IN THE SUPREME COURT OF THE STATE OF CALIFORNIA



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| IN THE MATTER OF C.H.<br><br>Minor and Appellant | No. S237762 |
| PEOPLE OF THE STATE CALIFORNIA,<br><br>Plaintiff and Respondent<br><br>v.<br><br>C.H.<br><br>Defendant and Appellant | (Court of Appeal Case No. A146120; Contra Costa Co. Superior Court No. J11-00679) |

# APPELLANT'S REPLY BRIEF ON THE MERITS

After Decision by the Court of Appeal
First Appellate District, Division Three
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By Appointment of the Court

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**APPELLANT'S REPLY BRIEF ON THE MERITS**

**INTRODUCTION**

**A. Summary of Appellant's Contentions.**

Appellant contends that the juvenile court erred in refusing to order expungement of his DNA sample and identifying profile after redesignating his theft adjudication as a misdemeanor pursuant to Proposition 47.[1]

Appellant argues that upon redesignation of his felony theft offense to a misdemeanor for all purposes pursuant to section 1170.18, subdivisions (f), (g) and (k), he no longer has a felony adjudication which would allow

[1] Proposition 47 is the Safe Neighborhoods and Schools Act enacted by voters in 2014 and is found at Penal Code section 1170.18. All further statutory references are to the Penal Code unless otherwise indicated.

the state to retain his DNA profile and sample. (Secs. 299 and 296; *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1226-1227.) The plain and unambiguous language of section 1170.18's provisions, particularly the "misdemeanor for all purposes" phrase in section 1170.18, subdivision (k), reveals the voters intended to remove all felony collateral consequences, except for restrictions on firearm possession, upon redesignation as a misdemeanor. Further, the inclusion of the firearm exception in subdivision (k) indicates voters intended to preclude all other exceptions not expressed, such as DNA retention. Appellant maintains that the language "misdemeanor for all purposes" in section 1170.18 should not be interpreted the same way it is interpreted in section 17 because the purpose and effect of the two statutes are not the same.

Expungement of appellant's DNA is required because the redesignation of appellant's felony adjudication changed the nature of the adjudication to a misdemeanor for all purposes thereby removing the adjudication from the felony category permanently. Appellant argues that section 299, subdivision (f) does not preclude expungement of appellant's DNA from the state database because after redesignation appellant no longer has an offense which qualifies for inclusion in the database.

Appellant contends those who voted for Proposition 69[2] found no public safety need to expand DNA collection to juvenile misdemeanants such as appellant. Appellant asserts that Proposition 47 and 69 can be harmonized by acknowledging the purpose and intent of those who voted for both propositions and by adopting a reasonable interpretation of section 1170.18, particularly subdivision (k), that is consistent with these principles. Moreover, a recent amendment to section 299, subdivision (f), AB 1492[3], is an unconstitutional amendment of Proposition 47 that is inconsistent with the intent of the initiative. Appellant finally argues that retention of appellant's DNA sample violates the equal protection clauses of the California and federal constitutions.

**B. Summary of Respondent's Contentions.**

Respondent maintains that Proposition 69's provisions regulate and prevent the expungement of appellant's DNA. Respondent reasons that section 299, subdivision (f) is a specific act prohibiting DNA expungement "notwithstanding any other provision of law" and that it controls over Proposition 47's general provisions, particularly because Proposition 47 was silent on the subject of DNA collection and retention. Respondent suggests the shared language "misdemeanor for all purposes" in section

[2] 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.

[3] AB 1492 amended section 299, subdivision (f), effective January 1, 2016, to include section 1170.18 in the list of statutes that do not authorize a judge to relieve a person of the duty to provide a DNA sample.

1170.18, subdivision (k) and section 17 means the two statutes should be interpreted the same way to preclude DNA expungement. Respondent contends that Proposition 69 and 47 can be harmonized by denying expungement to misdemeanants like appellant and that this would be consistent with their respective public safety goals. Finally, respondent argues AB 1492 is a clarification of existing law and not an unconstitutional amendment to Proposition 47, and retention of appellant's DNA sample does not violate the equal protection clauses of the California and federal constitutions.

## ARGUMENT

### I. THE REDESIGNATION PROCEDURE SET FORTH IN PENAL CODE SECTION 1170.18 RESULTS IN A MISDEMEANOR OFFENSE "FOR ALL PURPOSES" THAT DOES NOT QUALIFY AS AN ADJUDICATION PERMITTING DNA COLLECTION OR RETENTION.

#### A. Respondent's Claims Are Based On A Misconception Of The Procedural Posture Of This Case, The Precise Issue Presented And The Effects Of Proposition 47 Redesignation.

Respondent views Proposition 47, as codified in Section 1170.18, as purely a resentencing statute, in which an individual who was convicted or adjudicated of a felony offense which was reclassified as a misdemeanor by the proposition, can apply for resentencing. Resentencing on a case-by-case basis by the court is contingent on a determination of individual risk of dangerousness. Based on this misconception, respondent improperly

analogizes Section 1170.18 to Section 17. The many problems with this analogy will be discussed in more detail below.

Respondent misunderstands the provisions of Section 1170.18 at issue in this appeal. Appellant, a juvenile, did not seek resentencing pursuant to 1170.18, subdivisions (a) and (b). Rather, as a juvenile offender who was not serving a "felony sentence", appellant applied in juvenile court to have his adjudication redesignated as a misdemeanor and his application was granted with the exception of his request for DNA expungement. (Sec. 1170.18, subds. (f) and (g).) (CT 100-101, 103-104.) For redesignation applications, like appellant's, no hearing is necessary unless the eligible applicant requests one. (Sec. 1170.18, subd. (h).) More importantly, the court need not make an individualized determination of dangerousness.

In contrast, section 1170.18, subdivision (a) authorized persons serving sentences for certain low level felonies to petition for a recall of sentence and to request resentencing under the new law. (Sec. 1170.18, subd. (a).) If the court determines that the petitioner is eligible for resentencing, the court must recall the sentence and resentence the petitioner under the new misdemeanor provisions unless the petitioner poses an "unreasonable risk of danger to public safety." (Sec. 1170. 18, subd. (b).)

Respondent ignores appellant's status as a juvenile throughout the brief. Because appellant is a juvenile offender who was found, when he was 15 years old, to have committed theft of property valued at $46, he was entitled to seek redesignation under section 1170.18, subdivisions (f) and (g). (*Alejandro N. v. Superior Court*, *supra*, 238 Cal.App.4th at p. 1223.) Because of differences between the adult criminal and juvenile court procedures, a juvenile will always be applying for redesignation and not resentencing.

The juvenile wardship system and the adult criminal system are two distinct systems: the two systems use different terminology, and their underlying purposes have a different focus. (*Alejandro N. v. Superior Court*, *supra*, 238 Cal.App.4th at p. 1219.) A juvenile is not convicted of an offense, but adjudicated. (See Welf. & Inst. Code, sec. 203.) Following an adjudication – a true finding of a criminal allegation-the juvenile court imposes a "dispositional order". There are a range of dispositions. Although the seriousness of the offenses may lead to a more restrictive disposition, there are not separate dispositions for misdemeanors and felonies as there are for adults. (See sec. 17, subd. (a).) Appellant was not resentenced and could not have been resentenced under the juvenile court law.

These distinctions recognize the immutable fact that juveniles are not small adults and accordingly are treated differently in our justice system. (*Roper v. Simmons* (2005) 543 U.S. 551, 568-575, *Graham v.*

*Florida* (2010) 560 U.S. 48, *J.D.B. v. North Carolina* (2011) 564 U.S. 261, *Miller v. Alabama* (2012) __ U.S. __, 132 S.Ct. 2455.) It is therefore incorrect to describe appellant's redesignation of his juvenile adjudication in adult terms. See for example, Respondent's Brief on the Merits ["RBOM"], pp. 27, 34, 38, 39, 40, 41, 42, 44, 45 referring to appellant's "resentencing" or a "sentence reduction" or a "post-conviction sentence reduction."

Respondent misconstrues the scope of Proposition 47. Those who enacted Proposition 47 endorsed both its prospective and retroactive effects. Those who committed designated drug possession and theft offenses after the effective date of the initiative, November 5, 2014, would be convicted or adjudicated of misdemeanors "for all purposes". But Proposition 47 also provided for a retroactive remedy for cases like appellant's, codified in section 1170.18, by extending its benefits to persons convicted or adjudicated before its effective date and allowing them to petition to redesignate their offenses. (Sec. 1170.18, subd (f); *Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4$^{th}$ at pp. 1217, 1222-1223.)

Upon redesignation to a misdemeanor adjudication under section 1170.18, subdivision (f), (g) and (k), the felony is removed from the felony category permanently. It is as though the felony offense never occurred making DNA collection and retention unavailable for the redesignated

misdemeanant. (Sec. 296, subd. (a) (1).) (*Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at pp. 1229, 1230; and see Justice Pollak, dissenting in *In re C.B.*, review granted Nov. 9, 2016, No. S237801 [previously published at 2 Cal.App.5th 1112] at p. 1133.)[4]

Respondent misunderstands the effect of having an offense redesignated as a misdemeanor pursuant to section 1170.18. After redesignation, the offender stands adjudicated of a misdemeanor offense that does not qualify for DNA collection or retention. The offender no longer has an adjudication for a felony offense. This effect is expressed in section 1170.18, subdivision (k) which states that following redesignation, the offense shall be a misdemeanor for all purposes, except firearm restrictions. No other exceptions are expressed, including DNA retention.

Respondent discusses Proposition 69 and its DNA collection provisions at length. But the issue appellant presents on appeal is not a question of the interpretation of Proposition 69. Rather the issue here is the proper interpretation of Proposition 47, particularly, the interpretation of section 1170.18, subdivision (k) in relation to former felony offenses redesignated under subdivisions (f) and (g) as misdemeanors for all purposes. Nonetheless, respondent views the central issue on appeal as the proper interpretation of provisions codified by Proposition 69, a voter

[4] *In re C.B.* is on review in this Court. Cases pending on review may be cited for persuasive value. (Cal. Rules of Court, rule 8.115, subdivision ( e).)

initiative passed in November 2004 – ten years before Proposition 47 – which added to the categories of persons required to provide their DNA to the state (sec. 296) and added provisions permitting expungement of DNA. (Sec. 299.)

Respondent focuses on Section 299, subdivision (f) which he interprets as precluding expungement of DNA for persons found guilty of qualifying felony offenses who subsequently receive a misdemeanor sentence or other post-conviction relief that does not alter the nature of their underlying felony convictions. As discussed below, even if this interpretation of the statutory language is correct, it does not apply to appellant. Appellant's application to redesignate his petty theft adjudication as a misdemeanor was granted, and that changed the nature of the adjudication. Further, AB 1492, the amendment to section 299, subdivision (f) which expressly added section 1170.18 to the list of statutes that do not authorize a judge to relieve a person of the duty to provide a DNA sample, is an invalid amendment of Proposition 47 and its enactment postdates the redesignation petition and order in this case making it inapplicable to appellant's case.

Respondent emphasizes that Proposition 69 reflected a recognition that non-violent offenders may have committed violent crimes yielding DNA evidence. But respondent repeatedly ignores the fact that Proposition 69 did not require collection of DNA from persons convicted or adjudicated

of most misdemeanor offenses. Apparently, the voters who enacted Proposition 69 did not view these misdemeanor offenders as raising significant public safety concerns.

The focus of this Court's analysis should properly be on applying principles of statutory construction to interpret Proposition 47 and harmonizing that more recent initiative with the pre-existing provisions of Proposition 69, properly construed. As discussed below, these two statutory schemes may be harmonized by recognizing that appellant no longer has an adjudication for a misdemeanor sex or arson offense or a felony offense entitling the state to collect or retain his DNA, and by granting appellant's request for expungement.

Granting appellant, and others like him, the remedy of DNA expungement will not significantly decrease the state's stock of DNA or negatively impact the state's crime-solving abilities. This remedy will be available to a narrow group of redesignated misdemeanants who were required, prior to November 5, 2014, to submit their DNA to the state based solely on the underlying felony conviction or adjudication. Appellant falls into this category because he committed his petty theft crime, stealing pants worth $46, in April 2011 and admitted to felony grand theft in July 2011. His DNA was collected based on this sole felony adjudication. The state has produced no evidence that in the six years since that adjudication, he

was convicted or adjudicated of any felonies or sex and arson misdemeanors or arrested as an adult for any felony.

### B. Principles Of Statutory Construction Support Appellant's Interpretation of Section 1170.18, subdivision (k).

The parties agree that the issue in this case involves statutory construction, and that this is a question of law reviewed de novo. The parties also agree on the general principles aimed at determining the enactors' intent. (Opening Brief on The Merits ["OBOM"], pp. 23-25; RBOM, pp. 30-31.) However, while respondent focuses on applying these principles to interpret provisions of Proposition 69, particularly section 299, appellant asks this Court to apply the well-established principles to interpreting Proposition 47 as codified in section 1170.18.

Specifically, the question whether appellant's DNA should be expunged because his theft adjudication has been designated as a misdemeanor involves interpreting the statutory language stating that his offense is "a misdemeanor for all purposes" except for restrictions on firearm possession or ownership. (Sec. 1170.18, subd. (k).)

Appellant and respondent agree on most of the key principles of statutory construction, but respondent ignores important rules of statutory construction which are relevant to the interpretation of section 1170.18, subdivision (k).

First, if a statute states one exception, it precludes other exceptions not expressed. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852; *In re James H.* (2007) 154 Cal.App.4th 1078, 1084.)

Second, it is assumed that the Legislature or voters know of existing laws and judicial constructions when it enacts a law "and to have enacted or amended a statute in light thereof." (*People v. Superior Court* (*Cervantes*) (2014) 225 Cal.App.4th 1007, 1015.)

Third, in interpreting a statute significance should be given to every word and surplusage should be avoided. Courts are reluctant to interpret a provision of a statute or initiative in a way that renders another word or phrase unnecessary or nugatory. (*In re Anthony C.* (2006) 138 Cal.App.4th 1493, 1510.)

The plain language of section 1170.18, subdivision (k) stating that offenses redesignated as misdemeanors should be treated as misdemeanors "for all purposes" except firearm restrictions precludes DNA retention. See *Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at p. 1227. The intent of the voters to afford redesignated misdemeanors this comprehensive retroactive and prospective treatment was expressed in clear and unambiguous language in section 1170.18, subdivision (k).

Section 1170.18, subdivision (k) included one exception for firearm restrictions to the "misdemeanor for all purposes" language. Retention of DNA after redesignation was not included as an exception. By stating one

exception for firearm restrictions, other exceptions not expressed, such as DNA retention, are precluded. (*Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at p. 1227; *Gikas v. Zolin*, *supra*, 6 Cal.4th at p. 852; *In re James H., supra,* 154 Cal.App.4th at p. 1084.)

The drafters of Proposition 47 and the voters who enacted the initiative are assumed to have known of laws existing in 2014, including the provisions of the California DNA Act governing the collection, retention and expungement of DNA. (*People v. Superior Court (Cervantes), supra,* 225 Cal.App.4th at p. 1015, and see *Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at pp. 1227-1228.) However, they did not include DNA collection or retention as an exception to the misdemeanor treatment of the offense. (*Ibid.*)

The Court in *Alejandro N.* concluded that the voters did not intend for an offense redesignated as a misdemeanor pursuant to Proposition 47, to be deemed a felony for purposes of retaining DNA samples. The clear statement that the offense should be treated as a misdemeanor "for all purposes", excepting firearm restrictions, required the court to expunge Alejandro's DNA. (*Id.* at pp. 1228, 1230.) Justice Pollak, dissenting in *In re C.B*, concurred with *Alejandro N.* (*In re C.B.*, *supra,* 2 Cal.App.5th at p. 1130.)

That conclusion, based on applying well-established principles of statutory construction, applies to appellant.

### C. The Redesignation Of An Offense Under Section 1170.18, Subdivision (f) Results In A Misdemeanor Adjudication Which Is Different From The Effect Of Reducing A Wobbler To A Misdemeanor For Sentencing Under Section 17, Subdivision (b), And Thus Similar Language In The Two Provisions Should Not Be Given The Same Interpretation.

Throughout his brief, respondent contends that persons whose felony convictions or adjudications are redesignated as misdemeanors pursuant to section 1170.18 should be treated exactly like offenders who are found guilty of felonies and then sentenced or resentenced as misdemeanants under section 17, subdivision (b), specifically (b) (1) and (3). Consequently they should be denied expungement. (RBOM, pp. 27, 34-42.) Respondent reasons that the language "misdemeanor for all purposes" in section 1170.18 should be interpreted the same way it is interpreted in section 17. (RBOM, pp. 35-42.)

Respondent maintains that section 1170.18, subdivision (k) and section 17 use the same language, "misdemeanor for all purposes", to "[accomplish] the same task of reducing a felony to a misdemeanor." (RBOM, pp. 35, 39.) Respondent misstates the task performed by section 1170.18 in this matter and in so doing, errs in his analysis. First, section 1170.18 is not merely a resentencing statute, and appellant did not apply for resentencing. He applied for and was granted redesignation of his adjudication from a felony to a misdemeanor. Second, the redesignation of appellant's theft adjudication to a misdemeanor petty theft pursuant to

section 1170.18, subdivisions (f) and (g) is not a "reduction" of charges under the individual circumstances. The redesignation of a felony offense under section 1170.18 removes the offense from the felony category permanently making DNA collection and retention unavailable. (*Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at p. 1229-1230; see also *In re C.B., supra*, 2 Cal.App.5th at pp. 1132-1133, dis. opn. of Pollak, J.) Post-redesignation, appellant stands adjudicated of a misdemeanor petty theft which no longer qualifies for inclusion in the state's DNA database.[5] Unlike section 1170.18 redesignation which changes the nature of the underlying offense from a felony to a misdemeanor, section 17, subdivision (b) offers no such retroactive remedy. Thus, a felony offense that is sentenced or resentenced as a misdemeanor pursuant to section 17 would be treated as a misdemeanor "for all purposes" only from that time forward.

Justice Pollak, dissenting in *In re C. B., supra*, 2 Cal.App.5th 1112, 1132-1133, emphasized the critical distinction between section 17, subdivision (b) and section 1170.18. 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

[5] Appellant does not challenge the validity of the order that entitled the state to collect his DNA at the time that appellant admitted to felony theft in July 2011. Rather, appellant argues that the state has no right to retain his DNA because by virtue of section 1170.18 redesignation, appellant now stands adjudicated of misdemeanor petty theft, a non-qualifying offense. He is entitled to the remedy of expungement. (*In re C.B., supra*, 2 Cal.App.5th at p. 1136, dis. opn. of Pollak, J.)

treatment of the offense as less serious than a felony. However, the offender remains guilty of a felony. The offense itself remains a felony under law and in the particular case, even though the offender has received a reduced sentence based on individual circumstances. In contrast, under section 1170.18, upon redesignation of a felony offense to a misdemeanor, the nature of the offense changes and the offense is removed from the felony category. (*Ibid.*, citing *Alejandro N. v. Superior Court (San Diego), supra*, 238 Cal.App.4th at p. 1230.) See also *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978.

Thus, the task performed by the trial court pursuant to section 17 is a discretionary choice based on the offender's profile. The task performed by the court upon redesignation of a felony adjudication pursuant to section 1170.18, subdivision (f) and (g) is an automatic redesignation based on the type of offense. The focus is not on the offender but on the category of offense originally adjudicated. By voting to enact Proposition 47 the voters decided that a petty theft valued under $950.00, as in the present case, was a nonserious and nonviolent crime that was to be redesignated from a felony to a misdemeanor, unless the offense was committed by certain ineligible offenders of which appellant is not one. (Sec. 1170.18, subd. (i).)

In addition, while the language used in sections 17 and 1170.18 is substantially similar, there is an important difference in the two phrases. Respondent ignores the fact that the language in section 1170.18 states an

express exception to the "misdemeanor for all purposes" treatment-specifically, firearms restrictions. Retention of DNA after redesignation was not included as an exception. By stating one exception for firearm restrictions, other exceptions not expressed, such as DNA retention, are precluded. (*Gikas v. Zolin, supra,* 6 Cal.4th at p. 852; *In re James H., supra,* 154 Cal.App.4th at p. 1084.)

Respondent's reliance on *Coffey v. Superior Court* (2005) 129 Cal.App.4th 809 is misplaced. *Coffey* is distinguishable as it involved the effects of resentencing under section 17, subdivision (b) and not the effects of redesignation under section 1170.18.

*Coffey* involved the defendant's request to have his previously collected DNA expunged after sentencing reduction pursuant to section 17, subdivision (b). The defendant pled guilty to battery, a wobbler offense, as a felony. He received a sentence for misdemeanor battery. The defendant challenged the validity of the order that required him to submit his DNA after the felony plea, claiming he was not "convicted" until sentencing and that he was sentenced as a misdemeanant. The Court of Appeal held that the duty to provide DNA arose at the time defendant pled guilty to a felony and that the imposition of the misdemeanor sentence did not obviate that duty, because the offense would be treated as a misdemeanor only from the time of resentencing onward.

The defendant in *Coffey* had not requested expungement by arguing that he no longer had a qualifying offense, nor could he have done so. As established above, the reduction of a felony offense to a misdemeanor at sentencing based on the individual offender's facts under section 17, subdivision (b), does not change the nature of the offense of which the offender was found guilty. Defendant still had a conviction for felony battery-that offense had not been reclassified-although it would be treated as a misdemeanor from sentencing onward.

Appellant's situation is distinguishable. When appellant's application for redesignation of his theft adjudication was granted pursuant to section 1170.18, subdivision (f) and (g), it was because the classification of the offense had changed from felony theft to misdemeanor petty theft "for all purposes" except firearm restrictions. That misdemeanor offense was not a qualifying offense for purposes of DNA collection and retention. He was entitled to expungement.

Respondent also cites *People v. Rivera* (2015) 233 Cal.App.4th 1085 in support of his contention that the "misdemeanor for all purposes" language of section 1170.18, subdivision (k) and section 17 should be construed the same way. (RBOM, p. 37.) *Rivera* is not dispositive. *Rivera* involved an adult criminal case in which a defendant was charged in an information with a felony and was convicted of a felony. The defendant was resentenced to a misdemeanor under Proposition 47, pursuant to

section 1170.18, subdivisions (a) and (b). (*Id.* at pp. 1090-1091.) The question for the Court in *Rivera* was whether the Court of Appeal, as opposed to the Superior Court Appellate Division, had appellate jurisdiction over the appeal of the resentenced misdemeanor offense. (*Id.* at p.1089.)

*Rivera* concerned established rules of appellate jurisdiction, which focus on whether a felony is charged in an information, not whether the defendant was convicted of a felony or a misdemeanor. The fact that the defendant's offense was redesignated as a misdemeanor for all purposes following resentencing was irrelevant. Changing the nature of the conviction offense from a felony to a misdemeanor did not alter appellate jurisdiction. Further, unlike the *Rivera* case, the instant matter is a juvenile case. Appeals in juvenile cases are heard in the Court of Appeal regardless of offense category. (See, Cal. Rules of Court, rules 8.400, 8.401, 8.405.)

Thus, *Rivera* is not dispositive on the question presented here. (See *People v. Knoller* (2007) 41 Cal.4$^{th}$ 139, 154-155.)

Consequently, the language "misdemeanor for all purposes" in section 1170.18 should not be interpreted in the same way it is interpreted in section 17. The redesignation of an offense under section 1170.18, subdivision (f) results in a misdemeanor adjudication that is not eligible for DNA collection or DNA retention if previously collected.