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.**	S237801

First District Court of Appeal Case No. A146277
Contra Costa County Superior Court Case No. J1301073
The Honorable Thomas Maddock, Judge

REPLY BRIEF ON THE MERITS

Anne Mania
Law Office of Anne Mania
1946 Embarcadero
Oakland, CA 94606
510 479 1818
manialaw@sbcglobal.net

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INTRODUCTION

When the voters enacted Proposition 47, they mandated that a select number of former felony offenses, including appellant's theft offense of property worth less than $950, "shall be considered a misdemeanor for all purposes except that such resentencing shall not permit that person to [own a firearm or be avoid being punished for being a felon in possession of a firearm]." (Pen. Code § 1170.18, subd. (k).) And, the voters created a mechanism whereby people with past convictions for reclassified offenses can make those convictions misdemeanors consistent with current law. (Pen. Code § 1170.18, subd. (a), (b), (f) & (g).) Petitioner successfully petitioned to have his offense reclassified and he is now asking that the court give full meaning to that order by granting his request to have his DNA expunged from the state's DNA database.

ARGUMENT

SUMMARY OF APPELLANT'S CONTENTIONS

Appellant contends that the juvenile court erred when it denied his request to have his DNA expunged from the state's DNA database following the reclassification of his adjudicated offense to misdemeanor petty theft pursuant to Proposition 47. The enactors of Proposition 47 mandated that reclassified offenses be considered misdemeanors for all purposes but gun possession. In identifying that one exception to misdemeanor treatment of reclassified offenses, the voters signaled their intent to preclude all other exceptions to that misdemeanor treatment

of reclassified offenses. The denial of appellant's request for DNA expungement creates a second, unauthorized exception to the misdemeanor treatment of his reclassified offense.

Appellant further contends that reclassification of an offense as a misdemeanor pursuant to Penal Code section 1170.18 is not analogous to the discretionary reduction of a felony to a misdemeanor under Penal Code section 17. That is because offenses reclassified as misdemeanors by Proposition 47 are now misdemeanors as a matter of law – unlike the wobbler offenses to which section 17 is addressed. The electorate has statutorily removed those offenses from the category of crimes requiring DNA submission. Because of the differences between the two statues, the case law and analysis governing expungement requests under Penal Code section 17 should not govern expungement requests under Proposition 47.

The established law in place at the time appellant requested the DNA expungement, as articulated in *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209 made it clear that appellant, whose offense had been reclassified to a misdemeanor, was entitled to expungement of his DNA sample. Because AB 1492 changed that law, AB 1492's subsequent amendments to Penal Code section 299, subdivision (f) are not applicable to appellant's case. In addition, AB 1492 was an impermissible amendment to Proposition 47 because it countervailed, rather than furthered the purposes of the statute.

A grant of appellant's request for expungement is consistent with the public

policy behind the DNA collection statutes and Proposition 47. The legislature has made it clear that people arrested for and/or convicted of misdemeanors do not have to submit DNA samples to the state's database. Proposition 47, in turn, statutorily reclassified a number of non-violent drug and theft offenses as misdemeanors, bringing those offenses into the class of crimes that do not require submission of DNA samples. Granting appellant's request for expungement is thus consistent with the public policy behind both Proposition 47 and Proposition 69 and harmonizes the two statues. Requiring expungement is also consistent with California's strong public policy of privacy protections.

SUMMARY OF RESPONDENT'S CONTENTIONS

Respondent contends that people who have their offenses reclassified under Proposition 47 are not entitled to DNA expungement because Penal Code section 299, subdivision (f) bars that expungement. Respondent argues that it is the original conviction/adjudication that is determinative as to a person's right to DNA expungement and if that original conviction/adjudication was for an offense requiring DNA submission, later reclassification of that offense does not entitle a person to expungement. Respondent also asserts that reclassification does not fall within the circumstances allowing for expungement in Penal Code section 299, subdivision (b), that list is exclusive, and that is another bar to expungement.

According to respondent, section 1170.18's mandate that a reclassified offense "shall be considered a misdemeanor for all purposes except" for permitting gun possession should be interpreted identically to requests for

expungement under Penal Code section 17, and DNA is retained following resentencing under section 17.

Respondent asserts AB 1492's amendment to Penal Code section 299 is applicable to appellant's case because it clarified, rather than changed, existing law. For that same reason, it was not inconsistent with the intent behind Proposition 47.

Finally, Respondent argues that prohibiting expungement is consistent with the public policy seeking to maximize opportunities to obtain and retain DNA samples from people involved in the criminal justice system.

I. BECAUSE THE PLAIN LANGUAGE OF PENAL CODE SECTION 1170.18 MANDATES THAT RECLASSIFIED OFFENSES BE CONSIDERED MISDEMEANORS FOR ALL PURPOSES EXCEPT FOR RESTRICTIONS ON THE USE AND POSSESSION OF FIREARMS, AND BECAUSE JUVENILES ADJUDICATED AS DELINQUENTS FOR MISDEMEANORS OTHER THAN SEX AND ARSON OFFENSES ARE NOT REQUIRED TO PROVIDE DNA SAMPLES, APPELLANT WAS ENTITLED TO HAVE HIS DNA EXPUNGED WHEN HIS OFFENSE WAS RECLASSIFIED AS A MISDEMEANOR.

Proposition 69, on which respondent relies throughout her brief, states that people convicted of, and adjudicated for, almost all misdemeanors should *not* be required to submit DNA samples to the state's DNA databank. (Pen. Code § 296, subd. (a)(1) & (a)(3).) The electorate specifically singled out only two classes of misdemeanor convictions that require DNA submission - sex offense and arson registrants. (Pen. Code § 296, subd. (a)(3).) Thirteen years after Proposition 69

was passed, people convicted of the overwhelming majority of misdemeanors still do not have to submit their DNA to the state's databank.

In enacting Proposition 47, the electorate decided that a specific set of non-violent, non-serious theft and drug related offenses should be statutorily converted from felonies (or wobblers) to misdemeanors. (Proposition 47 §§ 3, subd. (3) 5-14, Voter Information Guide, Gen. Elec. (Nov. 4, 2014), pp. 70-73.) And, the electorate created a mechanism by which people *previously* convicted of those particular offenses could convert their past convictions from felonies to misdemeanors. (Pen. Code § 1170.18, subd. (a), (b), (f) & (g).) Proposition 47 thus mandated that certain offenses move from the category of offenses requiring DNA submission (felonies) to the category of offenses not requiring DNA submission (misdemeanors). And, the Proposition enabled people both serving current sentences and those who had already completed their sentences prior to passage of the act to ask to have their offenses reclassified as misdemeanors, not requiring DNA submission. Appellant's theft offense is now a misdemeanor as a matter of law under this statutory scheme. His offense therefore falls within the category of offenses not requiring DNA submission. He is therefore entitled to have his DNA expunged.

A. RESPONDENT MISINTERPRETS THE APPLICATION AND EFFECT OF PROPOSITION 47.

Respondent improperly narrows the scope of Proposition 47's reclassification provisions. Respondent's arguments are predicated on the assertion that reclassification of an offense under Proposition 47 is nothing more than a prospective re-sentencing statute, akin to Penal Code section 17.[1] (Respondent's Brief on the Merits ("RBM") 36-42.) In so asserting, respondent misinterprets the mandatory and categorical nature of the provisions of Section 1170.18.

If a person meets the criteria for reclassification laid out in Proposition 47, that reclassification is mandatory. (Pen. Code §§ 1170.18, subd. (b) ["If the petitioner satisfied the criteria in subdivision (a) the petitioner's felony sentence *shall be* recalled and the petitioner resentenced to a misdemeanor" absent a finding that resentencing would pose an unreasonable risk to public safety] & subd. (g) [If the application satisfies the criteria in subdivision (f), the court *shall* designate the felony offense or offenses as a misdemeanor] emphasis added.) And, reclassification is available regardless of when the original conviction took place. (Pen. Code § 1170.18, subd. (a), (b), (f), (g).) Appellant met the criteria for reclassification and his application was granted as required by law and without objection from the people. (RT 9-11; CT 289-290; Pen. Code §1170.18, subd. (b)

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

& (g).) [2]

Despite the mandatory language in section 1170.18 and the categorical and retroactive reclassification of offenses under Proposition 47, respondent asserts that Proposition 47 should be viewed as a discretionary resentencing statute akin to Penal Code section 17. (RBM 36-44.) It is not. As stated in *In re Alejandro N.* (2105) 238 Cal.App.4th 1209, 1224-1226 "Proposition 47 changes "the *very definition of the offenses themselves*." (*Id.*, emphasis in original.)

Section 17, subdivision (b), in contrast, addresses the discretionary reduction of "wobbler" offenses - offenses that can be punished either as a misdemeanor or a felony – to misdemeanors. (Pen. Code § 17, subd. (b).) Section 17 lists a number of circumstances where a court can sentence a wobbler offense as a misdemeanor. (Pen. Code § 17, subd. (b)(1)-(b)(5).) None of those circumstances, however, change the nature of the underlying offense as a matter of law. The offenses themselves remain punishable either as felonies or misdemeanors today.

Offenses reclassified under Proposition 47, in contrast, are indisputably misdemeanors today. And, as discussed above, reclassification for eligible

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[2] It is unclear from the record which provision the court relied on in this matter. Appellant did not cite a particular subdivision of section 1170.18 in his request for reclassification (II CT 289-290), and no opposition was filed to that request. At the hearing, there was no discussion of future dangerousness and the District Attorney acknowledged "The reduction of the 487 subsection (c)felony to the misdemeanor 490.2 appears appropriate because the value of the stolen property appears to be under 950. The People agree that the total custody time for that charged should be reduced to six months[.]" (See RT 9-11.)

offenders who have already completed sentences imposed for former felonies is mandatory. (Pen. Code §1170.18, subd. (f) & (g).) Thus, Proposition 47 is not simply a resentencing statutory scheme as respondent asserts; it is a statutory scheme which changed the nature of certain felonies to misdemeanors. (See Dissent at 6-7 [discussing why reclassification of an offense under section 1170.18 is not analogous to reduction of charges under section 17.]; OBM 33-37.)

Respondent also misconstrues the scope of Proposition 47 as prospective only. If Proposition 47 reclassification were, as respondent contends, simply a resentencing statute intended to apply prospectively, subdivisions (f) and (g) – which enable people who have completed their sentences to have their offenses reclassified as misdemeanors - would not be included in the statute. Inclusion of those subdivisions demonstrates the voters' intent to have section 1170.18 apply retroactively and prospectively. The only purpose for including those retroactive provisions is to relieve those with reclassified offenses of the liabilities associated with having a past felony conviction, including having a DNA sample in the state's DNA database. (See OBM at 36; *People v. Evans* (2016) 6 Cal.App.5th 894, 900-901, review granted 2/2/17 S239635.)

Finally, respondent asserts that proper interpretation of provisions codified by Proposition 69 requires that appellant's request for DNA expungement be denied. That assertion is incorrect. Proposition 69, a voter initiative passed ten years before Proposition 47, added to the categories of persons required to provide their DNA to the state (Pen. Code § 296) and added provisions permitting

expungement of DNA – the destruction of DNA samples and the removal of DNA identifying profiles from the state database. (Pen. Code § 299) Proposition 69 ensured that expungement is available to individuals who have previously and legally submitted their DNA to the state, but who no longer have a qualifying conviction or adjudication.(Pen. Code § 299, subd. (a) & (b).) Appellant now falls within that category. Therefore, granting appellant's request to have his DNA expunged can, and should be, read as entirely consistent with the intent of Proposition 69.

Respondent repeatedly emphasizes that Proposition 69 reflected a recognition that non-violent offenders may have committed violent crimes yielding DNA evidence in arguing that DNA expungement is barred. (See RBM at 45-46.) Respondent also, however, repeatedly ignores the fact that Proposition 69 did not require collection of DNA from persons convicted or adjudicated of almost all misdemeanor offenses. The voters who enacted Proposition 69 thus did not view misdemeanor offenders as raising significant public safety concerns. Appellant now stands adjudicated of a misdemeanor offense and falls into the category of offenses deemed not to raise a public safety concern under Proposition 69.

Respondent's assertion that granting appellant's request for DNA expungement will somehow endanger California's crime fighting abilities also misunderstands the scope of the statute. There is only a small subset of people who are eligible for DNA expungment under Proposition 47. That is because

adults arrested for felonies are required to submit DNA samples upon arrest. (Pen. Code § 296, subd. (a)(2)(C).) That means that the only people eligible for expungement will be juveniles who were adjudicated for one of the reclassified offense before enactment of Proposition 47 and who have no prior or subsequent felony adjudications, or subsequent adult arrests for felonies.[3] Granting expungement requests for that small subset of cases will not endanger California's crime fighting capabilities, but it will ensure that reclassified offenses are treated "as misdemeanors for all purposes," consistent with the intent of the voters in enacting Proposition 47.

B. PRINCIPLES OF STATUTORY CONTSTRUCTION SUPPORT APPELLANT'S INTERPRETATION OF PENAL CODE SECTION 1170.18, SUBDIVISION (K).

The parties agree that the issues in this case involve statutory construction and that this is a question of law, reviewed de novo. As outlined in the Opening Brief on the Merits (OBM), courts look first to the plain language of a statute as "the most reliable indicator of legislative intent" and where language is clear, there is no need for further statutory construction. (*People v. Gardley* (1996) 14 Cal.4th 605, 621.) The plain language of section 1170.18, subdivision (k) states that a reclassified offense "shall be considered a misdemeanors for all purposes" except

[3] Another class of people possibly eligible for expungement would be adults who were arrested for a misdemeanor but convicted of one of the reclassified offenses as a felony. That seems an unlikely scenario.

for one. That language reflects the voters' intent that "the redesignated misdemeanor offenses should be treated exactly like any other misdemeanor offense, except for firearm restrictions." (*Alejandro N. supra*, 238 Cal.App.4th at 1227.)

Indeed, the enactors of Proposition 47 identified and expressly stated only one exception (firearm restrictions) to the "misdemeanor for all purposes" treatment of reclassified offenses in section 1170.18, and in so doing, precluded the addition of others ("expression of some things in a statute necessarily means the exclusion of other things not expressed" [*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852, citations omitted]; see also *In re Alejandro N. supra*, 238 Cal.App 4th 1227; Dissent at 3.)

Respondent does not acknowledge the above principles of statutory interpretation and instead argues that inclusion of the exception to misdemeanor treatment of reclassified offenses for firearm possession does not preclude other exceptions because specific statues control over more general statutes. (RBM 41-42.) Respondent asserts that the firearm possession exception to misdemeanor treatment of reclassified offenses is included, not as an indication that all other exceptions are barred, but because the prohibition on gun possession requires the current status of being convicted of a felony. Respondent argues that including that exception "reflects the voters' intent to apply the section 17 paradigm while imposing additional public safety oriented restrictions on an offender who will be resentenced to a misdemeanor prospectively." (RBM 42.) Inclusion of the firearm

exception is unrelated to the issue of prospective or retroactive application of Proposition 47.

Regardless of whether reclassification only applies prospectively, or retroactively and prospectively, a person with a reclassified offense will have the status of not being convicted of a felony from the time of reclassification forward. Therefore, inclusion of the exception for gun possession statues for the misdemeanor treatment of reclassified offenses does not show that the voters intended reclassification of offenses to be prospective only. Rather, it shows that the voters intended only one exception to the misdemeanor treatment of reclassified offenses. (*Alejandro N., supra* at p. 1228; see also Dissent at 3.)

Respondent also asserts that because Proposition 47 is silent on the issue of DNA collection and retention, the legislature and the courts are free to create additional exceptions to the misdemeanor treatment of reclassified offenses. (RBM 48-49.) She points to the principle that specific statues control over general sttues as support for that contention and asserts that because section 299, subdivision (f) is a specific statute, it should control over the more general language in section 1170.18. (RBM 47-48.) As stated in the Opening Brief, taken to its logical conclusion, respondent's interpretation would enable courts and/or the legislature to nullify any and all collateral benefits flowing from reclassification of an offense under Proposition 47 by passing statutes specifically targeting those benefits, because Proposition 47 is "silent" as to the exact nature of those benefits. That reasoning violates "[w]ell-established canons of statutory construction [that]

preclude a construction [that] renders a part of a statute meaningless or inoperative." (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274.)

C. THE RECLASSIFICATION OF AN OFFENSE UNDER SECTION 1170.18 RESULTS UNAMBIGUOUSLY IN A MISDEMEANOR ADJUDICATION. IT IS THEREFORE NOT ANALAGOUS TO REDUCTION OF A WOBBLER FROM A FELONY TO A MISDEMEANOR UNDER SECTION 17.

Proposition 47 is not simply, as respondent asserts, "a determination that section 17 type relief is available in another post-conviction context to allow a trial court to redesignate a qualifying felony conviction or adjudication as a misdemeanor." (RB 44.) There are clear and categorical differences between reclassification of an offense under section 1170.18 and reduction of a wobbler from a felony to a misdemeanor under section 17. Yet, a fundamental premise underlying all of respondent's arguments is that because both section 17 and section 1170.18, subdivision (k) use the language "misdemeanor for all purposes," section 1170.18 cannot be read to authorize DNA expungement because expungement is barred under section 17. (RBM 36-44.) That argument ignores the foundational differences between the two statutes.

As a preliminary matter, respondent appears to argue that reclassification under section 1170.18 is discretionary in making the above analogy. As discussed in argument I.A., above, it is not. It is mandatory for any person who meets the statutory criteria. More fundamentally, section 17 only applies to "wobbler" offenses that, once charged as felonies, may be reduced to misdemeanors at

different junctures in the criminal conviction process at the discretion of the district attorney or the court. (Pen. Code §17, subd. (b)(1)-(b)(5).) Resentencing under section 17 does not, however, change the nature of the underlying statutory offenses, which remain chargeable as felonies as a matter of law.

Reclassification under section 1170.18, in contrast, statutorily moves an offense out of the felony category. It is thus a recognition that the applicant's past offense is no longer a felony as a matter of law and makes that conviction consistent with the present state of the law. DNA expungement is consistent with that recognition because a person with a reclassified offense no longer has a conviction for a misdemeanor, or a wobbler.

Respondent nonetheless takes the position that the phrase "misdemeanors for all purposes" in section 1170.18 should be interpreted identically to the same language in section 17, and expungement of appellant's DNA is therefore barred. (RBM 35-40.) Respondent's reasoning is flawed because the two statutes are not dealing with the same subject, and because the context for the phrase is different in the respective statutes.

1. The Use of The Phrase "For All Purposes" in Section 1170.18, Subdivision (k) Does Not Mandate That Courts Interpret It Identically to the Phrase In Section 17 Because The Two Statutes are Not Addressing the Same Subject.

Respondent contends that because courts have interpreted the phrase "misdemeanor for all purposes" in section 17, subdivision (b) to mean that DNA

expungement is tied to the original finding of guilt, use of that same phrase in section 1170.18, subdivision (k) also means that DNA expungement is barred when an offense is reclassified under section 1170.18. (RBM 36-42.)

Respondent's argument is premised on the idea that reclassification under section 1170.18 and reduction of a wobbler from a felony to a misdemeanor under section 17 are analogous. As discussed in above and in the Opening Brief (pp. 33-37), that premise is flawed because a section 17 subdivision (b) reduction does not categorically remove the underlying offense altogether from the felony category. Instead, section 17 enables different functionaries in the criminal process to reduce the punishment for wobblers "because the court determines in its discretion that the particular circumstances of a case justify treating the offense as less serious than a felony." (Dissent at 6.) It is that difference that mandates a different analysis of the right to DNA expungement.

The cases on which Respondent relies do not support a finding that section 1170.18 is properly analogized to section 17. In *People v. Harrison* (1989) 48 Cal.3d 321, 329, the court was considering the point at which the crime of sexual penetration is completed. (*Id.*) The court held that because multiple other sex offense statutes determined that a crime is committed upon penetration no matter how slight, the same interpretation should apply to the definition of the offense in section 289. (*Id.* at 328-329.) Similarly, in *People v. Lopez* (2005) 34 Cal.4th 1002, the court was considering the scope of offenses defined by the phrase "punishable within the state prison for life" in section 186.22. (*Id.* at 1006.) In both of those

cases, the court was considering identical language defining the scope of offenses in statutory schemes covering the same category of crimes. That is not the case here. As discussed above, the nature of the offenses targeted by section 17(b) differs foundationally from those targeted by section 1170.18. They are not the same category of offenses and the use of the phrase "misdemeanor for all purposes" needs to be analyzed within the context of the different statutory schemes.

In *People v. Rivera* (2015) 233 Cal.App.4th 1085, also relied on by respondent, the Sixth District Court of Appeal addressed the issue of the effect of reclassification of an offense on appellate jurisdiction. The court held that jurisdiction of the appeal of a case with a reclassified offense remains with the courts of appeal and not the appellate division of the superior court, because the event triggering jurisdiction in the court of appeal is the *charging* of the offense as a felony, not the finding of guilt. (*Id.* at 1098.) In its analysis, the court noted the similarities in language between section 17, subdivision (b) and section 1170.18 and that courts had held that reduction of a felony to a misdemeanor under section 17 only applies prospectively and does not alter the basis for appellate jurisdiction. (*Id.* at 1100.) The court then stated that it found nothing in Proposition 47 showing that section 1170.18, subdivision (k) "was intended to change preexisting rules regarding appellate jurisdiction. (citations) We therefore *presume* that the phrase 'shall be considered a misdemeanor for all purposes' in section 1170.18 subdivision (k) does not apply retroactively." (*Id.* at 1100, emphasis added.)