

ASSEMBLY BILL

No. 1697

Introduced by Assembly Member Donnelly

February 13, 2014

An act to amend Sections 295.1, 299.5, and 299.6 of, and to add Section 295.2 to, the Penal Code, relating to forensic identification.

LEGISLATIVE COUNSEL'S DIGEST

AB 1697, as introduced, Donnelly. Forensic identification: informed consent.

Existing law, as amended by the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, Proposition 69, approved by the voters at the November 2, 2004, general election, subjects certain offenders to the collection of buccal swab samples, right thumbprints, a full palm print impression of each hand, and blood specimens or other biological samples for law enforcement identification analysis. The DNA Laboratory of the Department of Justice (DOJ) is required to serve as a repository for blood specimens, buccal swabs, and other biological samples collected, and is required to analyze specimens and samples, and to store, compile, correlate, compare, maintain, and use deoxyribonucleic acid (DNA) and forensic identification profiles and records related to several functions, including, but not limited to, using anonymous DNA records for training, research, statistical analysis of populations, quality assurance, or quality control. Proposition 69 amended these provisions to include buccal swabs as samples and using anonymous DNA records for quality assurance.

This bill would prohibit the DOJ from using any DNA specimen or sample obtained pursuant to these provisions, or any information, profile, or record derived from that specimen or sample, for any purpose related

to research or statistical analysis of populations, except as necessary for quality assurance or quality control, without complying with the requirements of the Protection of Human Subjects in Medical Experimentation Act. The prohibition would apply regardless of whether the DOJ anonymizes DNA records prior to conducting research or statistical analysis of populations, and would not apply to DNA specimens, samples, profiles, or records obtained prior to January 1, 2015. The bill would also make conforming changes.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares all of the
2 following:

3 (a) In June 2013, the United States Supreme Court upheld the
4 authority of government to collect and analyze deoxyribonucleic
5 acid (DNA) from individuals arrested for a crime, regardless of
6 whether they are ultimately convicted. In his dissent, Justice
7 Antonin Scalia concluded that, “as an entirely predictable
8 consequence of today’s decision, your DNA can be taken and
9 entered into a national DNA database if you are ever arrested,
10 rightly or wrongly, and for whatever reason Today’s judgment
11 will, to be sure, have the beneficial effect of solving more crimes;
12 then again, so would the taking of DNA samples from anyone who
13 flies on an airplane (surely the Transportation Security
14 Administration needs to know the ‘identity’ of the flying public),
15 applies for a driver’s license, or attends a public school. Perhaps
16 the construction of such a genetic panopticon is wise. But I doubt
17 that the proud men who wrote the charter of our liberties would
18 have been so eager to open their mouths for royal inspection”
19 (Maryland v. King (2013) 133 S.Ct. 1958, 1989).

20 (b) Also in June 2013, the United States Court of Appeals for
21 the Ninth Circuit upheld the authority of government to retain
22 DNA samples indefinitely, long after standard forensic information
23 has been extracted and entered into a database for criminal
24 identification purposes. In his dissent, Justice Stephen Reinhardt
25 noted that “The government has statutory authority to use its
26 indefinite access to stored blood samples in any capacity justified
27 by ‘law enforcement identification purposes.’ [citation omitted]

1 However, ‘law enforcement identification purposes’ have not been
2 specifically defined or circumscribed by Congress or the courts.
3 Whatever limitation envisioned by restricting use of blood samples
4 to only those used for ‘law enforcement identification purposes,’
5 it does not prevent the reanalysis or testing of stored blood samples
6 for certain genetic traits ‘Law enforcement identification
7 purposes’ could include retesting for certain behavior traits. For
8 example, behavior geneticists have been researching a purported
9 ‘crime gene’ that could lead to the use of genetic material for
10 ‘preventive detentions or other means of social control for those
11 identified as genetically predisposed to criminality’” (U.S. v.
12 Kriesel (9th Cir. 2013) 720 F.3d 1137, 1160).

13 (c) The California Department of Justice (DOJ) maintains
14 indefinite access to more than 1.8 million DNA samples. These
15 samples contain an individual’s entire genome, and could be tested
16 to reveal traits related to ethnicity, health, and behavior. While the
17 DOJ may only perform DNA analysis “for identification purposes,”
18 this term is not defined, and could include research into the link
19 between genes and criminal behavior. Existing law authorizes the
20 DOJ to use its samples for research purposes, and its vast collection
21 of DNA samples provides the means to study how genetic profiles
22 could help preemptively identify individuals predisposed to
23 criminal behavior. This emerging field is known as “behavioral
24 genomics.”

25 (d) Recent research indicates that more than one-half of the
26 variance in antisocial behavior can be attributed to genetic factors
27 (C.J. Ferguson, Genetic Contributions to Antisocial Personality
28 and Behavior: a Meta-analytic Review from an Evolutionary
29 Prospective, *Journal of Social Psychology* (March-April 2010,
30 Volume 150, Issue 2, pp. 160-180)). For example, researchers have
31 demonstrated that individuals possessing one particular gene
32 variant are statistically more likely to join a gang, and also more
33 likely to use a weapon in a fight (Kevin M. Beaver, et al.,
34 Monoamine Oxidase A Genotype Is Associated with Gang
35 Membership and Weapon Use, *Comprehensive Psychiatry* (March
36 2010, Volume 51, Issue 2, pp. 130-134)). The ability of this
37 research to identify likely criminals and potential criminals will
38 increase dramatically as researchers gain the means to track the
39 interaction of thousands of gene variants across millions of

1 samples, and correlate these results with known criminal behaviors.
2 The Department of Justice DNA repository offers that capability.

3 (e) The ability to perform this analysis is increasingly within
4 reach. According to the National Human Genome Research
5 Institute, the cost of whole-genome sequencing has decreased more
6 than 9,000 fold over the past 10 years.

7 (f) In response to Nazi human experimentation performed during
8 the Holocaust, the Nuremberg Military Tribunal's verdict in the
9 "Doctor's Trial" incorporated a set of research ethics for legitimate
10 human experimentation, known as the "Nuremberg Code." These
11 requirements, such as voluntary informed consent, are codified in
12 California law as the Protection of Human Subjects in Medical
13 Experimentation Act (Chapter 1.3 (commencing with Section
14 24170) of Division 20 of the Health and Safety Code). It is the
15 intent of the Legislature, in enacting this act, to ensure that the
16 DOJ provides these basic protections to all human subjects in
17 behavioral genomics research studies, regardless of whether the
18 DNA sample itself is obtained voluntarily or involuntarily.

19 (g) It is the intent of the Legislature that nothing in this act shall
20 limit, or otherwise affect, the forensic activities of the DOJ
21 unrelated to research, or the use of research for quality control or
22 quality assurance purposes.

23 (h) This act does not amend, the DNA Fingerprint, Unsolved
24 Crime and Innocence Protection Act adopted as Proposition 69 at
25 the November 2, 2004, statewide general election. Statutory
26 authority for the DOJ to perform research using collected DNA
27 samples predates the adoption of Proposition 69. Pursuant to
28 Section 9605 of the Government Code, "[w]here a section or part
29 of a statute is amended, it is not to be considered as having been
30 repealed and reenacted in the amended form. The portions which
31 are not altered are to be considered as having been the law from
32 the time when they were enacted; the new provisions are to be
33 considered as having been enacted at the time of the amendment.
34 ..." Accordingly, the Legislature remains free to address the issue
35 of research, a matter that Proposition 69 itself does not "specifically
36 authorize or prohibit" (People v. Kelly (2010) 47 Cal.4th 1008,
37 1025-1026; see also People v. Cooper (2002) 27 Cal.4th 38, 44,
38 and County of San Diego v. San Diego NORML (2008) 165
39 Cal.App.4th 798, 830).

40 SEC. 2. Section 295.1 of the Penal Code is amended to read:

1 295.1. (a) The Department of Justice shall perform DNA
2 analysis and other forensic identification analysis pursuant to this
3 chapter only for identification purposes.

4 (b) The Department of Justice Bureau of Criminal Identification
5 and Information shall perform examinations of palm prints pursuant
6 to this chapter only for identification purposes.

7 (c) The DNA Laboratory of the Department of Justice shall
8 serve as a repository for blood specimens and buccal swab and
9 other biological samples collected, and shall analyze specimens
10 and samples, and store, compile, correlate, compare, maintain, and
11 use DNA and forensic identification profiles and records related
12 to the following:

13 (1) Forensic casework and forensic unknowns.

14 (2) Known and evidentiary specimens and samples from crime
15 scenes or criminal investigations.

16 (3) Missing or unidentified persons.

17 (4) Persons required to provide specimens, samples, and print
18 impressions under this chapter.

19 (5) Legally obtained samples.

20 (6) ~~Anonymous~~ *Subject to the requirements of Section 295.2,*
21 *anonymous* DNA records used for training, research, statistical
22 analysis of populations, quality assurance, or quality control.

23 (d) The computerized data bank and database of the DNA
24 Laboratory of the Department of Justice shall include files as
25 necessary to implement this chapter.

26 (e) Nothing in this section shall be construed as requiring the
27 Department of Justice to provide specimens or samples for quality
28 control or other purposes to those who request specimens or
29 samples.

30 (f) Submission of samples, specimens, or profiles for the state
31 DNA Database and Data Bank Program shall include information
32 as required by the Department of Justice for ensuring search
33 capabilities and compliance with National DNA Index System
34 (NDIS) standards.

35 SEC. 3. Section 295.2 is added to the Penal Code, to read:

36 295.2. (a) The Department of Justice shall not use any DNA
37 specimen or sample obtained pursuant to this chapter, or any
38 information, profile, or record derived from that specimen or
39 sample, for any purpose related to research or statistical analysis
40 of populations, except as necessary for quality assurance or quality

1 control, without complying with the requirements of the Protection
2 of Human Subjects in Medical Experimentation Act (Chapter 1.3
3 (commencing with Section 24170) of Division 20 of the Health
4 and Safety Code). This section applies regardless of whether the
5 Department of Justice anonymizes DNA records prior to
6 conducting research or statistical analysis of populations.

7 (b) This section does not apply to DNA specimens, samples,
8 profiles, or records obtained prior to January 1, 2015.

9 SEC. 4. Section 299.5 of the Penal Code is amended to read:

10 299.5. (a) All DNA and forensic identification profiles and
11 other identification information retained by the Department of
12 Justice pursuant to this chapter are exempt from any law requiring
13 disclosure of information to the public and shall be confidential
14 except as otherwise provided in this chapter.

15 (b) All evidence and forensic samples containing biological
16 material retained by the Department of Justice DNA Laboratory
17 or other state law enforcement agency are exempt from any law
18 requiring disclosure of information to the public or the return of
19 biological specimens, samples, or print impressions.

20 (c) Non-DNA forensic identification information may be filed
21 with the offender's file maintained by the Sex Registration Unit
22 of the Department of Justice or in other computerized data bank
23 or database systems maintained by the Department of Justice.

24 (d) The DNA and other forensic identification information
25 retained by the Department of Justice pursuant to this chapter shall
26 not be included in the state summary criminal history information.
27 However, nothing in this chapter precludes law enforcement
28 personnel from entering into a person's criminal history
29 information or offender file maintained by the Department of
30 Justice, the fact that the specimens, samples, and print impressions
31 required by this chapter have or have not been collected from that
32 person.

33 (e) The fact that the blood specimens, saliva or buccal swab
34 samples, and print impressions required by this chapter have been
35 received by the DNA Laboratory of the Department of Justice shall
36 be included in the state summary criminal history information as
37 soon as administratively practicable.

38 The full palm prints of each hand shall be filed and maintained
39 by the Automated Latent Print Section of the Bureau of Criminal

1 Identification and Information of the Department of Justice, and
2 may be included in the state summary criminal history information.

3 (f) DNA samples and DNA profiles and other forensic
4 identification information shall be released only to law enforcement
5 agencies, including, but not limited to, parole officers of the
6 Department of Corrections, hearing officers of the parole authority,
7 probation officers, the Attorney General's office, district attorneys'
8 offices, and prosecuting city attorneys' offices, unless otherwise
9 specifically authorized by this chapter. Dissemination of DNA
10 specimens, samples, and DNA profiles and other forensic
11 identification information to law enforcement agencies and district
12 attorneys' offices outside this state shall be performed in
13 conformity with the provisions of this chapter.

14 (g) A defendant's DNA and other forensic identification
15 information developed pursuant to this chapter shall be available
16 to his or her defense counsel upon court order made pursuant to
17 Chapter 10 (commencing with Section 1054) of Title 6 of Part 2.

18 (h) Except as provided in subdivision (g) and in order to protect
19 the confidentiality and privacy of database and data bank
20 information, the Department of Justice and local public DNA
21 laboratories shall not otherwise be compelled in a criminal or civil
22 proceeding to provide any DNA profile or forensic identification
23 database or data bank information or its computer database program
24 software or structures to any person or party seeking ~~such~~ *those*
25 records or information whether by subpoena or discovery, or other
26 procedural device or inquiry.

27 (i) (1) (A) Any person who knowingly uses an offender
28 specimen, sample, or DNA profile collected pursuant to this chapter
29 for other than criminal identification or exclusion purposes, or for
30 other than the identification of missing persons, or who knowingly
31 discloses DNA or other forensic identification information
32 developed pursuant to this section to an unauthorized individual
33 or agency, for other than criminal identification or exclusion
34 purposes, or for the identification of missing persons, in violation
35 of this chapter, shall be punished by imprisonment in a county jail
36 not exceeding one year or by imprisonment in the state prison for
37 16 months, or two or three years.

38 (B) Any person who, for the purpose of financial gain,
39 knowingly uses a specimen, sample, or DNA profile collected
40 pursuant to this chapter for other than criminal identification or

1 exclusion purposes or for the identification of missing persons or
2 who, for the purpose of financial gain, knowingly discloses DNA
3 or other forensic identification information developed pursuant to
4 this section to an unauthorized individual or agency, for other than
5 criminal identification or exclusion purposes or for other than the
6 identification of missing persons, in violation of this chapter, shall,
7 in addition to the penalty provided in subparagraph (A), be
8 punished by a criminal fine in an amount three times that of any
9 financial gain received or ten thousand dollars (\$10,000),
10 whichever is greater.

11 (2) (A) If any employee of the Department of Justice knowingly
12 uses a specimen, sample, or DNA profile collected pursuant to this
13 chapter for other than criminal identification or exclusion purposes,
14 or knowingly discloses DNA or other forensic identification
15 information developed pursuant to this section to an unauthorized
16 individual or agency, for other than criminal identification or
17 exclusion purposes or for other than the identification of missing
18 persons, in violation of this chapter, the department shall be liable
19 in civil damages to the donor of the DNA identification information
20 in the amount of five thousand dollars (\$5,000) for each violation,
21 plus attorney's fees and costs. In the event of multiple disclosures,
22 the total damages available to the donor of the DNA is limited to
23 fifty thousand dollars (\$50,000) plus attorney's fees and costs.

24 (B) (i) Notwithstanding any other law, this shall be the sole
25 and exclusive remedy against the Department of Justice and its
26 employees available to the donor of the DNA.

27 (ii) The Department of Justice employee disclosing DNA
28 identification information in violation of this chapter shall be
29 absolutely immune from civil liability under this or any other law.

30 (3) It is not a violation of this section for a law enforcement
31 agency in its discretion to publicly disclose the fact of a DNA
32 profile match, or the name of the person identified by the DNA
33 match when this match is the basis of law enforcement's
34 investigation, arrest, or prosecution of a particular person, or the
35 identification of a missing or abducted person.

36 (j) It is not a violation of this chapter to furnish DNA or other
37 forensic identification information of the defendant to his or her
38 defense counsel for criminal defense purposes in compliance with
39 discovery.

1 (k) It is not a violation of this section for law enforcement to
2 release DNA and other forensic identification information
3 developed pursuant to this chapter to a jury or grand jury, or in a
4 document filed with a court or administrative agency, or as part
5 of a judicial or administrative proceeding, or for this information
6 to become part of the public transcript or record of proceedings
7 when, in the discretion of law enforcement, disclosure is necessary
8 because the DNA information pertains to the basis for law
9 enforcement's identification, arrest, investigation, prosecution, or
10 exclusion of a particular person related to the case.

11 (l) It is not a violation of this section to include information
12 obtained from a file in a transcript or record of a judicial
13 proceeding, or in any other public record when the inclusion of
14 the information in the public record is authorized by a court, statute,
15 or decisional law.

16 (m) ~~It~~ *Except as specified in Section 295.2, it* is not a violation
17 of this section for the DNA Laboratory of the Department of
18 Justice, or an organization retained as an agent of the Department
19 of Justice, or a local public laboratory to use anonymous records
20 or criminal history information obtained pursuant to this chapter
21 for training, research, statistical analysis of populations, or quality
22 assurance or quality control.

23 (n) The Department of Justice shall make public the
24 methodology and procedures to be used in its DNA program prior
25 to the commencement of DNA testing in its laboratories. The
26 Department of Justice shall review and consider on an ongoing
27 basis the findings and results of any peer review and validation
28 studies submitted to the department by members of the relevant
29 scientific community experienced in the use of DNA technology.
30 This material shall be available to criminal defense counsel upon
31 court order made pursuant to Chapter 10 (commencing with Section
32 1054) of Title 6 of Part 2.

33 (o) In order to maintain the computer system security of the
34 Department of Justice DNA and Forensic Identification Database
35 and Data Bank Program, the computer software and database
36 structures used by the DNA Laboratory of the Department of
37 Justice to implement this chapter are confidential.

38 SEC. 5. Section 299.6 of the Penal Code is amended to read:

39 299.6. (a) Nothing in this chapter shall prohibit the Department
40 of Justice, in its sole discretion, from the sharing or disseminating

1 of population database or data bank information, DNA profile or
 2 forensic identification database or data bank information, analytical
 3 data and results generated for forensic identification database and
 4 data bank purposes, or protocol and forensic DNA analysis methods
 5 and quality assurance or quality control procedures with any of
 6 the following:

7 (1) Federal, state, or local law enforcement agencies.

8 (2) Crime laboratories, whether public or private, that serve
 9 federal, state, and local law enforcement agencies that have been
 10 approved by the Department of Justice.

11 (3) The attorney general’s office of any state.

12 (4) Any state or federally authorized auditing agent or board
 13 that inspects or reviews the work of the Department of Justice
 14 DNA Laboratory for the purpose of ensuring that the laboratory
 15 meets ASCLD/LAB and FBI standards for accreditation and quality
 16 assurance standards necessary under this chapter and for the state’s
 17 participation in CODIS and other national or international
 18 crime-solving networks.

19 (5) ~~Any~~ *Subject to the requirements of Section 295.2, any* third
 20 party that the Department of Justice deems necessary to assist the
 21 department’s crime laboratory with statistical analyses of
 22 population databases, or the analyses of forensic protocol, research
 23 methods, or quality control procedures, or to assist in the recovery
 24 or identification of human remains for humanitarian purposes,
 25 including identification of missing persons.

26 (b) The population databases and data banks of the DNA
 27 Laboratory of the Department of Justice may be made available
 28 to and searched by the FBI and any other agency participating in
 29 the FBI’s CODIS System or any other national or international
 30 law enforcement database or data bank system.

31 (c) The Department of Justice may provide portions of biological
 32 samples including blood specimens, saliva samples, and buccal
 33 swab samples collected pursuant to this chapter to local public law
 34 enforcement DNA laboratories for identification purposes provided
 35 that the privacy provisions of this section are followed by the local
 36 public law enforcement laboratory and if each of the following
 37 conditions is met:

38 (1) The procedures used by the local public DNA laboratory
 39 for the handling of specimens and samples and the disclosure of

1 results are the same as those established by the Department of
2 Justice pursuant to Sections 297, 298, and 299.5.

3 (2) The methodologies and procedures used by the local public
4 DNA laboratory for DNA or forensic identification analysis are
5 compatible with those used by the Department of Justice, or
6 otherwise are determined by the Department of Justice to be valid
7 and appropriate for identification purposes.

8 (3) Only tests of value to law enforcement for identification
9 purposes are performed and a copy of the results of the analysis
10 are sent to the Department of Justice.

11 (4) All provisions of this section concerning privacy and security
12 are followed.

13 (5) The local public law enforcement DNA laboratory assumes
14 all costs of securing the specimens and samples and provides
15 appropriate tubes, labels, and materials necessary to secure the
16 specimens and samples.

17 (d) Any local DNA laboratory that produces DNA profiles of
18 known reference samples for inclusion within the permanent files
19 of the state's DNA Data Bank program shall follow the policies
20 of the DNA Laboratory of the Department of Justice.