SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	AB 1492	**Hearing Date:**	July 14, 2015
Author:	Gatto		
Version:	June 29, 2015		
Urgency:	No	**Fiscal:**	Yes
Consultant:	MK		

Subject: ***Forensic Testing: DNA Samples***

HISTORY

Source: Author

Prior Legislation: Proposition 69 November 2, 2004
SB 883 (Margett) not heard Assembly Public Safety 2004
SB 284 (Brulte) - failed Senate Public Safety 2003
SB 1242 (Brulte) - Chapter 632, Stats. 2002
AB 2105 (La Suer) - Chapter 160, Stats. 2002
AB 673 (Migden) - Chapter 906, Stats. 2001
AB 2814 (Machado) - Chapter 823, Stats. 2000
AB 557 (Nakano) - not heard in Senate Public Safety 1999-2000
SB 654 (Schiff) - Chapter 475, Stats. 1999
AB 1332 (Murray) - Chapter 696, Stats. 1998

Support: Crime Victims United

Opposition: California State Sheriffs' Association

Assembly Floor Vote: No longer relevant

PURPOSE

The purpose of this bill is to allow for DNA collection of a person convicted of a serious felony if the ruling of* People v Buza *is upheld by the California Supreme Court and to allow law enforcement access to publicly available data bases.

Existing law requires the following persons provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required pursuant to this chapter for law enforcement identification analysis:

- Any person, including any juvenile, who is convicted of or pleads guilty or no contest to any felony offense, or is found not guilty by reason of insanity of any felony offense, or any juvenile where a court has found that they have committed any felony offense. (Penal Code § 296 (a)(1).)
- Any adult person who is arrested for or charged with a felony offense. (Penal Code § 296 (a)(2)(C).)

- Any person, including any juvenile, who is required to register as a sex offender or arson offender because of the commission of, or the attempt to commit, a felony or misdemeanor offense, or any person, including any juvenile, who is housed in a mental health facility or sex offender treatment program after referral to such facility or program by a court after being charged with any felony offense. (Penal Code, § 296 (a)(3).)

Existing law provides that the term "felony" includes an attempt to commit the offense. (Penal Code, §296 (a)(4).)

Existing law allows the collection and analysis of specimens, samples, or print impressions as a condition of a plea for a non-qualifying offense. (Penal Code §296 (a)(5).)

Existing law requires submission of specimens, samples, and print impressions as soon as administratively practicable by qualified persons and shall apply regardless of placement or confinement in any mental hospital or other public or private treatment facility, and shall include, but not be limited to, the following persons, including juveniles:

- Any person committed to a state hospital or other treatment facility as a mentally disordered sex offender.
- Any person who is designated a mentally ordered offender.
- Any person found to be a sexually violent predator. (Penal Code, §296 (c)(3).)

Existing law specifies that the court shall inquire and verify, prior to final disposition or sentencing in the case, that the specimens, samples, and print impressions have been obtained and that this fact is included in the abstract of judgment or dispositional order in the case of a juvenile. (Penal Code §296 (f).)

Existing law provides that failure by the court to verify specimen, sample, and print impression collection or enter these facts in the abstract of judgment or dispositional order in the case of a juvenile shall not invalidate an arrest, plea, conviction, or disposition, or otherwise relieve a person from the requirements to provide samples. (Penal Code §296(f).)

Existing law provides that The Department of Justice(DOJ), through its DNA Laboratory, is responsible for the management and administration of the state's DNA and Forensic Identification Database and Data Bank Program and for liaising with the Federal Bureau of Investigation (FBI) regarding the state's participation in a national or international DNA database and data bank program such as the Combined DNA Index System (CODIS) that allows the storage and exchange of DNA records submitted by state and local forensic DNA laboratories nationwide. (Penal Code, § 295 (g).)

Existing law provides that DOJ can perform DNA analysis, other forensic identification analysis, and examination of palm prints pursuant to the Act only for identification purposes. (Penal Code § 295.1 (a) & (b).)

Existing law specifies that the Director of Corrections, or the Chief Administrative Officer of the detention facility, jail, or other facility at which the blood specimens, buccal swab samples, and thumb and palm print impressions were collected send them promptly to the Department of Justice.(Penal Code § 298.)

Existing law requires the DNA Laboratory of DOJ to establish procedures for entering data bank and database information. (Penal Code § 298(b)(6).)

Existing law specifies that a person whose DNA profile has been included in the data bank pursuant to this chapter shall have his or her DNA specimen and sample destroyed and searchable database profile expunged from the data bank program if the person has no past or present offense or pending charge which qualifies that person for inclusion within the state's DNA and Forensic Identification Database and Data Bank Program and there otherwise is no legal basis for retaining the specimen or sample or searchable profile:

- Following arrest, no accusatory pleading has been filed within the applicable period allowed by law charging the person with a qualifying offense or if the charges which served as the basis for including the DNA profile in the state's DNA Database and Data Bank Identification Program have been dismissed prior to adjudication by a trier of fact; or ,
- The underlying conviction or disposition serving as the basis for including the DNA profile has been reversed and the case dismissed; or,
- The person has been found factually innocent of the underlying offense; or,
- The defendant has been found not guilty or the defendant has been acquitted of the underlying offense. (Penal Code § 299 (b).)

Existing law requires the person requesting the data bank entry to be expunged send a copy of his or her request to the trial court of the county where the arrest occurred, or that entered the conviction or rendered disposition in the case, to the DNA Laboratory of the Department of Justice, and to the prosecuting attorney of the county in which he or she was arrested or, convicted, or adjudicated, with proof of service on all parties. The court has the discretion to grant or deny the request for expungement. The denial of a request for expungement is a non-appealable order and shall not be reviewed by petition for writ. (Penal Code, § 299 (c)(1).)

Existing law requires DOJ destroy a specimen and sample and expunge the searchable DNA database profile pertaining to the person who has no present or past qualifying offense of record upon receipt of a court order that verifies the applicant has made the necessary showing at a noticed hearing, and that includes all of the following:

- The written request for expungement pursuant to this section.
- A certified copy of the court order reversing and dismissing the conviction or case, or a letter from the district attorney certifying that no accusatory pleading has been filed or the charges which served as the basis for collecting a DNA specimen and sample have been dismissed prior to adjudication by a trier of fact, the defendant has been found factually innocent, the defendant has been found not guilty, the defendant has been acquitted of the underlying offense, or the underlying conviction has been reversed and the case dismissed.
- Proof of written notice to the prosecuting attorney and the Department of Justice that expungement has been requested.
- A court order verifying that no retrial or appeal of the case is pending, that it has been at least 180 days since the defendant or minor has notified the prosecuting attorney and the Department of Justice of the expungement request, and that the court has not received an objection from the Department of Justice or the prosecuting attorney . (Penal Code, § 299 (c)(2).):

Existing law states that the Department of Justice shall destroy not any specimen or sample collected from the person and any searchable DNA database profile pertaining to the person, if department determines that the person is subject to the provisions of this chapter because of a past qualifying offense of record or is or has otherwise become obligated to submit a blood specimen or buccal swab sample as a result of a separate arrest, conviction, juvenile adjudication, or finding of guilty or not guilty by reason of insanity for an offense requiring a DNA sample, or as a condition of a plea. (Penal Code, § 299 (d).)

Existing law provides that the Department of Justice is not required to destroy analytical data or other items obtained from a blood specimen or saliva, or buccal swab sample, if evidence relating to another person subject to the provisions of this chapter would thereby be destroyed or otherwise compromised. (Penal Code, § 299 (d).)

Existing law states that a judge is not authorized to relieve a person of the separate administrative duty to provide specimens, samples, or print impressions required, including reduction to a misdemeanor(Penal Code § 17.), or dismissal following conviction. (Penal Code §§ 1203.4, 1203.4a.) (Penal Code § 299(f).)

This bill requires that DNA samples obtained during an arrest for a sex offense or a serious or violent felony not be sent to Department of Justice for analysis until after a judicial determination of probable cause, operative if the California Supreme Court upholds the case of *People v. Buza*, review granted February 18, 2015.

This bill establishes a procedure for a person's DNA sample and searchable database profile to be expunged if the case is dismissed, or the accused is acquitted, or otherwise exonerated, and the person has no past qualifying offense, without the requirement of an application from the person, operative if the California Supreme Court upholds the case of *People v. Buza*, review granted February 18, 2015, S223698. If *Buza* is upheld, any of the following apply:

- Law enforcement has not received notice that a court has found probable cause for a qualifying offense. Or if the charges which served as the basis for including the DNA profile in the state's DNA Database and Data Bank Identification Program have been dismissed by to adjudication by a trier of fact, in which case the district attorney shall submit a letter to the Department of Justice as soon as these conditions have been met.
- The underlying conviction or disposition serving as the basis for including the DNA profile has been reversed and the case dismissed, in which case the court shall forward its order to the Department of Justice upon disposition of the case.
- The person has been found factually innocent of the underlying offense, in which case the court shall forward its order to the Department of Justice upon disposition of the case.
- The defendant has been found not guilty or the defendant has been acquitted of the underlying offense, in which case the court shall forward its order to the Department of Justice upon disposition of the case.

This bill allows a law enforcement agency to use any publicly available database, excluding any non CODIS law enforcement databases, if (1) the case involves a homicide or a sexual assault involving force; (2) the case is unsolved and all investigative leads have been exhausted; (3) the law enforcement agency must review non-forensic information in order to identify additional evidence bearing on relatedness.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for The Bill

According to the author:

> In 2004, California voters passed Proposition 69, expanding the State's DNA collection and testing program to allow for the collection of DNA samples from every person arrested for a felony. Proposition 69 went into effect in 2009, but shortly thereafter, its constitutionality was challenged in court. In December of 2014, California's Appellate Court struck down the state's criminal-DNA-testing program contained in Proposition 69. In *People v. Buza*, the court found several aspects of California's DNA-testing practices to be unconstitutional, dealing a huge setback to law enforcement's ability to solve crimes. The Attorney General has appealed the *Buza* decision, but during the period between the Appeals Court decision and the CA Supreme Court's decision to hear the case, the Department of Justice was forced to halt the collection of DNA from felony arrestees, thus hindering law enforcement's ability to solve crimes. DNA collection of felony arrestees has resumed since March of 2015, when the *Buza* decision was depublished while the CA Supreme Court considers the case, so AB 1492 seeks to provide a back-up system, that is consistent with what the US Supreme Court found constitutional in the *Maryland v. King* case, in case the CA Supreme Court upholds the lower court's decision.
>
> AB 1492 would provide for DNA collection of those charged with a serious felony (rather than every felony, as is currently being decided in the *Buza* case), would require a probable cause determination (rather than immediately upon arrest), and would set up a framework for automatic expungement of those samples collected from individuals who are ultimately not charged, found not-guilty or otherwise exonerated, thus furthering the voters' intent in passing Proposition 69 and creating parity between California's DNA collection laws and those upheld by the US Supreme Court. It strikes a careful balance by enhancing law enforcement's ability to fully utilize the tools necessary to solve crimes, while ensuring for the protection of Californians' constitutional rights. DNA testing is crucial to our ability to solve crimes, and AB 1492 strives to make sure that best practices are implemented, the constitution is respected, the innocent are exonerated, and the guilty are brought to justice.

2. *People v. Buza*

Presently pending before the California Supreme Court is *People v. Buza*, review granted February 18, 2015, S223698. At issue in *Buza* was the legality of California's DNA collection from arrestees on felony offenses. (Proposition 69 (2004).) The *Buza* court found the California DNA scheme unconstitutional. In finding Proposition 69 invalid, the Appellate Court focused on the fact that the California Supreme Court has found that article I, section 13, of the California Constitution imposes a "more exacting standard" than the equivalent language found in the Fourth Amendment of the U.S. Constitution. *People v. Ruggles* (1985) 39 Cal.3d 1, 11-12, *People v. Brisendine* (1975) 13 Cal.3d 528, 545. The court in *Buza* held 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 language of article I, section 13, of the California Constitution mirrors the language contained in the Fourth Amendment of the U.S. Constitution regarding the right to be free from unreasonable search and seizure.

The court in *Buza* stated, ". . . the fact that DNA is collected and analyzed immediately after arrest means that some of the arrestees subjected to collection will never be charged, much less convicted, of any crime—and, therefore, that the governmental interest in DNA collection is inapplicable while the privacy interest is effectively that of an ordinary citizen. The absence of automatic expungement procedures increases the privacy intrusion because DNA profiles and samples are likely to remain available to the government for some period of time after the justification for their collection has disappeared, potentially indefinitely. And the fact that familial DNA searches are not prohibited means that the act would permit intrusion into the privacy interests of arrestees' biological relatives if the DOJ were to alter its current policy of not using arrestees' DNA for such searches."

The *Buza* case is under review by the California Supreme Court. Because the case is under review it has no authority, or value as precedent. As such, Proposition 69 continues to be the law in California. DNA samples continue to be taken, stored, and tested as in the manner laid out by Proposition 69. It is unclear when the Supreme Court will issue a decision in the *Buza* case. The case is currently being briefed. The Supreme Court has wide latitude in setting the briefing schedule and establishing a date for argument.

"In California, the burdened group includes not only those ultimately acquitted of criminal conduct but also those never even charged. The percentage of arrestees potentially affected in the latter way is not small: Statistics published by the DOJ indicate that in 2012, 62 percent of felony arrestees who were not ultimately convicted—almost 20 percent of total felony arrestees—were never even charged with a crime." *People v. Buza* (2014) 231 Cal.app.4th 1446,187 (citing *Crime in California*, California DOJ (2012) at 49.)

3. California DNA Database

The profile derived from the DNA sample is uploaded into the state's DNA databank, which is part of the national Combined DNA Index System (CODIS), and can be accessed by local, state and federal law enforcement agencies and officials. When a DNA profile is uploaded, it is compared to profiles contained in the Convicted Offender and Arrestee Indices; if there is a "hit," the laboratory conducts procedures to confirm the match and, if confirmed, obtains the identity of the suspect. The uploaded profile is also compared to crime scene profiles contained in the Forensic Index; again, if there is a hit, the match is confirmed by the laboratory. CODIS also performs weekly searches of the entire system. In CODIS, the profile does not include the name of the person from whom the DNA was collected or any case-related information, but only a specimen identification number, an identifier for the agency that provided the sample, and the name of the personnel associated with the analysis. CODIS is a massive computer system which connects federal, state, and local DNA databanks. CODIS is also the name of the related computer software program. CODIS's national component is the National DNA Index System (NDIS), the receptacle for all DNA profiles submitted by federal, state, and local forensic laboratories. DNA profiles typically originate at the Local DNA Index System (LDIS), then migrate to the State DNA Index System (SDIS), containing forensic profiles analyzed by local and state laboratories, and then to NDIS.

4. Proposition 69

Proposition 69 was passed by the voters in 2004. That proposition expanded the categories of people required to provide DNA samples for law enforcement identification analysis to include any adult person arrested or charged with any felony offense. The language of the proposition included a Section V related to amendments to the proposition which states:

> The provisions of this measure may be amended by a statute that is passed by each house of the Legislature and signed by the Governor. All amendments to this measure shall be to further the measure and shall be consistent with is purposes to enhance the use of DNA identification evidence for the purpose of accurate and expeditious crime solving and exonerating the innocent.

5. Alternative if *Buza* is Upheld

This bill would provide that if the *Buza* case is upheld by the California Supreme Court then the existing statutes related to the DNA Databank would be changed in the following ways:

a. Instead of all felonies DNA would only be taken from a person arrested or charged with:

   i. Any sex offense for which registration is required.
   ii. Murder or voluntary manslaughter or any attempt to commit murder of voluntary manslaughter.
   iii. Any serious of violent felony

b. Instead of the sample being submitted to the DOJ at arrest the sample will be submitted after a judicial determination for probable cause has occurred.

c. Instead of requiring the arrested person to request his or her DNA be removed from the data bank after a case was dismissed, found factually innocent or was found not guilty the district attorney shall forward its order to DOJ in the case of a dismissal and the court shall forward it order in the case of factual innocence or a not guilty verdict to the DOJ for removal and destruction of the DNA sample in accordance with the law.

It is unusual for the legislature to try to guess how a court will rule in a particular case. Is it appropriate in this case?

The California State Sheriffs' Association opposes this bill stating:

> In *Buza*, the appellate court, utilizing California constitutional standards and not a 4th Amendment analysis, precludes submission of a DNA sample to the Department of Justice (DOJ) DNA databank absent a judicial determination of probable cause. The holding further speaks to the need to alter the process whereby DNA samples of arrestees who are acquitted or not ultimately charged are removed from the databank. However, the court's analysis does not speak to the distinction between collecting DNA from all felony arrestees and only those arrested for serious crimes. In fact, the court points out this difference between

Maryland law and California law as part of the reason why it utilizes the California constitutional standard regarding privacy in lieu of the 4th Amendment standard used by the United States Supreme Court in *Maryland v. King* 569 U.S. ___ (2013), 133 S. Ct. 1958.

We understand and appreciate the author's goal of protecting the government's ability to collect DNA from certain persons arrested for felony crimes. That said, we cannot abide this significant change that will result in fewer DNA samples being entered into the DNA databank. We are happy to continue working with you and your office regarding this issue, but for the above-mentioned reasons, CSSA must respectfully oppose AB 1492 at this time.

6. Access to Publicly Available Databases

This bill provides that a law enforcement agency may use a publicly available database, excluding a law enforcement database that is not linked to the Combined DNA Index System (CODIS), if the case being investigated involves a homicide or sexual assault involving force and the case is unsolved and all investigative leads have been exhausted, in which case law enforcement agency shall review nonforensic information in order to identify additional evidence bearing on relatedness.

A publicly available database could be something like ancestry.com. According to the ancestry.com website anyone can get their DNA tested to find out their family ancestry for about $79. The intent appears to be to use these types of searches to look for leads; however it would seem unlikely that a person submitting DNA to a website like this would intend to have a relative, near or distant, subject to questioning by law enforcement even in a case where they are later excluded. Such a thing happened when a New Orleans filmmaker was questioned about an Idaho murder after his father submitted his DNA to the ancestry.com and the crime scene suggested a familial match—within 3 or 4 generations of the father. The filmmaker was cleared but not after facing questioning by the police and a month of waiting to hear the results of the DNA test. (Mustian, J "New Orleans Filmmaker Cleared in Cold-Case Murder; False Positive Highlights Limits of Familial DNA Searching" *The New Orleans Advocate* March 12, 2015. http://www.theneworleansadvocate.com/news/11707192-123/new-orleans-filmmaker-cleared-in)

Should the law explicitly allow the search of publicly available databases without a warrant?

7. Author's Amendments

The author intends to take the following clarifying/technical amendments in Committee.

Page 4 lines 9-18 will be amended as follows:

It is the intent of the Legislature ~~to allow~~ ***that when*** buccal swab samples ~~to be~~ ***are*** taken for DNA analysis as a condition of a plea or reduction or dismissal of charges, ~~provided that~~ all uses of the DNA sample ~~have been~~ ***shall first be*** disclosed to the defendant in writing, that consent ~~has been~~ *shall be* obtained in writing, ~~and~~ that the defendant ~~has~~ ***shall*** ~~signed~~ ***sign*** a written agreement allowing his or her buccal swap sample or blood sample to be taken for DNA analysis, ***and that the defendant shall have an opportunity to consult with counsel prior to signing the agreement***. It is the intent of the Legislature that buccal swab samples

taken as a condition of a plea or reduction or dismissal of charges to be done on the basis of individualized consideration.

Page 18 lines 8-17 (since the expungement will be automatic):

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

8. Other Legislation

AB 390 (Cooper) which is also scheduled to be heard today requires DNA collection of people who commit the crimes that used to be wobblers but are now misdemeanors after the passage of Proposition 4.

This bill was a gut and amend in the Senate on June 29, 2015. AB 84 (Gatto) which was almost identical to this bill was held in Assembly Appropriations on May 28th of this year.

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