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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE C.B.. A Minor, **PEOPLE OF THE STATE OF CALIFORNIA,** Plaintiff and Respondent, v. **C.B.,** Defendant and Appellant	No. A146277 (Contra Costa Superior Court Case No. J1301073)

PETITION FOR REVIEW

Appeal from the Judgment of the Superior Court
of the State of California for the County of Contra Costa

THE HONORABLE THOMAS MADDOCK, JUDGE

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

Pursuant to California Rules of Court, rule 8.500, appellant C.B. respectfully petitions this Court to review the published 2-1 opinion of the Court of Appeal, First Appellate District, issued on August 30, 2016, affirming the judgment below. No petition for rehearing was filed. A copy of the Court of Appeal's opinion (hereafter "Opn.") is attached hereto as Appendix A. Review is sought in accordance with California Rules of

Court, rule 8.500, subdivision (b) to secure uniformity of decisions and settle an important question of law.

ISSUE PRESENTED FOR REVIEW

I. WHETHER, WHEN A JUVENILE HAS A FELONY RECLASSIFIED AS A MISDEMEANOR PURSUANT TO PENAL CODE SECTION 1170.18, THE STATUTE'S DIRECTIVE THAT THE RECLASSIFIED OFFENSE BE TREATED AS A MISDEMEANOR FOR ALL PURPOSES MANDATES THAT COURTS GRANT THE JUVENILE'S REQUEST THAT THE DNA SAMPLE COLLECTED PURSUANT TO THE ORIGINAL FELONY ADJUDICATION BE EXPUNGED FROM THE STATE'S DNA DATABASE.

II. WHETHER ASSEMBLY BILL 1492 WAS AN AMENDMENT TO PROPOSITION 47 SUCH THAT IT SHOULD NOT BE RETROACTIVELY APPLIED TO JUVENILES WHO PETITIONED THE COURT FOR EXPUNGEMENT PRIOR TO ITS ENACTMENT.

III. WHETHER, WHEN ENACTING ASSEMBLY BILL1492, WHICH COURTS HAVE INTERPRETED TO PROHIBIT EXPUNGEMENT OF A JUVENILE DEFENDANT'S DNA FOLLOWING RECLASSIFICATION OF AN OFFENSE FROM A FELONY TO A MISDEMEANOR, THE LEGISLATURE IMPERMISSIBLY AMENDED TO PROPOSITION 47, BECAUSE AB 1492 CONTRAVENED THE PURPOSE OF PROPOSITION 47.

Reasons for Granting Review

Review is necessary in this case to both secure uniformity of decision and to settle an important question of law. As outlined in greater detail below, appellate courts diagree on whether reclassification of an offense from a felony to a misdemeanor pursuant to the provisions of Proposition 47 entitles a juvenile

defendant to have his/her DNA expunged from the state's DNA database. (See: *In re Alejandro N.* (2015) 238 Cal.App.4th 1209 (juvenile entitled to DNA expungement); *In re J.C.* (2016) 246 Cal.App.4th 1462 (juvenile not entitled to expungement based in part on recent amendment to the expungement statute); *In re C.B.* (2016) 2 Cal.App.5th 1112, attached hereto (Majority holds that a juvenile not entitled to expungement but dissenting opinion states that he is and that the recent amendment to the expungement statute is an impemissible amendment to the initiative.)

In addition to the conflicts outlined above, the legislature amended the expungement statute starting January 1, 2016 via Assembly Bill 1492, and at least one appellate justice has held that amendment to be an impermissible amendment to a voter initiative. (See Dissenting Opinion, at 8-9.)

Thus, this area of law is unsettled, and lower courts, as well as litigants would benefit from guidance as to the interplay between Proposition 47's reclassification of offenses from felonies to misdemeanors and statutes governing DNA collection and expungement. In addition, the legislature needs to understand any applicable limits on its ability to amend a voter-enacted initiative in a manner that contravenes the purpose of the initiative. A grant of review by this court would provide that much needed guidance.

STATEMENT OF PROCEDURE

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

On October 15, 2013, appellant was made a ward of the court, placed on juvenile probation with no termination date, and was ordered into out of home placement. (I CT 10.) As part of his disposition, he was ordered to submit samples for DNA collection pursuant to Penal Code section 296.1. (I CT 12.) On August 17, 2015, the juvenile court vacated the wardship order and ordered appellant's probation terminated unsuccessfully. (RT 28; II CT 351.)

On July 6, 2015, appellant petitioned the juvenile court to reduce his felony grand theft adjudication to misdemeanor petty theft under Penal Code section 490.2,[1] recalculate his maximum confinement period, reduce fines imposed to be consistent with a misdemeanor adjudication, and expunge his DNA from the DNA database, all pursuant to Penal Code section 1170.18. [2] (RT 9; II CT 289-290; 297-303.) The juvenile court reduced the grand theft to a misdemeanor petty theft, a violation of Penal Code section 490.2.(RT10-11; II CT 294.) The court denied appellant's expungement request, incorporating by stipulation the argument and ruling found in *In re S.B.*, which had been

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[1] Because the amount of the items stolen was less than $950, appellant was eligible for relief under Proposition 47. Penal Code section 490.2 states: (a) Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.

[2] Section 1170.18, was implemented by Proposition 47 in 2014. Subdivision (a) of that section states: A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ("this act") had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act. (Pen. Code, § 1170.18.) The subsequent subsections lay out the procedures for filing that petition.

decided by that court on June 4, 2015. (RT 10; II CT 295, 338-339; Transcript from In Re S.B., 6/4/15 1-21.)

Appellant filed a timely notice of appeal on September 14, 2015. (II CT 360-361.) Following briefing by the parties, Division Three of the First District Court of Appeal issued a published opinion and dissent on August 30, 2016. The majority opinion affirmed the ruling of the trial court. (Opn at 17.) A true and correct copy of that opinion is attached hereto as Appendix A.

STATEMENT OF FACTS

The Appellate Court opinion provides an accurate description of the offense at issue in this case. (Opn. at 2, fn. 2.)

ARGUMENT

II. THE JUVENILE COURT ERRED IN FAILING TO ORDER APPELLANT'S DNA EXPUNGED FROM THE STATE'S DATABASE AFTER HIS FELONY OFFENSE WAS RECLASSIFIED AS A MISDEMEANOR.

Penal Code section 299, subdivision (a) unambiguously states that a person whose DNA profile has been included in the state's DNA databank shall have his DNA sample destroyed and expunged "if the person has no past or present offense or pending charge which qualifies that person for inclusion within the state's DNA [] Database and ... there otherwise is no legal basis for retaining the specimen or sample or searchable profile." (Pen. Code §299, subd. (a).) When the court granted appellant's request to reclassify his felony theft adjudication as a misdemeanor, he no longer had a past offense qualifying him for inclusion in the state's DNA database as a matter of law. He was therefore entitled to have his DNA profile expunged under the plain language of the statute. Moreover, removal of appellant's DNA sample from the state's database is consistent with the intent and purpose of the voters in enacting Proposition 47.

A. Applicable Law.

Multiple statutes are relevant to this court's analysis of the issues raised here. They are summarized below.

1. Proposition 47.

In November 2014, the voters enacted the Safe Neighborhoods and Schools Act, or Proposition 47. That act reclassified a number of non-violent, non-serious felony offenses – including appellant's offense of grand theft from a person of property valued at less than $950 - as misdemeanors. (Pen. Code § 490.2.) Anyone convicted of that same offense today would be guilty only of a misdemeanor.

People convicted of any of the reclassified offenses prior to passage of the act can petition the court to have their conviction reclassified as a misdemeanor, even after they have served any sentence or disposition associated with the original felony offense. (Pen. Code § 1170.18.) The mechanism for petitioning the court for reclassification is outlined in Penal Code section 1170.18. Subdivision (k) of section 1170.18 addresses the impact of reclassification. It provides:

> Any felony conviction that is recalled and resentenced...or designated as a misdemeanor...*shall be considered a misdemeanor for all purposes, except that* such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under [the firearm restriction statutes.]

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

Thus, the plain and unambiguous language of the act makes it clear that reclassified offenses are to be treated as misdemeanors for all purposes except firearm possession.

2. DNA Forensic Identification Act.

California hs enacted statutes, both legislatively and by inititiative, requiring that the following people submit to the collection of tissue samples for the purpose of identifying their DNA and retaining those DNA samples/identifications in a state held database:1) Any person convicted of/adjudicated for a felony; 2) any adult arrested for or charged with a felony and 3) any person required to register as a sex offender or arsonist as a result of a felony or misdemeanor conviction or adjudication. (Pen. Code §§ 295, 296.) Juveniles who are adjudicated wards of the court for misdemeanors are not required to submit DNA samples unless they are also required to register as a sex offender or arsonist. Nor are juveniles who are arrested for, or charged with felonies required to submit DNA samples, unless that arrest or charge results in an adjudication.

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

> A person whose DNA profile has been included in the databank pursuant to this chapter shall have his or her DNA specimen and sample destroyed and searchable database profile expunged from the databank program pursuant to the procedures set forth in subdivision (b) *if the person has no past or present offense or pending charge which qualifies the person for inclusion within the* state's DNA database and Forensic Identification Database and Databank Program and there otherwise is not legal basis for retaining the specimen or sample or searchable profile.

(Pen. Code § 299, subd. (a),[3] emphasis added.) Subdivision (b) of the statute lists the circumstances under which someone may have their DNA expunged, and does not list reclassification pursuant to Proposition 47 as one of those circumstances. (Pen. Code §299, subd. (b).) Multiple courts have, however, recognized that the list in subdivision (b) is not exhaustive. (See *In re Alejandro N.*, *supra,* 238 Cal.App.4th at 1228-1229; *Coffey v. Superior Court* (2005) 129 Cal.app.4th 809, 817.) As discussed in greater detail, *infra*, subdivision (f) of section 299 creates exceptions to categories of people eligible for expungement.

3. Assembly Bill 1492.

On November 2, 2004, voters approved Proposition 69 – the DNA Fingerprint Unsolved Crime and Innocence Protection Act. That act expanded the State's DNA collection and testing program to allow for the warrantless collection of DNA samples from adults arrested for any felony offense. (Pen. Code §§295 et seq., 296, subd. (a)(2)(C).) That provision of the act was struck down by the Court of Appeal in *People v. Buza (Buza)* (2014) 231 Cal.App. 4th 1446. *Buza* held that collection of DNA from felony arrestees prior to a probable cause determination was unconstitutional. (*Id.*) This Court granted review in *Buza* on February 18, 2015. A decision is still pending.

Assembly Bill 1492 (Legislative Session 2015-2016 effective January 1, 2016, amended portions of Penal Code sections 298 and 299 in an effort to comport with a

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

potential decision by the California Supreme Court upholding *Buza.* The Legislature stated its intent specifically, "It is the intent of the Legislature to limit the analysis of buccal swab samples and blood samples taken from felony arrestees for purposes of DNA analysis only to the extent required by the decision in People v. Buza, and to further the purposes of the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, Proposition 69, approved by the voters at the November 2, 2004, statewide general election. ..." (2015 Cal. Legis. Serv. Ch. 487 (AB 1492) §1.)

The Legislature included in AB 1492 alternative provisions that go into effect based upon what decision is rendered in *Buza*. The primary purpose of the bill was to change the California DNA act to provide for automatic expungement of DNA if the decision in *Buza* is upheld. (*Id.*, § 5, enacted only if *Buza* affirmed.)

Regardless of how *Buza*is decided, the bill also amended section 299, subdivision (f), by adding Penal Code section 1170.18 to its list of statutes that do not relieve a person of their duty to provide samples. As amended, that section now states,

> Notwithstanding any other law, including sections 17, 1170.18, 1203.4, and 1203.4(a), a judge is not authorized to relieve a person of the separate administrative duty to provide specimens, samples, or print impressions required by this chapter if a person has been found guilty or was adjudicated a ward of the court by a trier of fact of a qualifying offense as defined in subdivision (a) of Section 296, or was found not guilty by reason of insanity or pleads no contest to a qualifying offense as defined in subdivision (a) of Section 296.

(*Id*, §§4-5; amended section 299, subd. (f).)The legislature provided little explanation for this amendment to section 299(f) in the legislative history of Section 1492. (See *In re J.C.* (2016) 246 Cal.App.4th 1462, 1472.)

AB1492 did not amend the DNA expungement provisions of section 299, subdivisions (a) or (b), which specifically delineates the bases for expungement.

B. Appellate Courts Have Differed In Their Interpretation of the Scope of Relief Provided by Proposition 47 When Considering Requests for Removal of DNA From The State's DNA Database.

Multiple courts have recently considered requests for expungement of DNA following the reclassification of offenses under Proposition 47, and the decisions have not been uniform. A brief summary of those holdings is outlined here.

***People v. Coffey*(2005) 129 Cal.App.4th 809.**

In *People v. Coffey* (2005) 129 Cal.App.4th 809, an adult defendant was charged with a battery under Penal Code section 245(a), which was a wobbler offense that could be treated as a felony or misdemeanor. (*Id.* at 812.) Coffey pled guilty to a felony with the understanding that if he completed certain programs, the offense would be reduced to

a misdemeanor at sentencing, pursuant to Penal Code section 17, subdivision (b).[4] (*Id.*) After he successfully completed his requirements, Coffey was sentenced to a misdemeanor battery. (*Id.* at 813.) He then moved to have DNA samples that had been collected after his initial plea removed from the state's DNA database, claiming he had never been convicted of a felony. (*Id.* at 813-814.) The Court denied that request based on cases holding that wobblers were to be considered felonies until sentencing, as well as language in the DNA collection statute in place at the time of Coffey's plea. (*Id.* at 821-822; Former Penal Code § 296, subd. (a).) The court found further support for its holding in subsequent amendments to the DNA collection statutes which specifically stated that DNA was to be collected from anyone who plead to a qualifying offense, notwithstanding Penal Code section 17. (*Id.*; Pen. Code §§ 296, subd. (a), former 299, subd. (f).) Thus,

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[4] That statute states: (b) When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:(1) After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county under the provisions of subdivision (h) of 1170.(2) When the court, upon committing the defendant to the Division of Juvenile Justice, designates the offense to be a misdemeanor.(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.(4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.(5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

Coffey considered the effect of the reduction of a wobbler - which could be charged as a felony or misdemeanor at the discretion of the District Attorney - from a felony to a misdemeanor after plea but before sentencing, on whether the defendant had the right to have his DNA sample removed from the DNA Database.

The court reasoned that because reduction of a charged under Penal Code section 17 renders an offense a misdemeanor for all purposes thereafter, without any retroactive effect, the original order requiring Coffey to submit a DNA sample was proper and he was not entitled to have his DNA expunged from the state's DNA database. (*Coffey v. Superior Court*, *supra*, 129 Cal.App.4that 823.)

While *Coffey* did not consider the issue of reclassification of an offense under section 1170.18, it is relevant here because, as outlined below, subsequent opinions have analogized reclassification under 1170.18 to reduction of an offense under section 17, subdivision (b), and then relied on the opinion in *Coffey* to deny the request for DNA expungement.

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

In re Alejandro N. (2015) 238 Cal.App.4th 1209.[5] Division One of the Fourth District Court of Appeal considered whether Proposition 47's reclassification provisions were applicable to juveniles, and if so, whether a juvenile who successfully petitioned a court to reclassify his felony as a misdemeanor should also be able to have his DNA sample expunged from the state's DNA database pursuant to Penal Code section 299. The

[5] The Petition for Review of *Alejandro N.* was denied by this court on October 14, 2015 in Case No. D067445.

court held that the reclassification provisions of Proposition 47 were applicable to juveniles and the Attorney General has not contested that holding in any subsequent cases. (*Id.* at 1226.) The contested issue is DNA expungement.

The trial court in *Alejandro N.* had denied the appellant's request to expunge his DNA from the state's DNA database because reclassification of an offense under Proposition 47 was not one of the grounds for expungement listed in Penal Code section 299, subdivision (b). (*In re Alejandro N.*, *supra*, 238 Cal.App.4that 1226-1227.) The Court of Appeal was unpersuaded by that reasoning. The court looked at the language in section 299, subdivision (a) which "provides for DNA expungement when a person '*has no past or present offense or pending charge which qualifies* that person for inclusion within' the DNA databank." (*Id.* at 1229, emphasis in original.) The court read that language along with "section 1170.18's broad directive that except for firearm restrictions, redesignated offense are misdemeanors for all purposes" and reasoned that reclassified offenses "are therefore disqualified for DNA retention." (*Id.* 1229.)

At the time *Alejandro N.* was decided, subdivision (f) of section 299 did not list reclassification of an offenses under Penal Code section 1170.18 as one of the circumstances where DNA expungement was prohibited. The opinion in *Alejandro N.* relied in part on the absence of that language to distinguish the facts of that case from the facts in *Coffey.* (*In re Alejandro N.*, *supra*, 238 Cal.App.4that 1229-1230.) The court also, however, recognized the substantive difference between the reduction of wobblers under section 17(b) and reclassification of offenses under section 1170.18. The court stated that

reclassified offenses were "distinct from wobbler offenses" in that, unlike wobblers, which remain chargeable as felonies or misdemeanors, "the offenses now classified as misdemeanors for qualifying offenders under Proposition 47 have permanently been removed from the felony category and are no longer subject to DNA collection." (*Id.* at 1230.)

***In re J.C.* (2016) 246 Cal.App.4th 1462.**

In *In re J.C.* (2016) 246 Cal.App.4th 1462 ("*J.C.*"), Division One of the First District Court of Appeal considered the effect of the AB 1492's amendment to section 299, subdivision (f) when considering the appellant's request to have his DNA expunged following reclassification of his offense under 1170.18. The court held that the addition of section 1170.18 to section 299(f)'s list of statutory schemes where DNA expungement was prohibited meant "the Legislature has prohibited the expungement of a defendant's DNA record when his or her felony offense is reduced to a misdemeanor pursuant to section 1170.18." (*Id.* at 1475.)

The court in *J.C.* further held that the amendment to section 299 (f) clarified, rather than changed, the effect of section 1170.18 and the statute could therefore be applied retroactively to the appellant's request for expungement, which predated the enactment of the bill. (*J.C.* at 1475-1482.)

Finally, the court summarily denied the appellant's argument, that AB 1492 was not a proper amendment to Proposition 47 because by its express terms, Proposition 47 can only be amended in a manner consistent with its intent. (*J.C.* at 1482, citations

omitted.) The court opined that because Proposition 47 "neither requires nor prohibits the expungement of DNA records, Bill No. 1492 does not, as so defined, amend the proposition." (*Id.* at 1482.) *J.C.* has been followed by multiple unpublished opinions in Divisions One and Five of the First District. [6]

Division Three has also agreed with the reasoning of *J.C.* in this published case, but the opinion here includes a well reasoned dissent.

The Appellate Court Opinion in This Case.

In the case at bar, the majority opinion from Division Three rejects appellant's argument that the language in section 1170.18 stating that reclassified misdemeanors "shall be considered misdemeanors for all purposes" except for firearms enhancements means that heno longer has an offense that obligates him to provide a DNA sample, and expungement is proper. (Opn. at 8; See Pen. Code §§1170.18, subd. (k) and 299, subd. (a).) The majority asserts that because Proposition 47 did not mention DNA collection, and reclassification of an offense under Proposition 47 is not one of the listed grounds for DNA expungement in section 299, subdivision (b), appellant is not entitled to expungment. (Opn. at 8-9.)[7]

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[6] See e.g. *In re R.W.* 2016 WL 3919191 July 18, 2016, *In re X.H.* 2016 WL 3547777 (Division 5); *In re Randy W.* 2016 WL 3919291, *In re A.C.* (2016 WL 3950682 (Division 1).

[7] The court also points out that some misdemeanor convictions require submission of DNA samples and therefore reclassification of an offense from a felony to a misdemeanor in and unto itself does not trigger the right to expungement. (Opn. 8-9.) Appellant does not disagree. But, Appellant has not been found guilty of any of the misdemeanors that require submission of DNA samples. If he had, no appeal would have been taken on this issue.

The majority also relied on the opinions in *Coffey* and *J.C.* and analogized reclassification of offenses under section 1170.18 to reduction of wobbler offenses to misdemeanors pursuant to section 17, subdivision (b). (Opn. at 9-11.) The majority argued that, as with reduction of wobbler offenses charged as felonies, reclassification of offenses under section 1170.18 should be given prospective effect only for the purposes of analyzing appellant's right to request that his DNA be expunged from the state's database. (Opn. at 11-12.)

Finally, the court summarily rejected appellant's argument that AB 1492 is an impermissible amendment to Proposition 47. (Opn. at 16.) The majority states that the amendment to section 299, subdivision (f) adding section 1170.18 to the list of statutory schemes where defendants are ineligible for DNA expungement did not amend, or change the effect of, the language in section 1170.18 (k) mandating that reclassified offenses be treated as misdemeanors for all purposes. (Opn. at 16.) And, on that basis, the amendment may be applied to appellant's case even though the amendment was enacted after the order was made, and appeal was taken, in appellant's case.

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

C. The Juvenile Court Erred In Failing to Order Appellant's DNA Expunged from the State's DNA Database After His Felony Offense Was Reclassified As A Misdemeanor.

Penal Code section 299, subdivision (a) unambiguously states that a person whose DNA profile has been included in the state's DNA databank shall have his DNA sampled

destroyed and expunged "if the person has no past or present offense or pending charge which qualifies that person for inclusion within the state's DNA [] Database and ... there otherwise is no legal basis for retaining the specimen or sample or searchable profile." (Pen. Code §299, subd. (a).) When the trial court granted appellant's request to reclassify his felony theft adjudication as a misdemeanor, he no longer had a past offense qualifying him for inclusion in the state's DNA database as a matter of law. He was therefore entitled to have his DNA profile expunged under section 1170.18(k). Moreover, removal of appellant's DNA sample from the state's database is consistent with the intent and purpose of the voters in enacting Proposition 47.

1. Proposition 47's Broad Directive Requires Reclassified Offenses to be Treated as Misdemeanors For All Purposes, Including DNA Expungement.

Because appellant is now a person who has been adjudicated for a misdemeanor, not a felony, there is no legal basis for the collection of his DNA. Therefore, the state has no legal justification for retaining his DNA sample in its database.

As outlined in the dissenting opinion in this case, and succinctly stated in *Alejandro N.*, in enacting Proposition 47, the voters intended that reclassified offenses be treated as misdemeanors for all purposes. The court in *Alejandro N.* stated that section 1170.18, subdivision (k)

> reflects the voters [intent that] the redesignated misdemeanor offense should be treated exactly like any other misdemeanor offense, except for firearm restrictions. Because the statute explicitly addresses what, if any, exceptions should be afforded to the otherwise all-encompassing misdemeanor treatment of the offense,

> and because only the firearm restriction was included as an exception, the enactors effectively directed the courts not to carve out other exceptions to the misdemeanor treatment of the reclassified offense absent some reasoned statutory or constitutional basis for doing so. [¶] At the time they enacted section 1170.18, the voters were presumed to have known of the existing statute authorizing DNA collection for felony, but not misdemeanor, offenders [citation], and yet they did not include DNA collection as an exception to the misdemeanor treatment of the offense. Thus, absent an intervening enactment providing otherwise, future offenders who commit a Proposition 47 reclassified misdemeanor offense will not be subject to DNA collection based solely on that offense...[T]he voters did not intend that a reclassified misdemeanor offense be deemed a felony for purposes of retention of DNA samples.

(*Alejandro N.* at p. 1228, 189 Cal.Rptr.3d 907.) As noted in the dissent, "If Alejandro was correctly decided and remains good law, minor is clearly entitled to expungement." (Dissent at 3.)

Proposition 47 unequivocally mandates that reclassified offenses for those defendants be considered misdemeanors for all purposes except for prohibitions on firearm possession. (Pen. Code §1170.18, subd. (k).) The court's denial of appellant's request to have his DNA removed from the state's DNA database contravenes that purpose and intent.

2. The Juvenile Court Erred in Denying DNA Expungement for Appellant Because Reclassification of an offense under Proposition 47 Is Not Equivalent to Reduction of a Felony to a misdemeanor Under Penal Code Section 17.

The majority opinion in this case reiterates the lower court's ruling that reclassification of an offense under section 1170.18 should be treated exactly like a reduction of a felony to a misdemeanor under Penal Code section 17, subdivision (b) for