the offense to be a misdemeanor]; and sec. 1170.18, subd. (k) ["[a]ny felony conviction that is . . . designated as a misdemeanor under subdivision (g) *shall be considered a misdemeanor for all purposes*" except firearms restrictions on resentencing.])

In section 1170.18, subdivision (k) the word "shall" makes the misdemeanor designation "for all purposes" mandatory. The word "shall" does not appear in section 17 because it is a discretionary choice made by the trial court.

2. Redesignation Under Section 1170.18 Does Not Relate Back To Change The Nature Of The Plea Or Conviction At The Time It Occurred.

The Court of Appeal here stated that the "triggering event for the obligation to provide a sample for the state's DNA database is a conviction or plea. . . .Because the obligation to contribute DNA arises from a conviction or plea, the substance of an application for expungement under section 1170.18 must be predicated on the theory that redesignation as a misdemeanor relates back to change the nature of a previous plea or felony conviction *when it occurred.*" (Opinion of the Court, p. 6; italics in original.)

The analysis by the Court is erroneous. The application for expungement under section 1170.18 is not predicated on the theory that redesignation relates back to change the nature of a previous plea or felony conviction at the time it occurred.

Petitioner's request seeks ongoing misdemeanor treatment of his reclassified offense. Petitioner' request for expungement does not challenge his earlier plea to a felony offense or the validity of the order requiring him to provide his DNA sample.

Petitioner does not seek to retroactively change his felony plea or to invalidate an order correctly entered. Justice Pollak, Dissenting in *In re C. B.,* explains:

> [The minor] contends that although he was correctly ordered to provide the sample, now that his offense has been reclassified as a misdemeanor pursuant to section 1170.18 he no longer has been convicted of a qualifying offense and therefore he is entitled to have his specimen removed from the database. He does not seek retroactive application of section 1170.18 but prospective application to his request for expungement. The distinction parallels the distinction that has been made in interpreting section 17. The "for all purposes" phrase in section 17 does not mean that an enhancement in another case based upon the defendant having previously been convicted of a wobbler charged as a felony should be set aside when the wobbler offense is later sentenced under section 17 as a misdemeanor. (*People v. Park, supra,* 56 Cal.4th at p. 802. . . . However, the "for all purposes" requirement does mean that the offense cannot be used prospectively to impose a new enhancement based on the offense having previously been designated as a felony. (*Park*, p. 804. . . . That is the same distinction that has been recognized in recent cases applying section 1170.18, rejecting applications to set aside enhancements previously imposed based on an offense that was formerly but is no longer classified as a felony, [footnote omitted] but holding that prospectively offenses reclassified under section 1170.18 cannot be treated as a felony to impose new enhancements. (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 747 . . . .) Similarly, in the present case minor seeks only prospective application of section 1170.18.

(In re C. B., supra, ___ Cal.App.4th ___ dis. opn. of Pollak, J., at pp. 10-11.)

The Court of Appeal noted that the appeal of a redesignated offense lies with the Court of Appeal precisely because the redesignation "does not retroactively convert the offense to a misdemeanor at the time of charging, which is the relevant point in time for determining where an appeal lies. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1110-1111; *People v. Rivera* [(2015) 233 Cal.App.4th 1085] at pp. 1096-1097, 1099-1100." (Opinion of the Court, p. 6.) However as Justice Pollak demonstrates, the request for redesignation to a misdemeanor seeks prospective misdemeanor treatment of a

reclassified offense. The nature of a previous plea or felony conviction is unchanged. Thus, an appeal may lie in the Court of Appeal.

Proposition 47 requires the expungement of a reclassified misdemeanant's DNA sample. Accordingly, the Court of Appeal erred in affirming the juvenile court's order denying DNA expungement in petitioner's case. Petitioner respectfully requests that his Petition for Review be granted

C. Proposition 69's Specific DNA Provisions Do Not Require The Retention Of A Reclassified Misdemeanant's DNA Sample.

The Court of Appeal held that Proposition 47 can be harmonized with Proposition 69, California's DNA Act, codified at sections 295-302.2, but if there is a conflict between the two, Proposition 69's more specific measures control. (Opinion of the Court, pp. 1-2, 7-8.)

The Court of Appeal is in error when it states the two propositions can be harmonized. Propositions 69 [the DNA Act focused on identifying criminals and crime-solving] and 47 [the Safe Neighborhoods Act focused on reducing punishment for low level theft and drug offenses] do not address the same subject matter. Although both are part of the Penal Code, section 299 is found at Part 1 "Of Crimes and Punishment" and section 1170.18 is found at Part 2 "Of Criminal Procedure". The intent of the voters, the goals of the respective Propositions and the subjects addressed by the Propositions are different. The statutes cannot be harmonized.

It makes no sense to suggest that Proposition 69's more specific provisions on a different subject matter - DNA expungement/retention - override or control the general

provisions of Proposition 47 which clearly states the voters' intent to reduce punishment for low-level crimes.

"An interpretation which is repugnant to the purpose of the initiative would permit the very 'mischief' the initiative was designed to prevent. [Citation.] Such a view conflicts with the basic principle of statutory interpretation, . . . that provisions of statutes are to be interpreted to effectuate the purpose of the law." [Citation omitted.] (*McLaughlin v. Santa Barbara Board of Education* (1993) 75 Cal App.4th 196, 223.) Hence, the Court of Appeal is incorrect.

1. Section 299, Subdivisions (a) and (b).

In support of its argument that the specific provisions of Proposition 69 control over the general provisions of Proposition 47 the Court of Appeal cites section 299, subdivisions (a) and (b)[6] of the DNA Act. Subdivision (b) describes the circumstances

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[6] Section 299 states:
(a) A person whose DNA profile has been included in the databank pursuant to this chapter shall have his or her DNA specimen and sample destroyed and searchable database profile expunged from the databank program pursuant to the procedures set forth in subdivision (b) if the person has no past or present offense or pending charge which qualifies that person for inclusion within the state's DNA and Forensic Identification Database and Databank Program and there otherwise is no legal basis for retaining the specimen or sample or searchable profile. [¶] (b) Pursuant to subdivision (a), a person who has no past or present qualifying offense, and for whom there otherwise is no legal basis for retaining the specimen or sample or searchable profile, may make a written request to have his or her specimen and sample destroyed and searchable database profile expunged from the databank program if any of the following apply: [¶] (1) Following arrest, no accusatory pleading has been filed within the applicable period allowed by law, charging the person with a qualifying offense as set forth in subdivision (a) of Section 296 or if the charges which served as the basis for including the DNA profile in the state's DNA and Forensic Identification Database and Databank Program have been dismissed prior to adjudication by a trier of fact; [¶] (2) The underlying conviction or disposition serving as the basis for including the DNA profile has been reversed and the case dismissed; [¶] (3) The person has been found factually innocent of the underlying offense pursuant to Section 851.8, or Section 781.5 of the Welfare and Institutions Code; or [¶] (4) The defendant has been found not guilty or the defendant has been acquitted of the underlying offense.

under which DNA may be expunged, but the Court observed that petitioner did not fall within any of the circumstances set forth. (Opinion of the Court, pp. 6-7.) While this is true, the circumstances resulting from the enactment of Proposition 47 did not exist at the time section 299, subdivision (b) was promulgated.

Justice Pollak observed:

> Section 299, subdivision (a) provides that a person has the right to have his or her DNA specimen expunged from the databank pursuant to the procedures specified in subdivision (b) "if the person has no past or present offense or pending charge which qualifies the person for inclusion within" the databank. The reclassification of minor's offense thus brings him or her within the scope of section 299, subdivision (a), even though the circumstances creating the right to expungement are not within those specified in subdivision (b). Both [*Alejandro N.* and *Coffey v. Superior* Court (2005) 129 Cal.App.4th 809] recognize that section 299 does not provide exclusive authority for removing a specimen from the databank that does not belong there. (*Alejandro, supra*, 238 Cal.App.4th at pp. 1228-1229; *Coffey, supra,* 129 Cal.App.4th at p. 817.) When section 299 was originally enacted, the alternatives specified in subdivision (b) were virtually the only possible scenarios by which a person's DNA sample could have been included in the databank even though the person was not convicted of a qualifying offense. By changing what formerly was a qualifying offense into a nonqualifying offense, Proposition 47 has created a new situation in which this is now possible. There is no good reason why a person whose offense, by virtue of Proposition 47, has been determined to be a nonqualifying offense, should not be entitled to expungement in the same manner as those within the categories specified in subdivision (b).

(In re C. B., supra, ___ Cal.App.4th ___ dis. opn. of Pollak, J., at p. 12.)

The Court in *Alejandro N.* also rejected the argument adopted by the Court of Appeal in petitioner's case that expungement was not available to reclassified misdemeanants under Proposition 47 because it is not listed as a ground for DNA expungement in section 299.