In the Supreme Court of the State of California

In re C.H., a Person Coming Under the Juvenile Court Law.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **C.H.,** Defendant and Appellant.

Case No. S237762

First Appellate District, Division Three, Case No. A146120
Contra Costa County Superior Court, Case No. J1100679
The Honorable Thomas M. Maddock, Judge

RESPONDENT'S BRIEF ON THE MERITS

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ISSUES

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

2. Whether the retention of an offender's DNA identification sample in the state's database after the offender has a felony adjudication reduced to a misdemeanor under Proposition 47 violates equal protection guarantees.

INTRODUCTION

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

Proposition 47, the Safe Neighborhoods and Schools Act, passed in

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

2014, reduces certain nonviolent felonies to misdemeanors.[2] It also provides a postconviction procedure to enable qualifying offenders to have a prior felony conviction resentenced as a "misdemeanor for all purposes." (§ 1170.18.) Proposition 47 is silent about expungement of DNA identification samples, which are neither punishment nor part of any sentencing choice.

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

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

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

DNA sample expungement based on Proposition 47 is a correct interpretation of law.

STATEMENT

A. Court Proceedings

In 2011, appellant stole some pants from a store and kicked a store loss prevention officer in the forehead. (CT 31-33.) Later, in juvenile court, appellant admitted to committing felony grand theft (§ 487, subd. (c)) in exchange for the dismissal of allegations of second degree robbery (§ 211) and assault by force likely to produce great bodily injury (§ 245, subd. (a)(1)). Appellant was adjudged a ward of the court. (CT 3, 22-33, 100-105, 108; 1RT 2.)

In June 2015, appellant petitioned under section 1170.18 to reduce the grand theft conviction to a misdemeanor. The court granted the petition. (CT 3, 22-27, 31-33, 100-105, 108; 1RT 2.) The court, however, denied appellant's request under Proposition 47 to expunge his DNA sample collected after his felony adjudication. (CT 26, 100-107; see §§ 295, subd. (b)(2), 296, subd. (a)(1), 296.1, subd. (a)(2).)[3] The court ruled: "Prop 47 does not mention DNA" and does not "embod[y] a change to the DNA

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[3] The parties stipulated that the briefs and argument, and the court's ruling, on the DNA expungement issue in *In re S.B.*, Contra Costa County case No. J13-01068, be incorporated as part of the record in this case. (CT 105; 1RT 4.) The same ruling applied in both this case and *In re C.B.* (2016) 2 Cal.App.5th 1112, review granted Nov. 9, 2016, S237801. The reporter's transcript from *S.B.* is designated "2RT." A defense motion for reconsideration of the court's DNA ruling in *In re Lamont P.*, Contra Costa County case No. J12-00947, filed on August 25, 2015, is also part of the record in this case. (1RT 8.) The reporter's transcript in *Lamont P.* is designated "3RT."

rules."[4] (2RT 24.) The court said, "[W]hat we are doing here today is the equivalent of a Section 17 [sentence reduction]," which is specifically referenced in the DNA Act. (2RT 24.) It cited *Coffey v. Superior Court* (2005) 129 Cal.App.4th 809, which held that reclassification of a felony to a "misdemeanor for all purposes" under section 17 does not authorize DNA database sample expungement pursuant to section 299, subdivision (f). (*Id.* at pp. 821-823.) The court recognized that the collection and retention of DNA samples is ordered as an "administrative" requirement akin to fingerprinting, rather than as punishment for the crime. (2RT 25; see *Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1508-1510 [upholding DNA collection from misdemeanant sex offender registrants regardless of conviction date, noting the DNA Act involves an administrative identification procedure like fingerprinting and is not punishment].) The court later declined to reconsider its ruling, finding unpersuasive *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, which held a Proposition 47 sentence reduction also compels DNA sample expungement. (CT 117-121; 1RT 8-9; 3RT 9-10.)

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[4] The "DNA rules" in Proposition 69 include section 299, subdivision (f), which when enacted read: "*Notwithstanding any other provision of law*, including Sections 17, 1203.4, and 1203.4a, a judge is not authorized to relieve a person of the separate administrative duty to provide specimens, samples, or print impressions required by this chapter if a person has been found guilty or was adjudicated a ward of the court by a trier of fact of a qualifying offense as defined in subdivision (a) of Section 296, or was found not guilty by reason of insanity or pleads no contest to a qualifying offense as defined in subdivision (a) of Section 296." (Italics added.) The three statutes cited in section 299, subdivision (f)'s nonexhaustive list of circumstances that prohibit DNA sample expungement encompass reduction of felonies to misdemeanors, dismissal of charges after a guilty verdict, and release from penalties and disabilities attending a former conviction.

The Court of Appeal affirmed. (*In re C.H.* (2016) 2 Cal.App.5th 1139, 1148-1149, review granted Nov. 16, 2016, S237762.)[5] The court concluded that "Proposition 47's directive to treat a redesignated offense as a misdemeanor 'for all purposes' employs words that have a well-defined meaning and have never applied to alter a crime's original status." (*Id.* at pp. 1143-1144.) Under the DNA Act's section 299, subdivision (f), the court held, "offenders may not be relieved of the obligation to provide a sample because the qualifying charge has been reduced under some other law." (*Id.* at p. 1148.) The court said the statute "at all times specified it is to be given effect 'notwithstanding any other law,' [so] it is unnecessary to consider whether th[e] recent amendment to Proposition 69 [in AB 1492] is a change or clarification of existing law, or is somehow impermissibly retroactive in operation." (*Id.* at p. 1148, fn. 4.) The court recognized that the "provisions of Proposition 47 can be harmonized with our state's DNA collection law, Proposition 69, giving effect to each measure," including each measure's enhancement of public safety. (*Id.* at p. 1144.) It added that "if there is any fatal conflict between the text of the two measures, Proposition 69 controls because it is the more specific law." (*Ibid.*)

The court rejected appellant's further claim that the retention of his DNA and profile in the state database following the passage of Proposition 47 violates his right to equal protection. (*C.H.*, *supra*, 2 Cal.App.5th at pp. 1151-1152.) The court cited several purposes of the DNA Act that rationally justify retention of DNA profiles from defendants whose offenses

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

no longer qualify for DNA collection after Proposition 47. (*Ibid.*) These include "preserving the integrity and vitality of the state's DNA database" used for identifying offenders of violent crime as a result of a DNA match with samples taken from nonviolent offenders, protecting public safety, and exonerating persons wrongly suspected or accused of crime. (*Ibid.*)

This Court granted review on November 16, 2016.[6]

B. Legal Background

1. Proposition 69

California's DNA Act is the product of both legislation and ballot initiative. The Legislature enacted the DNA Act in 1998, by amending a 1983 statute, and authorizing DNA sample collection for identification purposes from an expanded class of convicted violent felony offenders.[7] On November 2, 2004, California voters, weighing the privacy of criminal offenders and the compelling public interest in safer communities, overwhelmingly passed Proposition 69, the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, amending and clarifying the forensic DNA database law.[8] Voters saw Proposition 69 as the blueprint for a

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[6] The Court granted review in *In re C.B.* (2016) 2 Cal.App.5th 1112, on November 9, 2016 (S237801), on similar claims. Respondent's answering briefs in both cases contain essentially the same arguments and analysis on overlapping issues.

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

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

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criminal justice system anchored in the best "scientific technology" for "accurately and expeditiously" identifying criminal offenders and exonerating the innocent within the context of a circumscribed statutory program. (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. 69, § II, Findings and Declarations, at p. 135) (hereafter "Prop. 69 Findings"); § 295.1 [California Department of Justice ("DOJ") shall perform DNA analysis "only for identification purposes"]; § 299.5 [setting forth confidentiality and privacy protections].) To this end, voters established DNA collection as an "administrative requirement" equivalent to fingerprinting—part of the routine processing of an offender who has come under the jurisdiction of the criminal justice system. (§ 295, subd. (d) ["Like the collection of fingerprints, the collection of DNA samples, pursuant to this chapter is an administrative requirement to assist in the accurate identification of criminal offenders"]; *Good v. Superior Court*, *supra*, 158 Cal.App.4th at p. 1508 [DNA sample collection is "not punitive . . . but is confined to a simple administrative identifying procedure akin to fingerprinting"]; see also *Maryland v. King* (2013) 569 U.S. __ [133 S.Ct. 1958, 1972, 1976] [DNA is an identification metric and the only difference between fingerprints, photographs, and DNA collected at booking is "the unparalleled accuracy DNA provides"].) This Court has acknowledged the compelling state interest in accurately identifying criminal offenders. (See *People v. Robinson*, *supra*, 47 Cal.4th at p. 1121.)

Recognizing that the "majority of violent criminals have non-violent criminal prior convictions" (Prop. 69 Findings, *supra*, § II), voters in Proposition 69 also expanded the collection of forensic identification DNA

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samples from convicted offenders]; *Haskell v. Brown* (N.D. Cal. 2009) 677 F. Supp.2d 1187, 1190-1191, 1203.)

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

At the same time that Proposition 69 expanded the list of qualifying offenses, it replaced blood draws with less intrusive buccal swabs for sample collection, imposed more stringent use and disclosure restrictions, and clarified the limited circumstances warranting sample expungement (i.e., destruction of the sample and deletion of the searchable DNA identification profile). (§§ 299, subd. (e), 299.5, subd. (h); see *People v. Travis* (2006) 139 Cal.App.4th 1271, 1286-1287; *Alfaro*, *supra*, 98 Cal.App.4th at pp. 504-505, 508.) By statute, the DOJ DNA Laboratory is

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

"responsible for the management and administration" of the state's DNA database program (§ 295, subd. (g)) and cannot expunge DNA identification samples from convicted and adjudicated offenders who lawfully qualified for collection, except when specified by law (§ 299). Section 299, subdivision (b) authorizes expungement of a DNA database sample from convicted or adjudicated offenders only when a conviction or disposition is "reversed and the case dismissed," when a person is "factually innocent," or when a person has been "acquitted," and then only when no other legal basis for sample retention exists.

Proposition 69 also clarified that broad categories of criminals do not qualify for expungement despite a change in their offender status. Sex and arson offenders who have their duty to register terminated do not qualify to have their DNA samples expunged from the database. (§ 299, subd. (e).) Proposition 69 also precludes courts from ordering expungement of a sample from an offender who "has been found guilty or was adjudicated a ward of the court . . . of a qualifying offense," "[n]otwithstanding any other provision of law, including Sections 17, 1203.4, and 1203.4a" that may enable a change in sentence or consequences of conviction. (§ 299, subd. (f).) Therefore, sample expungement is barred even if a qualifying offender's felony conviction is reduced to a misdemeanor "for all purposes" (§ 17) or later dismissed with "release from all penalties and disabilities" (§§ 1203.4, 1203.4a). That DNA sample retention is broadly permitted when a felony is reduced to a misdemeanor is consistent with voters' intent to expand the use of DNA to accurately identify recidivist criminal offenders and exonerate the innocent. (See *People v. Robinson, supra,* 47 Cal.4th at p. 1123, fn. 19 [recognizing state interest in accurate DNA identification information from criminals convicted of offenses beyond those listed in the DNA Act as qualifying offenses]; cf. *Loder v. Municipal Court* (1976) 17 Cal.3d 859, 864-865 [fingerprint and photograph

information taken at booking may be retained and used in identifying arrestee even where an arrest is unlawful].)

2. Proposition 47—the Safe Neighborhoods and Schools Act

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

Under section 1170.18, subdivision (a), offenders who have not yet completed their sentences for enumerated theft and drug-related felonies may petition for recall of their sentence and request resentencing of their offenses as misdemeanors. Prior to resentencing, the court must determine whether the petitioner poses an "unreasonable risk of danger to public safety," to commit a violent offense based upon the petitioner's criminal history, rehabilitation while incarcerated, and other factors the court deems relevant. (§ 1170.18, subd. (b).) Under section 1170.18, subdivision (d) a person who benefits from Proposition 47 "by receiving a reduced sentence and given credit for time served" under subdivision (b) is "subject to a one-year parole period after completion of the reduced sentence, subject to the court's discretion to release the person from that parole." (*Morales*, *supra*, 63 Cal.4th at p. 403; Prop. 47 Ballot Pamp., *supra*, at pp. 34-37 [analysis of Legis. Analyst].)

Section 1170.18 subdivision (f) permits an individual who has completed the sentence for a qualifying nonviolent felony to apply for a

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

"One of Proposition 47's primary purposes is to reduce the number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative." (*Harris v. Superior Court* (2016) 1 Cal.5th 984, 992; accord, *People v. Romanowski* (2017) 2 Cal.5th 903, ___ [391 P.3d 633, 635].) The initiative's ballot title page stated that Proposition 47 "[r]equires misdemeanor sentence instead of felony for certain drug and property offenses," and that it would potentially save the state and counties "hundreds of millions of dollars annually." (Prop. 47 Ballot Pamp., *supra*, at p. 34 [official title and summary].) The ballot arguments in favor of Proposition 47 likewise informed voters that "Proposition 47 is sensible" and that it "focuses law enforcement dollars on violent and serious crime while providing new funding for education and crime prevention programs that will make us all safer." (Prop. 47 Ballot Pamp., *supra*, at p. 38