

ASSEMBLY BILL

No. 84

Introduced by Assembly Member Gatto

January 6, 2015

An act to amend Sections 295.1, 296, 298, 299, and 300 of the Penal Code, relating to DNA samples.

LEGISLATIVE COUNSEL'S DIGEST

AB 84, as introduced, Gatto. Forensic testing: DNA samples.

(1) 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 (the DNA Act) requires that any adult person who is arrested or charged with any felony offense to provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required for law enforcement identification analysis. Existing law requires that blood specimens and buccal swab samples be forwarded promptly to the Department of Justice for analysis. Existing case law holds that the DNA Act, to the extent it requires felony arrestees to submit to a DNA sample for law enforcement analysis and inclusion in the state and federal DNA databases, without independent suspicion, a warrant, or a judicial or grand jury determination of probable cause, unreasonably intrudes on the arrestee's expectation of privacy and is invalid under the California Constitution. The DNA Act provides that it may be amended by a statute passed by each house of the Legislature that furthers the purpose of the measure.

This bill would state that it is the intention of the Legislature to further the purposes of the DNA Act in light of the above-specified case law. The bill would require that a blood specimen or buccal swab sample

taken from a person arrested for the commission of a felony be forwarded to the department after a judicial determination of probable cause to believe the person has committed the offense for which he or she was arrested has been made.

(2) Existing law, as amended by the DNA Act, requires a person who has been convicted of a felony offense to provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required for law enforcement identification analysis. Existing law makes these provisions retroactive, regardless of when the crime charged or committed became a qualifying offense. Existing law, subject to exceptions, provides that any person who has been convicted of certain misdemeanors may not, within 10 years of the conviction, own, purchase, receive, possess, or have under his or her custody or control, any firearm.

This bill would require a person who has been convicted of a misdemeanor to which the 10-year prohibition on the possession of a firearm applies, to provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required for law enforcement identification analysis. By imposing additional duties on local law enforcement agencies to collect and forward these samples, this bill would impose a state-mandated local program.

(3) Existing law, as amended by the DNA Act, requires that a DNA specimen and sample be destroyed and that a searchable database profile be expunged from the data bank program if the person from whom the specimen or sample was collected has no past or present offense or pending charge which qualifies that person for inclusion in the database and if that person submits an application, as specified. Existing law gives the court discretion to grant or deny the application.

This bill would require the DNA specimen and sample to be destroyed and the searchable database profile expunged from the database without the requirement of an application.

(4) Existing law, as amended by the DNA Act, states that its provisions do not prohibit collection and analysis of specimens, samples, or print impressions as a condition of a plea for an offense that does not require the taking of samples and specimens.

The bill would state that it is the intent of the Legislature to allow buccal swab samples to be taken for DNA analysis as a condition of a plea or reduction or dismissal of charges. The bill would permit a law

enforcement agency to use any publicly available database to aid in the investigation of a crime.

(5) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

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

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

1 SECTION 1. It is the intent of the Legislature to limit the
2 analysis of buccal swab samples and blood samples taken from
3 felony arrestees for purposes of DNA analysis only to the extent
4 required by the decision in *People v. Buza* (2014) 180 Cal Rptr.
5 3d753, and to further the purposes of the DNA Fingerprint,
6 Unsolved Crime and Innocence Protection Act, Proposition 69,
7 approved by the voters at the November 2, 2004, statewide general
8 election, in light of that decision.

9 SEC. 2. It is the intent of the Legislature to allow buccal swab
10 samples to be taken for DNA analysis as a condition of a plea or
11 reduction or dismissal of charges, provided that all uses of the
12 DNA sample have been disclosed to the defendant in writing, that
13 consent has been obtained in writing, and that the defendant has
14 signed a written agreement allowing his or her buccal swap sample
15 or blood sample to be taken for DNA analysis.

16 SEC. 3. Section 295.1 of the Penal Code is amended to read:
17 295.1. (a) The Department of Justice shall perform DNA
18 analysis and other forensic identification analysis pursuant to this
19 chapter only for identification purposes.

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

23 (c) The DNA Laboratory of the Department of Justice shall
24 serve as a repository for blood specimens and buccal swab and
25 other biological samples collected, and shall analyze specimens
26 and samples, and store, compile, correlate, compare, maintain, and

1 use DNA and forensic identification profiles and records related
 2 to the following:

- 3 (1) Forensic casework and forensic unknowns.
- 4 (2) Known and evidentiary specimens and samples from crime
 5 scenes or criminal investigations.
- 6 (3) Missing or unidentified persons.
- 7 (4) Persons required to provide specimens, samples, and print
 8 impressions under this chapter.
- 9 (5) Legally obtained samples.
- 10 (6) Anonymous DNA records used for training, research,
 11 statistical analysis of populations, quality assurance, or quality
 12 control.

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

16 (e) ~~Nothing in this section shall be construed as requiring~~ *This*
 17 *section does not require* the Department of Justice to provide
 18 specimens or samples for quality control or other purposes to those
 19 who request specimens or samples.

20 (f) Submission of samples, specimens, or profiles for the state
 21 DNA Database and Data Bank Program shall include information
 22 as required by the Department of Justice for ensuring search
 23 capabilities and compliance with National DNA Index System
 24 (NDIS) standards.

25 (g) *DNA specimens collected from a person who has been*
 26 *convicted of an offense specified in subdivision (a) of Section 296*
 27 *may be used to conduct familial searches of the DNA Database.*

28 SEC. 4. Section 296 of the Penal Code is amended to read:

29 296. (a) The following persons shall provide buccal swab
 30 samples, right thumbprints, and a full palm print impression of
 31 each hand, and any blood specimens or other biological samples
 32 required pursuant to this chapter for law enforcement identification
 33 analysis:

- 34 (1) Any person, including any juvenile, who is convicted of or
 35 pleads guilty or no contest to any felony offense *or to a*
 36 *misdemeanor offense specified in Section 29805*, or is found not
 37 guilty by reason of insanity of any felony offense *or misdemeanor*
 38 *offense specified in Section 29805*, or any juvenile who is
 39 adjudicated under Section 602 of the Welfare and Institutions Code

1 for committing any felony offense *or a misdemeanor offense*
2 *specified in Section 29805.*

3 (2) Any adult person who is arrested for or charged with any of
4 the following felony offenses:

5 (A) Any felony offense specified in Section 290 or attempt to
6 commit any felony offense described in Section 290, or any felony
7 offense that imposes upon a person the duty to register in California
8 as a sex offender under Section 290.

9 (B) Murder or voluntary manslaughter or any attempt to commit
10 murder or voluntary manslaughter.

11 (C) ~~Commencing on January 1 of the fifth year following~~
12 ~~enactment of the act that added this subparagraph, as amended,~~
13 ~~2009, any adult person arrested or charged with any felony offense.~~

14 (3) Any person, including any juvenile, who is required to
15 register under Section 290 or 457.1 because of the commission of,
16 or the attempt to commit, a felony or misdemeanor offense, or any
17 person, including any juvenile, who is housed in a mental health
18 facility or sex offender treatment program after referral to such
19 facility or program by a court after being charged with any felony
20 offense.

21 (4) The term “felony” as used in this subdivision includes an
22 attempt to commit the offense.

23 (5) ~~Nothing in this chapter shall be construed as prohibiting~~
24 ~~This chapter does not prohibit~~ collection and analysis of specimens,
25 samples, or print impressions as a condition of a plea for a
26 non-qualifying offense.

27 (b) The provisions of this chapter and its requirements for
28 submission of specimens, samples and print impressions as soon
29 as administratively practicable shall apply to all qualifying persons
30 regardless of sentence imposed, including ~~any~~ a sentence of death,
31 life without the possibility of parole, or ~~any~~ a life or indeterminate
32 term, or ~~any~~ other disposition rendered in the case of an adult or
33 juvenile tried as an adult, or whether the person is diverted, fined,
34 or referred for evaluation, and regardless of disposition rendered
35 or placement made in the case of juvenile who is found to have
36 committed any felony offense or is adjudicated under Section 602
37 of the Welfare and Institutions Code.

38 (c) The provisions of this chapter and its requirements for
39 submission of specimens, samples, and print impressions as soon
40 as administratively practicable by qualified persons as described

1 in subdivision (a) shall apply regardless of placement or
2 confinement in any mental hospital or other public or private
3 treatment facility, and shall include, but not be limited to, the
4 following persons, including juveniles:

5 (1) Any person committed to a state hospital or other treatment
6 facility as a mentally disordered sex offender under *former* Article
7 1 (commencing with Section 6300) of Chapter 2 of Part 2 of
8 Division 6 of the Welfare and Institutions Code.

9 (2) Any person who has a severe mental disorder as set forth
10 within the provisions of Article 4 (commencing with Section 2960)
11 of Chapter 7 of Title 1 of Part 3 of the Penal Code.

12 (3) Any person found to be a sexually violent predator pursuant
13 to Article 4 (commencing with Section 6600) of Chapter 2 of Part
14 2 of Division 6 of the Welfare and Institutions Code.

15 (d) The provisions of this chapter are mandatory and apply
16 whether or not the court advises a person, including any juvenile,
17 that he or she must provide the data bank and database specimens,
18 samples, and print impressions as a condition of probation, parole,
19 or any plea of guilty, no contest, or not guilty by reason of insanity,
20 or any admission to any of the offenses described in subdivision
21 (a).

22 (e) If at any stage of court proceedings the prosecuting attorney
23 determines that specimens, samples, and print impressions required
24 by this chapter have not already been taken from any person, as
25 defined under subdivision (a) of Section 296, the prosecuting
26 attorney shall notify the court orally on the record, or in writing,
27 and request that the court order collection of the specimens,
28 samples, and print impressions required by law. However, a failure
29 by the prosecuting attorney or any other law enforcement agency
30 to notify the court shall not relieve a person of the obligation to
31 provide specimens, samples, and print impressions pursuant to this
32 chapter.

33 (f) Prior to final disposition or sentencing in the case the court
34 shall inquire and verify that the specimens, samples, and print
35 impressions required by this chapter have been obtained and that
36 this fact is included in the abstract of judgment or dispositional
37 order in the case of a juvenile. The abstract of judgment issued by
38 the court shall indicate that the court has ordered the person to
39 comply with the requirements of this chapter and that the person

1 shall be included in the state's DNA and Forensic Identification
2 Data Base and Data Bank program and be subject to this chapter.

3 However, failure by the court to verify specimen, sample, and
4 print impression collection or enter these facts in the abstract of
5 judgment or dispositional order in the case of a juvenile shall not
6 invalidate an arrest, plea, conviction, or disposition, or otherwise
7 relieve a person from the requirements of this chapter.

8 SEC. 5. Section 298 of the Penal Code is amended to read:

9 298. (a) ~~The Director of Corrections~~ *Secretary of the*
10 *Department of Corrections and Rehabilitation*, or the Chief
11 Administrative Officer of the detention facility, jail, or other facility
12 at which the blood specimens, buccal swab samples, and thumb
13 and palm print impressions were collected shall cause these
14 specimens, samples, and print impressions to be forwarded
15 promptly to the Department of Justice, *except that a blood*
16 *specimen or buccal swab sample taken from a person arrested for*
17 *the commission of a felony as specified in paragraph (2) of*
18 *subdivision (a) of Section 296 shall be forwarded to the Department*
19 *of Justice after a judicial determination of probable cause to*
20 *believe the person has committed the offense for which he or she*
21 *was arrested has been made pursuant to Section 825. The*
22 specimens, samples, and print impressions shall be collected by a
23 person using a Department of Justice approved collection kit and
24 in accordance with the requirements and procedures set forth in
25 subdivision (b).

26 (b) (1) The Department of Justice shall provide all blood
27 specimen vials, buccal swab collectors, mailing tubes, labels, and
28 instructions for the collection of the blood specimens, buccal swab
29 samples, and thumbprints. The specimens, samples, and
30 thumbprints shall thereafter be forwarded to the DNA Laboratory
31 of the Department of Justice for analysis of DNA and other forensic
32 identification markers.

33 Additionally, the Department of Justice shall provide all full
34 palm print cards, mailing envelopes, and instructions for the
35 collection of full palm prints. The full palm prints, on a form
36 prescribed by the Department of Justice, shall thereafter be
37 forwarded to the Department of Justice for maintenance in a file
38 for identification purposes.

39 (2) The withdrawal of blood shall be performed in a medically
40 approved manner. Only health care providers trained and certified

1 to draw blood may withdraw the blood specimens for purposes of
2 this section.

3 (3) Buccal swab samples may be procured by law enforcement
4 or corrections personnel or other individuals trained to assist in
5 buccal swab collection.

6 (4) Right thumbprints and a full palm print impression of each
7 hand shall be taken on forms prescribed by the Department of
8 Justice. The palm print forms shall be forwarded to and maintained
9 by the Bureau of Criminal Identification and Information of the
10 Department of Justice. Right thumbprints also shall be taken at
11 the time of the collection of samples and specimens and shall be
12 placed on the sample and specimen containers and forms as
13 directed by the Department of Justice. The samples, specimens,
14 and forms shall be forwarded to and maintained by the DNA
15 Laboratory of the Department of Justice.

16 (5) The law enforcement or custodial agency collecting
17 specimens, samples, or print impressions is responsible for
18 confirming that the person qualifies for entry into the Department
19 of Justice DNA Database and Data Bank Program prior to
20 collecting the specimens, samples, or print impressions pursuant
21 to this chapter.

22 (6) The DNA Laboratory of the Department of Justice is
23 responsible for establishing procedures for entering data bank and
24 database information.

25 (c) (1) Persons authorized to draw blood or obtain samples or
26 print impressions under this chapter for the data bank or database
27 shall not be civilly or criminally liable either for withdrawing blood
28 when done in accordance with medically accepted procedures, or
29 for obtaining buccal swab samples by scraping inner cheek cells
30 of the mouth, or thumb or palm print impressions when performed
31 in accordance with standard professional practices.

32 (2) There is no civil or criminal cause of action against any law
33 enforcement agency or the Department of Justice, or any employee
34 thereof, for a mistake in confirming a person's or sample's
35 qualifying status for inclusion within the database or data bank or
36 in placing an entry in a data bank or a database.

37 (3) The failure of the Department of Justice or local law
38 enforcement to comply with Article 4 or any other provision of
39 this chapter shall not invalidate an arrest, plea, conviction, or
40 disposition.

1 SEC. 6. Section 299 of the Penal Code is amended to read:

2 299. (a) A person whose DNA profile has been included in
3 the data bank pursuant to this chapter shall have his or her DNA
4 specimen and sample destroyed and searchable database profile
5 expunged from the data bank program ~~pursuant to the procedures~~
6 ~~set forth in subdivision (b)~~ if the person has no past or present
7 offense or pending charge which qualifies that person for inclusion
8 within the state's DNA and Forensic Identification Database and
9 Data Bank Program and there otherwise is no legal basis for
10 retaining the specimen or sample or searchable profile.

11 (b) Pursuant to subdivision (a), a person who has no past or
12 present qualifying offense, and for whom there otherwise is no
13 legal basis for retaining the specimen or sample or searchable
14 profile, ~~may make a written request to~~ shall have his or her
15 specimen and sample destroyed and searchable database profile
16 expunged from the data bank program if *any of the following apply*:

17 (1) Following arrest, no accusatory pleading has been filed
18 within the applicable period allowed by law charging the person
19 with a qualifying offense as set forth in subdivision (a) of Section
20 296 or if the charges which served as the basis for including the
21 DNA profile in the state's DNA Database and Data Bank
22 Identification Program have been dismissed prior to adjudication
23 by a trier of fact, *in which case the district attorney shall submit*
24 *a letter to the Department of Justice as soon as these conditions*
25 *have been met.*

26 (2) The underlying conviction or disposition serving as the basis
27 for including the DNA profile has been reversed and the case
28 dismissed, *in which case the court shall forward its order to the*
29 *Department of Justice upon disposition of the case.*

30 (3) The person has been found factually innocent of the
31 underlying offense pursuant to Section 851.8, or Section 781.5 of
32 the Welfare and Institutions Code; ~~or~~, *in which case the court shall*
33 *forward its order to the Department of Justice upon disposition*
34 *of the case.*

35 (4) The defendant has been found not guilty or the defendant
36 has been acquitted of the underlying offense, *in which case the*
37 *court shall forward its order to the Department of Justice upon*
38 *disposition of the case.*

39 (e) ~~(1) The person requesting the data bank entry to be expunged~~
40 ~~must send a copy of his or her request to the trial court of the~~

1 county where the arrest occurred, or that entered the conviction or
2 rendered disposition in the case, to the DNA Laboratory of the
3 Department of Justice, and to the prosecuting attorney of the county
4 in which he or she was arrested or, convicted, or adjudicated, with
5 proof of service on all parties. The court has the discretion to grant
6 or deny the request for expungement. The denial of a request for
7 expungement is a nonappealable order and shall not be reviewed
8 by petition for writ.

9 (2)

10 (c) Except as provided below *in this section*, the Department of
11 Justice shall destroy a specimen and sample and expunge the
12 searchable DNA database profile pertaining to the person who has
13 no present or past qualifying offense of record upon receipt of a
14 court order that verifies the applicant has made the necessary
15 showing at a noticed hearing, and that includes all of the following:

16 (A) The written request for expungement pursuant to this
17 section.

18 (B)

19 (1) A certified copy of the court order reversing and dismissing
20 the conviction or case, or a letter from the district attorney
21 certifying that no accusatory pleading has been filed or the charges
22 which served as the basis for collecting a DNA specimen and
23 sample have been dismissed prior to adjudication by a trier of fact,
24 the defendant has been found factually innocent, the defendant has
25 been found not guilty, the defendant has been acquitted of the
26 underlying offense, or the underlying conviction has been reversed
27 and the case dismissed.

28 (C) Proof of written notice to the prosecuting attorney and the
29 Department of Justice that expungement has been requested.

30 (D)

31 (2) A court order verifying that no retrial or appeal of the case
32 is pending, that it has been at least 180 days since the defendant
33 or minor has notified the prosecuting attorney and the Department
34 of Justice of the expungement request, and that the court has not
35 received an objection from the Department of Justice or the
36 prosecuting attorney *pending*.

37 (d) Upon order from the court, the Department of Justice shall
38 destroy any specimen or sample collected from the person and any
39 searchable DNA database profile pertaining to the person, unless
40 the department determines that the person is subject to the

1 provisions of this chapter because of a past qualifying offense of
2 record or is or has otherwise become obligated to submit a blood
3 specimen or buccal swab sample as a result of a separate arrest,
4 conviction, juvenile adjudication, or finding of guilty or not guilty
5 by reason of insanity for an offense described in subdivision (a)
6 of Section 296, or as a condition of a plea.

7 The Department of Justice is not required to destroy analytical
8 data or other items obtained from a blood specimen or saliva, or
9 buccal swab sample, if evidence relating to another person subject
10 to the provisions of this chapter would thereby be destroyed or
11 otherwise compromised.

12 Any identification, warrant, probable cause to arrest, or arrest
13 based upon a data bank or database match is not invalidated due
14 to a failure to expunge or a delay in expunging records.

15 (e) Notwithstanding any other ~~provision of law~~, the Department
16 of Justice DNA Laboratory is not required to expunge DNA profile
17 or forensic identification information or destroy or return
18 specimens, samples, or print impressions taken pursuant to this
19 section if the duty to register under Section 290 or 457.1 is
20 terminated.

21 (f) Notwithstanding any other ~~provision of law~~, including
22 Sections 17, 1203.4, and 1203.4a, a judge is not authorized to
23 relieve a person of the separate administrative duty to provide
24 specimens, samples, or print impressions required by this chapter
25 if a person has been found guilty or was adjudicated a ward of the
26 court by a trier of fact of a qualifying offense as defined in
27 subdivision (a) of Section 296, or was found not guilty by reason
28 of insanity or pleads no contest to a qualifying offense as defined
29 in subdivision (a) of Section 296.

30 SEC. 7. Section 300 of the Penal Code is amended to read:

31 ~~300. Nothing in this chapter shall~~ *This chapter does not limit*
32 or abrogate any existing authority of law enforcement officers to
33 take, maintain, store, and utilize DNA or forensic identification
34 markers, blood specimens, buccal swab samples, saliva samples,
35 or thumb or palm print impressions for identification purposes. *A*
36 *law enforcement agency may use any publicly available database*
37 *to aid in the investigation of a crime.*

38 SEC. 8. If the Commission on State Mandates determines that
39 this act contains costs mandated by the state, reimbursement to
40 local agencies and school districts for those costs shall be made

- 1 pursuant to Part 7 (commencing with Section 17500) of Division
- 2 4 of Title 2 of the Government Code.

O