

Introduced by Senator RunnerFebruary 17, 2016

An act to amend Sections 299 and 1170.18 of the Penal Code, relating to DNA evidence.

LEGISLATIVE COUNSEL'S DIGEST

SB 1109, as introduced, Runner. DNA evidence: expungement.

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, statewide general election, requires any adult person who is arrested, charged, or convicted of specified offenses 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 and inclusion in state and federal DNA databases. Existing law requires a person's DNA profile to be expunged from this database if no accusatory pleading is filed within the applicable period allowed by law, the underlying conviction serving as the basis for the DNA profile has been reversed and the case dismissed, the person has been found factually innocent of the underlying offense, or the defendant has been found not guilty or has been acquitted of the underlying offense.

Existing law, added by Proposition 47, approved by the voters at the November 4, 2014, statewide general election, allows a person to petition the court for resentencing if he or she was convicted of a felony that was reduced to a misdemeanor by Proposition 47. Existing law requires the court to resentence the petitioner, unless the court

determines that the person would pose an unreasonable risk to public safety.

This bill would prevent resentencing under Proposition 47 from being considered a basis for expungement of DNA evidence.

Vote: $\frac{2}{3}$. Appropriation: no. Fiscal committee: no.
 State-mandated local program: no.

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

1 SECTION 1. Section 299 of the Penal Code, as amended by
 2 Section 4 of Chapter 487 of the Statutes of 2015, is amended to
 3 read:

4 299. (a) A person whose DNA profile has been included in
 5 the databank pursuant to this chapter shall have his or her DNA
 6 specimen and sample destroyed and searchable database profile
 7 expunged from the databank program pursuant to the procedures
 8 set forth in subdivision (b) if the person has no past or present
 9 offense or pending charge which qualifies that person for inclusion
 10 within the state’s DNA and Forensic Identification Database and
 11 Databank Program and there otherwise is no legal basis for
 12 retaining the specimen or sample or searchable profile. *A DNA*
 13 *profile that was lawfully collected and included in the databank*
 14 *as a consequence of a conviction of a qualifying offense shall not*
 15 *be destroyed due to resentencing of that person pursuant to Section*
 16 *1170.18.*

17 (b) Pursuant to subdivision (a), a person who has no past or
 18 present qualifying offense, and for whom there otherwise is no
 19 legal basis for retaining the specimen or sample or searchable
 20 profile, may make a written request to have his or her specimen
 21 and sample destroyed and searchable database profile expunged
 22 from the databank program if any of the following apply:

23 (1) Following arrest, no accusatory pleading has been filed
 24 within the applicable period allowed by law, charging the person
 25 with a qualifying offense as set forth in subdivision (a) of Section
 26 296 or if the charges which served as the basis for including the
 27 DNA profile in the state’s DNA and Forensic Identification
 28 Database and Databank Program have been dismissed prior to
 29 adjudication by a trier of fact;

1 (2) The underlying conviction or disposition serving as the basis
2 for including the DNA profile has been reversed and the case
3 dismissed;

4 (3) The person has been found factually innocent of the
5 underlying offense pursuant to Section 851.8, or Section 781.5 of
6 the Welfare and Institutions Code; or

7 (4) The defendant has been found not guilty or the defendant
8 has been acquitted of the underlying offense.

9 (c) (1) The person requesting the databank entry to be expunged
10 must send a copy of his or her request to the trial court of the
11 county where the arrest occurred, or that entered the conviction or
12 rendered disposition in the case, to the DNA Laboratory of the
13 Department of Justice, and to the prosecuting attorney of the county
14 in which he or she was arrested or, convicted, or adjudicated, with
15 proof of service on all parties. The court has the discretion to grant
16 or deny the request for expungement. The denial of a request for
17 expungement is a nonappealable order and shall not be reviewed
18 by petition for writ.

19 (2) Except as provided in this section, the Department of Justice
20 shall destroy a specimen and sample and expunge the searchable
21 DNA database profile pertaining to the person who has no present
22 or past qualifying offense of record upon receipt of a court order
23 that verifies the applicant has made the necessary showing at a
24 noticed hearing, and that includes all of the following:

25 (A) The written request for expungement pursuant to this
26 section.

27 (B) A certified copy of the court order reversing and dismissing
28 the conviction or case, or a letter from the district attorney
29 certifying that no accusatory pleading has been filed or the charges
30 which served as the basis for collecting a DNA specimen and
31 sample have been dismissed prior to adjudication by a trier of fact,
32 the defendant has been found factually innocent, the defendant has
33 been found not guilty, the defendant has been acquitted of the
34 underlying offense, or the underlying conviction has been reversed
35 and the case dismissed.

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

38 (D) A court order verifying that no retrial or appeal of the case
39 is pending, that it has been at least 180 days since the defendant
40 or minor has notified the prosecuting attorney and the Department

1 of Justice of the expungement request, and that the court has not
2 received an objection from the Department of Justice or the
3 prosecuting attorney.

4 (d) (1) Upon order from the court, the Department of Justice
5 shall destroy any specimen or sample collected from the person
6 and any searchable DNA database profile pertaining to the person,
7 unless the department determines that the person is subject to the
8 provisions of this chapter because of a past qualifying offense of
9 record or is or has otherwise become obligated to submit a blood
10 specimen or buccal swab sample as a result of a separate arrest,
11 conviction, juvenile adjudication, or finding of guilty or not guilty
12 by reason of insanity for an offense described in subdivision (a)
13 of Section 296, or as a condition of a plea.

14 ~~The~~

15 (2) ~~The~~ Department of Justice is not required to destroy
16 analytical data or other items obtained from a blood specimen or
17 saliva, or buccal swab sample, if evidence relating to another
18 person subject to the provisions of this chapter would thereby be
19 destroyed or otherwise compromised.

20 ~~Any~~

21 (3) ~~Any~~ identification, warrant, probable cause to arrest, or arrest
22 based upon a databank or database match is not invalidated due
23 to a failure to expunge or a delay in expunging records.

24 (e) Notwithstanding any other law, the Department of Justice
25 DNA Laboratory is not required to expunge DNA profile or
26 forensic identification information or destroy or return specimens,
27 samples, or print impressions taken pursuant to this section if the
28 duty to register under Section 290 or 457.1 is terminated.

29 (f) Notwithstanding any other law, including Sections 17,
30 1170.18, 1203.4, and 1203.4a, a judge is not authorized to relieve
31 a person of the separate administrative duty to provide specimens,
32 samples, or print impressions required by this chapter if a person
33 has been found guilty or was adjudicated a ward of the court by a
34 trier of fact of a qualifying offense as defined in subdivision (a)
35 of Section 296, or was found not guilty by reason of insanity or
36 pleads no contest to a qualifying offense as defined in subdivision
37 (a) of Section 296.

38 (g) This section shall become inoperative if the California
39 Supreme Court rules to uphold the California Court of Appeal
40 decision in *People v. Buza* (2014) 231 Cal.App.4th 1446 in regard

1 to the provisions of Section 299 of the Penal Code, as amended
2 by Section 9 of the DNA Fingerprint, Unsolved Crime and
3 Innocence Protection Act, Proposition 69, approved by the voters
4 at the November 2, 2004, statewide general election, in which case
5 this section shall become inoperative immediately upon that ruling
6 becoming final.

7 SEC. 2. Section 299 of the Penal Code, as amended by Section
8 5 of Chapter 487 of the Statutes of 2015, is amended to read:

9 299. (a) A person whose DNA profile has been included in
10 the databank pursuant to this chapter shall have his or her DNA
11 specimen and sample destroyed and searchable database profile
12 expunged from the databank program if the person has no past or
13 present offense or pending charge which qualifies that person for
14 inclusion within the state's DNA and Forensic Identification
15 Database and Databank Program and there otherwise is no legal
16 basis for retaining the specimen or sample or searchable profile.
17 *A DNA profile that was lawfully collected and included in the*
18 *databank as a consequence of a conviction of a qualifying offense*
19 *shall not be destroyed due to resentencing of that person pursuant*
20 *to Section 1170.18.*

21 (b) Pursuant to subdivision (a), a person who has no past or
22 present qualifying offense, and for whom there otherwise is no
23 legal basis for retaining the specimen or sample or searchable
24 profile shall have his or her specimen and sample destroyed and
25 searchable database profile expunged from the databank program
26 if any of the following apply:

27 (1) Following arrest, and after the applicable law enforcement
28 agency has provided notice to the prosecuting attorney that the
29 criminal case will not be presented to the prosecuting attorney for
30 review, or after the applicable law enforcement agency has
31 submitted a criminal case to the prosecuting attorney for review,
32 no accusatory pleading has been filed within the applicable period
33 allowed by law, charging the person with a qualifying offense as
34 set forth in subdivision (a) of Section 296, in which case the
35 prosecuting attorney shall immediately, or as soon as practically
36 possible, submit a letter to the Department of Justice indicating
37 that an accusatory pleading has not been filed.

38 (2) The charges which served as the basis for including the DNA
39 profile in the state's DNA and Forensic Identification Database
40 and Databank Program have been dismissed prior to adjudication

1 by a trier of fact, in which case the court shall forward an order to
2 the Department of Justice upon disposition of the case, indicating
3 that the charges have been dismissed.

4 (3) The underlying conviction or disposition serving as the basis
5 for including the DNA profile has been reversed and the case
6 dismissed, in which case the court shall forward its order to the
7 Department of Justice upon disposition of the case.

8 (4) The person has been found factually innocent of the
9 underlying offense pursuant to Section 851.8, or Section 781.5 of
10 the Welfare and Institutions Code, in which case the court shall
11 forward its order to the Department of Justice upon disposition of
12 the case.

13 (5) The defendant has been found not guilty or the defendant
14 has been acquitted of the underlying offense, in which case the
15 court shall forward its order to the Department of Justice upon
16 disposition of the case.

17 (c) Except as provided in this section, the Department of Justice
18 shall destroy a specimen and sample and expunge the searchable
19 DNA database profile pertaining to the person who has no present
20 or past qualifying offense of record upon receipt of the following:

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

30 (2) A court order verifying that no retrial or appeal of the case
31 is pending.

32 (d) (1) Pursuant to this section, the Department of Justice shall
33 destroy any specimen or sample collected from the person and any
34 searchable DNA database profile pertaining to the person, unless
35 the department determines that the person is subject to the
36 provisions of this chapter because of a past qualifying offense of
37 record or is or has otherwise become obligated to submit a blood
38 specimen or buccal swab sample as a result of a separate arrest,
39 conviction, juvenile adjudication, or finding of guilty or not guilty

1 by reason of insanity for an offense described in subdivision (a)
2 of Section 296, or as a condition of a plea.

3 ~~The~~

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

9 ~~Any~~

10 (3) *Any* identification, warrant, probable cause to arrest, or arrest
11 based upon a databank or database match is not invalidated due
12 to a failure to expunge or a delay in expunging records.

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

18 (f) Notwithstanding any other law, including Sections 17,
19 1170.18, 1203.4, and 1203.4a, a judge is not authorized to relieve
20 a person of the separate administrative duty to provide specimens,
21 samples, or print impressions required by this chapter if a person
22 has been found guilty or was adjudicated a ward of the court by a
23 trier of fact of a qualifying offense as defined in subdivision (a)
24 of Section 296, or was found not guilty by reason of insanity or
25 pleads no contest to a qualifying offense as defined in subdivision
26 (a) of Section 296.

27 (g) This section shall only become operative if the California
28 Supreme Court rules to uphold the California Court of Appeal
29 decision in *People v. Buza* (2014) 231 Cal.App.4th 1446 in regard
30 to the provisions of Section 299 of the Penal Code, as amended
31 by Section 9 of the DNA Fingerprint, Unsolved Crime and
32 Innocence Protection Act, Proposition 69, approved by the voters
33 at the November 2, 2004, statewide general election, in which case
34 this section shall become operative immediately upon that ruling
35 becoming final.

36 SEC. 3. Section 1170.18 of the Penal Code is amended to read:

37 1170.18. (a) A person currently serving a sentence for a
38 conviction, whether by trial or plea, of a felony or felonies who
39 would have been guilty of a misdemeanor under the act that added
40 this section (“this act”) had this act been in effect at the time of

1 the offense may petition for a recall of sentence before the trial
2 court that entered the judgment of conviction in his or her case to
3 request resentencing in accordance with Sections 11350, 11357,
4 or 11377 of the Health and Safety Code, or Section 459.5, 473,
5 476a, 490.2, 496, or 666 of the Penal Code, as those sections have
6 been amended or added by this act.

7 (b) Upon receiving a petition under subdivision (a), the court
8 shall determine whether the petitioner satisfies the criteria in
9 subdivision (a). If the petitioner satisfies the criteria in subdivision
10 (a), the petitioner's felony sentence shall be recalled and the
11 petitioner resentenced to a misdemeanor pursuant to Sections
12 11350, 11357, or 11377 of the Health and Safety Code, or Section
13 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, those
14 sections have been amended or added by this act, unless the court,
15 in its discretion, determines that resentencing the petitioner would
16 pose an unreasonable risk of danger to public safety. In exercising
17 its discretion, the court may consider all of the following:

18 (1) The petitioner's criminal conviction history, including the
19 type of crimes committed, the extent of injury to victims, the length
20 of prior prison commitments, and the remoteness of the crimes.

21 (2) The petitioner's disciplinary record and record of
22 rehabilitation while incarcerated.

23 (3) Any other evidence the court, within its discretion,
24 determines to be relevant in deciding whether a new sentence
25 would result in an unreasonable risk of danger to public safety.

26 (c) As used throughout this Code, "unreasonable risk of danger
27 to public safety" means an unreasonable risk that the petitioner
28 will commit a new violent felony within the meaning of clause
29 (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of
30 Section 667.

31 (d) A person who is resentenced pursuant to subdivision (b)
32 shall be given credit for time served and shall be subject to parole
33 for one year following completion of his or her sentence, unless
34 the court, in its discretion, as part of its resentencing order, releases
35 the person from parole. Such person is subject to Section 3000.08
36 parole supervision by the Department of Corrections and
37 Rehabilitation and the jurisdiction of the court in the county in
38 which the parolee is released or resides, or in which an alleged
39 violation of supervision has occurred, for the purpose of hearing
40 petitions to revoke parole and impose a term of custody.

- 1 (e) Under no circumstances may resentencing under this section
2 result in the imposition of a term longer than the original sentence.
- 3 (f) A person who has completed his or her sentence for a
4 conviction, whether by trial or plea, of a felony or felonies who
5 would have been guilty of a misdemeanor under this act had this
6 act been in effect at the time of the offense, may file an application
7 before the trial court that entered the judgment of conviction in
8 his or her case to have the felony conviction or convictions
9 designated as misdemeanors.
- 10 (g) If the application satisfies the criteria in subdivision (f), the
11 court shall designate the felony offense or offenses as a
12 misdemeanor.
- 13 (h) Unless requested by the applicant, no hearing is necessary
14 to grant or deny an application filed under subsection (f).
- 15 (i) The provisions of this section shall not apply to persons who
16 have one or more prior convictions for an offense specified in
17 clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e)
18 of Section 667 or for an offense requiring registration pursuant to
19 subdivision (c) of Section 290.
- 20 (j) Any petition or application under this section shall be filed
21 within three years after the effective date of the act that added this
22 section or at a later date upon a showing of good cause.
- 23 (k) Any felony conviction that is recalled and resentenced under
24 subdivision (b) or designated as a misdemeanor under subdivision
25 (g) shall be considered a misdemeanor for all purposes, except that
26 such resentencing shall not permit that person to own, possess, or
27 have in his or her custody or control any ~~firearm~~ or *firearm*, prevent
28 his or her conviction under Chapter 2 (commencing with Section
29 29800) of Division 9 of Title 4 of Part ~~6~~ 6, *or be considered a*
30 *basis for expungement of DNA evidence pursuant to Section 299.*
- 31 (l) If the court that originally sentenced the petitioner is not
32 available, the presiding judge shall designate another judge to rule
33 on the petition or application.
- 34 (m) Nothing in this section is intended to diminish or abrogate
35 any rights or remedies otherwise available to the petitioner or
36 applicant.
- 37 (n) Nothing in this and related sections is intended to diminish
38 or abrogate the finality of judgments in any case not falling within
39 the purview of this act.

1 (o) A resentencing hearing ordered under this act shall constitute
2 a “post-conviction release proceeding” under paragraph (7) of
3 subdivision (b) of Section 28 of Article I of the California
4 Constitution (Marsy’s Law).

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