

AMENDED IN ASSEMBLY MARCH 20, 2014

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

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 amended, 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.~~

This bill would state that for purposes of these provisions, the terms “research” and “statistical analysis of populations” do not include the use of DNA sequence data for purposes of identifying or characterizing any general correlations between sequence-specific information and behaviors, health, or ethnicity. The bill would state that this type of research or statistical analysis of populations does not serve a forensic identification purpose. The bill also would 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).

1 (b) Also in June 2013, the United States Court of Appeals for
2 the Ninth Circuit upheld the authority of government to retain
3 DNA samples indefinitely, long after standard forensic information
4 has been extracted and entered into a database for criminal
5 identification purposes. In his dissent, Justice Stephen Reinhardt
6 noted that “The government has statutory authority to use its
7 indefinite access to stored blood samples in any capacity justified
8 by ‘law enforcement identification purposes.’ [citation omitted]
9 However, ‘law enforcement identification purposes’ have not been
10 specifically defined or circumscribed by Congress or the courts.
11 Whatever limitation envisioned by restricting use of blood samples
12 to only those used for ‘law enforcement identification purposes,’
13 it does not prevent the reanalysis or testing of stored blood samples
14 for certain genetic traits ‘Law enforcement identification
15 purposes’ could include retesting for certain behavior traits. For
16 example, behavior geneticists have been researching a purported
17 ‘crime gene’ that could lead to the use of genetic material for
18 ‘preventive detentions or other means of social control for those
19 identified as genetically predisposed to criminality’” (U.S. v.
20 Kriesel (9th Cir. 2013) 720 F.3d 1137, 1160).

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

33 (d) Recent research indicates that more than one-half of the
34 variance in antisocial behavior can be attributed to genetic factors
35 (C.J. Ferguson, Genetic Contributions to Antisocial Personality
36 and Behavior: a Meta-analytic Review from an Evolutionary
37 Prospective, *Journal of Social Psychology* (March-April 2010,
38 Volume 150, Issue 2, pp. 160-180)). For example, researchers have
39 demonstrated that individuals possessing one particular gene
40 variant are statistically more likely to join a gang, and also more

1 likely to use a weapon in a fight (Kevin M. Beaver, et al.,
2 Monoamine Oxidase A Genotype Is Associated with Gang
3 Membership and Weapon Use, *Comprehensive Psychiatry* (March
4 2010, Volume 51, Issue 2, pp. 130-134)). The ability of this
5 research to identify likely criminals and potential criminals will
6 increase dramatically as researchers gain the means to track the
7 interaction of thousands of gene variants across millions of
8 samples, and correlate these results with known criminal behaviors.
9 The Department of Justice DNA repository offers that capability.

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

14 ~~(f) In response to Nazi human experimentation performed during
15 the Holocaust, the Nuremberg Military Tribunal's verdict in the
16 "Doctor's Trial" incorporated a set of research ethics for legitimate
17 human experimentation, known as the "Nuremberg Code." These
18 requirements, such as voluntary informed consent, are codified in
19 California law as the Protection of Human Subjects in Medical
20 Experimentation Act (Chapter 1.3 (commencing with Section
21 24170) of Division 20 of the Health and Safety Code). It is the
22 intent of the Legislature, in enacting this act, to ensure that the
23 DOJ provides these basic protections to all human subjects in
24 behavioral genomics research studies, regardless of whether the
25 DNA sample itself is obtained voluntarily or involuntarily.~~

26 ~~(g)~~

27 (f) It is the intent of the Legislature that nothing in this act shall
28 limit, or otherwise affect, the forensic activities of the DOJ
29 unrelated to research, or the use of research for quality control or
30 quality assurance purposes.

31 ~~(h)~~

32 (g) This act does not amend; the DNA Fingerprint, Unsolved
33 Crime and Innocence Protection Act, *which was* adopted as
34 Proposition 69 at the November 2, 2004, statewide general election.
35 Statutory authority for the DOJ to perform research using collected
36 DNA samples predates the adoption of Proposition 69. Pursuant
37 to Section 9605 of the Government Code, "[w]here a section or
38 part of a statute is amended, it is not to be considered as having
39 been repealed and reenacted in the amended form. The portions
40 which are not altered are to be considered as having been the law

1 from the time when they were enacted; the new provisions are to
2 be considered as having been enacted at the time of the amendment.
3 ...” Accordingly, the Legislature remains free to address the issue
4 of research, a matter that Proposition 69 itself does not “specifically
5 authorize or prohibit” (People v. Kelly (2010) 47 Cal.4th 1008,
6 1025-1026; see also People v. Cooper (2002) 27 Cal.4th 38, 44,
7 and County of San Diego v. San Diego NORML (2008) 165
8 Cal.App.4th 798, 830).

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

10 295.1. (a) The Department of Justice shall perform DNA
11 analysis and other forensic identification analysis pursuant to this
12 chapter only for identification purposes.

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

16 (c) The DNA Laboratory of the Department of Justice shall
17 serve as a repository for blood specimens and buccal swab and
18 other biological samples collected, and shall analyze specimens
19 and samples, and store, compile, correlate, compare, maintain, and
20 use DNA and forensic identification profiles and records related
21 to the following:

- 22 (1) Forensic casework and forensic unknowns.
- 23 (2) Known and evidentiary specimens and samples from crime
24 scenes or criminal investigations.
- 25 (3) Missing or unidentified persons.
- 26 (4) Persons required to provide specimens, samples, and print
27 impressions under this chapter.
- 28 (5) Legally obtained samples.
- 29 (6) Subject to ~~the requirements of~~ Section 295.2, anonymous
30 DNA records used for training, research, statistical analysis of
31 populations, quality assurance, or quality control.
- 32 (d) The computerized data bank and database of the DNA
33 Laboratory of the Department of Justice shall include files as
34 necessary to implement this chapter.
- 35 (e) Nothing in this section shall be construed as requiring the
36 Department of Justice to provide specimens or samples for quality
37 control or other purposes to those who request specimens or
38 samples.
- 39 (f) Submission of samples, specimens, or profiles for the state
40 DNA Database and Data Bank Program shall include information

1 as required by the Department of Justice for ensuring search
2 capabilities and compliance with National DNA Index System
3 (NDIS) standards.

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

5 ~~295.2. (a) The Department of Justice shall not use any DNA~~
6 ~~specimen or sample obtained pursuant to this chapter, or any~~
7 ~~information, profile, or record derived from that specimen or~~
8 ~~sample, for any purpose related to research or statistical analysis~~
9 ~~of populations, except as necessary for quality assurance or quality~~
10 ~~control, without complying with the requirements of the Protection~~
11 ~~of Human Subjects in Medical Experimentation Act (Chapter 1.3~~
12 ~~(commencing with Section 24170) of Division 20 of the Health~~
13 ~~and Safety Code). This section applies regardless of whether the~~
14 ~~Department of Justice anonymizes DNA records prior to~~
15 ~~conducting research or statistical analysis of populations.~~

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

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

19 ~~295.2. For purposes of this chapter, the terms “research” and~~
20 ~~“statistical analysis of populations” do not include the use of DNA~~
21 ~~sequence data for purposes of identifying or characterizing any~~
22 ~~general correlations between sequence-specific information and~~
23 ~~behaviors, health, or ethnicity. This type of research or statistical~~
24 ~~analysis of populations does not serve a forensic purpose.~~

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

26 ~~299.5. (a) All DNA and forensic identification profiles and~~
27 ~~other identification information retained by the Department of~~
28 ~~Justice pursuant to this chapter are exempt from any law requiring~~
29 ~~disclosure of information to the public and shall be confidential~~
30 ~~except as otherwise provided in this chapter.~~

31 ~~(b) All evidence and forensic samples containing biological~~
32 ~~material retained by the Department of Justice DNA Laboratory~~
33 ~~or other state law enforcement agency are exempt from any law~~
34 ~~requiring disclosure of information to the public or the return of~~
35 ~~biological specimens, samples, or print impressions.~~

36 ~~(c) Non-DNA forensic identification information may be filed~~
37 ~~with the offender’s file maintained by the Sex Registration Unit~~
38 ~~of the Department of Justice or in other computerized data bank~~
39 ~~or database systems maintained by the Department of Justice.~~

1 (d) The DNA and other forensic identification information
2 retained by the Department of Justice pursuant to this chapter shall
3 not be included in the state summary criminal history information.
4 However, nothing in this chapter precludes law enforcement
5 personnel from entering into a person's criminal history
6 information or offender file maintained by the Department of
7 Justice, the fact that the specimens, samples, and print impressions
8 required by this chapter have or have not been collected from that
9 person.

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

15 The full palm prints of each hand shall be filed and maintained
16 by the Automated Latent Print Section of the Bureau of Criminal
17 Identification and Information of the Department of Justice, and
18 may be included in the state summary criminal history information.

19 (f) DNA samples and DNA profiles and other forensic
20 identification information shall be released only to law enforcement
21 agencies, including, but not limited to, parole officers of the
22 Department of Corrections *and Rehabilitation*, hearing officers of
23 the parole authority, probation officers, the Attorney General's
24 office, district attorneys' offices, and prosecuting city attorneys'
25 offices, unless otherwise specifically authorized by this chapter.
26 Dissemination of DNA specimens, samples, and DNA profiles
27 and other forensic identification information to law enforcement
28 agencies and district attorneys' offices outside this state shall be
29 performed in conformity with the provisions of this chapter.

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

34 (h) Except as provided in subdivision (g) and in order to protect
35 the confidentiality and privacy of database and data bank
36 information, the Department of Justice and local public DNA
37 laboratories shall not otherwise be compelled in a criminal or civil
38 proceeding to provide any DNA profile or forensic identification
39 database or data bank information or its computer database program
40 software or structures to any person or party seeking those records

1 or information whether by subpoena or discovery, or other
2 procedural device or inquiry.

3 (i) (1) (A) Any person who knowingly uses an offender
4 specimen, sample, or DNA profile collected pursuant to this chapter
5 for other than criminal identification or exclusion purposes, or for
6 other than the identification of missing persons, or who knowingly
7 discloses DNA or other forensic identification information
8 developed pursuant to this section to an unauthorized individual
9 or agency, for other than criminal identification or exclusion
10 purposes, or for the identification of missing persons, in violation
11 of this chapter, shall be punished by imprisonment in a county jail
12 not exceeding one year or by imprisonment in the state prison for
13 16 months, or two or three years.

14 (B) Any person who, for the purpose of financial gain,
15 knowingly uses a specimen, sample, or DNA profile collected
16 pursuant to this chapter for other than criminal identification or
17 exclusion purposes or for the identification of missing persons or
18 who, for the purpose of financial gain, knowingly discloses DNA
19 or other forensic identification information developed pursuant to
20 this section to an unauthorized individual or agency, for other than
21 criminal identification or exclusion purposes or for other than the
22 identification of missing persons, in violation of this chapter, shall,
23 in addition to the penalty provided in subparagraph (A), be
24 punished by a criminal fine in an amount three times that of any
25 financial gain received or ten thousand dollars (\$10,000),
26 whichever is greater.

27 (2) (A) If any employee of the Department of Justice knowingly
28 uses a specimen, sample, or DNA profile collected pursuant to this
29 chapter for other than criminal identification or exclusion purposes,
30 or knowingly discloses DNA or other forensic identification
31 information developed pursuant to this section to an unauthorized
32 individual or agency, for other than criminal identification or
33 exclusion purposes or for other than the identification of missing
34 persons, in violation of this chapter, the department shall be liable
35 in civil damages to the donor of the DNA identification information
36 in the amount of five thousand dollars (\$5,000) for each violation,
37 plus attorney's fees and costs. In the event of multiple disclosures,
38 the total damages available to the donor of the DNA is limited to
39 fifty thousand dollars (\$50,000) plus attorney's fees and costs.

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

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

7 (3) It is not a violation of this section for a law enforcement
8 agency in its discretion to publicly disclose the fact of a DNA
9 profile match, or the name of the person identified by the DNA
10 match when this match is the basis of law enforcement's
11 investigation, arrest, or prosecution of a particular person, or the
12 identification of a missing or abducted person.

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

17 (k) It is not a violation of this section for law enforcement to
18 release DNA and other forensic identification information
19 developed pursuant to this chapter to a jury or grand jury, or in a
20 document filed with a court or administrative agency, or as part
21 of a judicial or administrative proceeding, or for this information
22 to become part of the public transcript or record of proceedings
23 when, in the discretion of law enforcement, disclosure is necessary
24 because the DNA information pertains to the basis for law
25 enforcement's identification, arrest, investigation, prosecution, or
26 exclusion of a particular person related to the case.

27 (l) It is not a violation of this section to include information
28 obtained from a file in a transcript or record of a judicial
29 proceeding, or in any other public record when the inclusion of
30 the information in the public record is authorized by a court, statute,
31 or decisional law.

32 (m) ~~Except as specified in~~ *Subject to* Section 295.2, it is not a
33 violation of this section for the DNA Laboratory of the Department
34 of Justice, or an organization retained as an agent of the Department
35 of Justice, or a local public laboratory to use anonymous records
36 or criminal history information obtained pursuant to this chapter
37 for training, research, statistical analysis of populations, or quality
38 assurance or quality control.

39 (n) The Department of Justice shall make public the
40 methodology and procedures to be used in its DNA program prior

1 to the commencement of DNA testing in its laboratories. The
2 Department of Justice shall review and consider on an ongoing
3 basis the findings and results of any peer review and validation
4 studies submitted to the department by members of the relevant
5 scientific community experienced in the use of DNA technology.
6 This material shall be available to criminal defense counsel upon
7 court order made pursuant to Chapter 10 (commencing with Section
8 1054) of Title 6 of Part 2.

9 (o) In order to maintain the computer system security of the
10 Department of Justice DNA and Forensic Identification Database
11 and Data Bank Program, the computer software and database
12 structures used by the DNA Laboratory of the Department of
13 Justice to implement this chapter are confidential.

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

15 299.6. (a) Nothing in this chapter shall prohibit the Department
16 of Justice, in its sole discretion, from the sharing or disseminating
17 of population database or data bank information, DNA profile or
18 forensic identification database or data bank information, analytical
19 data and results generated for forensic identification database and
20 data bank purposes, or protocol and forensic DNA analysis methods
21 and quality assurance or quality control procedures with any of
22 the following:

- 23 (1) Federal, state, or local law enforcement agencies.
- 24 (2) Crime laboratories, whether public or private, that serve
25 federal, state, and local law enforcement agencies that have been
26 approved by the Department of Justice.
- 27 (3) The attorney general's office of any state.
- 28 (4) Any state or federally authorized auditing agent or board
29 that inspects or reviews the work of the Department of Justice
30 DNA Laboratory for the purpose of ensuring that the laboratory
31 meets ASCLD/LAB and FBI standards for accreditation and quality
32 assurance standards necessary under this chapter and for the state's
33 participation in CODIS and other national or international
34 crime-solving networks.
- 35 (5) Subject to ~~the requirements of~~ Section 295.2, any third party
36 that the Department of Justice deems necessary to assist the
37 department's crime laboratory with statistical analyses of
38 population databases, or the analyses of forensic protocol, research
39 methods, or quality control procedures, or to assist in the recovery

1 or identification of human remains for humanitarian purposes,
2 including identification of missing persons.

3 (b) The population databases and data banks of the DNA
4 Laboratory of the Department of Justice may be made available
5 to and searched by the FBI and any other agency participating in
6 the FBI's CODIS System or any other national or international
7 law enforcement database or data bank system.

8 (c) The Department of Justice may provide portions of biological
9 samples including blood specimens, saliva samples, and buccal
10 swab samples collected pursuant to this chapter to local public law
11 enforcement DNA laboratories for identification purposes provided
12 that the privacy provisions of this section are followed by the local
13 public law enforcement laboratory and if each of the following
14 conditions is met:

15 (1) The procedures used by the local public DNA laboratory
16 for the handling of specimens and samples and the disclosure of
17 results are the same as those established by the Department of
18 Justice pursuant to Sections 297, 298, and 299.5.

19 (2) The methodologies and procedures used by the local public
20 DNA laboratory for DNA or forensic identification analysis are
21 compatible with those used by the Department of Justice, or
22 otherwise are determined by the Department of Justice to be valid
23 and appropriate for identification purposes.

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

27 (4) All provisions of this section concerning privacy and security
28 are followed.

29 (5) The local public law enforcement DNA laboratory assumes
30 all costs of securing the specimens and samples and provides
31 appropriate tubes, labels, and materials necessary to secure the
32 specimens and samples.

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