
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: SB 781 **Hearing Date:** April 18, 2017
Author: Glazer
Version: February 17, 2017
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Criminal Law: DNA Evidence*

HISTORY

Source: Author

Prior Legislation: SB 1355 (Glazer) held Senate Public Safety 2016
AB 390 (Cooper) held Senate Public Safety 2015
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: Alameda County District Attorney; Association for Los Angeles Deputy Sheriffs; Association of Deputy District Attorneys; California Association of Code Enforcement Officers; California College and University Police Chiefs Association; California District Attorneys Association; California Narcotic Officers Association; California Police Chiefs Association; California State Sheriffs' Association; Contra Costa District Attorney; Crime Victims United; Los Angeles County Professional Peace Officers Association; Los Angeles County Probation Officers Union AFSME Local 685; Los Angeles Police Protective League; Peace Officers Research Association of California; Riverside Sheriffs' Association; Sacramento County District Attorney; San Diego County District Attorney

Opposition: American Civil Liberties Union; California Civil Liberties Advocacy; California Attorneys for Criminal Justice; California Public Defenders Association; Courage Campaign; Drug Policy Alliance

PURPOSE

The purpose of this bill is to require the collection of DNA from persons convicted of crimes that were made misdemeanors by Proposition 47.

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 provides that the DOJ DNA Laboratory is to serve as a repository for blood specimens, buccal swab, and other biological samples collected and is required to analyze specimens and samples and store, compile, correlate, compare, maintain, and use DNA and forensic identification profiles and records related to the following:

- Forensic casework and forensic unknowns;
- Known and evidentiary specimens and samples from crime scenes or criminal investigations;
- Missing or unidentified persons;
- Persons required to provide specimens, samples, and print impressions;
- Legally obtained samples; and
- Anonymous DNA records used for training, research, statistical analysis of populations, quality assurance, or quality control. (Penal Code § 295.1)

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 DOJ. (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 provides any person arrested for or charged with a felony and any person required to register as a sex offender or arsonist shall be required to submit buccal swab samples, a full palm print impression of each hand and any blood specimens or other biological samples required for submission to the DNA databank. (Penal Code § 296)

This bill specified misdemeanors to provide buccal swab samples (DNA), right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required for law misdemeanor offenses, to the list of individuals required to provide DNA cheek swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples chapter for law enforcement identification analysis.

This bill expands these provisions to require persons convicted of the following misdemeanor offenses to give samples be included in the DNA Databank:

- Shoplifting; forgery where the value for the forged document does not exceed \$950;
- Check fraud where the total amount of checks does not exceed \$950;
- Grand theft that is punishable as a misdemeanor; possession of stolen property that is punishable as a misdemeanor;
- A misdemeanor violation for possession of a list of specified drugs, including cocaine, methamphetamine, 28.5 grams of marijuana, concentrated cannabis; and
- A misdemeanor violation of petty theft with specified prior theft convictions, and prior convictions for serious or violent felonies, or required to register as a sex offender.

COMMENTS

1. Need for This Bill

According to the author:

This bill would restore DNA collection for felony crimes recently reduced to specified misdemeanors. In 2013, 2014, and 2015, 1,396 total crimes were linked to DNA samples taken from certain non-violent offenders, according to data from the Attorney General's office. Of those 1,396 crimes, 394 were serious and violent crimes against persons which included rape, murder, and robbery. Unfortunately, DNA is no longer collected for these same qualifying arrest offenses. Together, these are 1,396 crimes that could have potentially gone unsolved without the collection of DNA from these 8 criminal categories and a subsequent "hit". Specifically, these crimes included 196 rapes, 54 murders, 4 attempted murders, 1 assault to commit rape, and 1 kidnapping with intent to commit rape.

While these crimes against persons negatively impact all of Californians, gender-based violence is of specific concern. Of the 394 more serious violent crimes against persons that were linked to non-violent offenders, approximately 50% were rape cases that disproportionately affected women and girls. Women are the victims of rape almost 90% of the time. It is imperative that we do not limit an effective tool that has historically been use by law enforcement to arrest those who commit rape, murder, or other serious and violent felonies. Without DNA collection for these 8 criminal categories, victims of violent crimes lose their opportunity to find justice.

2. California DNA Database

The profile derived from a 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 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.

3. 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. Proposition 69 provided for an expungement process for those individuals who were not convicted of a qualifying offense and had no prior qualifying offense.

4. Proposition 47

Proposition 47 was passed by the voters in 2014, thus after the passage of Proposition 69. By passing Proposition 47, the voters determined that certain offense can only be charged and punished as misdemeanors. The offenses that were affected by the voters in Prop. 47 were predominantly “wobblers.” A wobbler is an offense which can be charged as a felony, or a misdemeanor, at the discretion of the district attorney’s office responsible for charging the crime. The only offense affected by Proposition 47, that was chargeable exclusively as a felony, was possession of specified drugs, primarily cocaine. (Health and Safety Code § 11350(a).)

5. Expansion of DNA Data Bank to Include Misdemeanors that were Wobblers

This bill would expand the collection of DNA to include misdemeanors that used to be wobblers or felonies pre-Proposition 47. Currently in California the only misdemeanors that are included are those for which a person must register as a sex offender or as an arsonist.

According to the National Conference on State Legislatures, while 29 states collect DNA from at least some felonies only eight states collect DNA from specified misdemeanors. Of those states, Alabama, Arizona, Kansas, Louisiana, Minnesota, North Carolina, South Carolina and South Dakota, in all but Kansas and Minnesota the misdemeanors that are collected are misdemeanor sex offenses. Minnesota does not include all felonies and includes specific misdemeanors that are either sex offenses or things like stalking.

(<http://www.ncsl.org/Documents/cj/ArresteeDNALaws.pdf>)

This legislation requires that DNA samples be taken from individuals convicted of misdemeanors that were all affected by Prop. 47. Before Prop 47 these offenses were wobblers (except possession of cocaine), and thus an individual arrested for one of these offenses, could have been arrested for a felony or a misdemeanor, at the discretion of the officer. Similarly, these offenses could have been charged as either misdemeanors or felonies at the discretion of the district attorney’s offices responsible for making charging decisions. Thus, many instances covered by the proposed legislation would not have triggered DNA collection prior to Proposition 47.

6. This Bill Would Mandate Collection of DNA for Misdemeanor Offenses That Are Low Level, Non-Violent Offenses

The misdemeanors in this bill include petty theft, receiving stolen property (\$950 or less), passing a bad check (\$950 or less), and simple possession of drugs. These are all non-violent offenses on the lower end of the criminal spectrum. California criminal law generally imposes consequences in proportion to the level of criminal conduct for which the defendant has been convicted. Thus, a conviction on a felony offense generally justifies consequences which are more serious or more intrusive on an individual's privacy and rights than a conviction on a misdemeanor. California law currently requires DNA samples to be collected in relation to felony offenses. The only misdemeanor convictions which currently require a DNA sample are those misdemeanor convictions which result in registration of the defendant as a sex or arson offender. Those are offenses on the serious end of the spectrum for misdemeanor conduct and reflect conduct for which the individual is appropriately subject to additional scrutiny. Requiring DNA for those offenses is more consistent with concept of proportionality that runs through California's criminal law. Requiring DNA for those offenses is more consistent with the concept of proportionality that runs through California's criminal law. A DNA sample from an individual contains a tremendous amount of private and sensitive information about that individual. This bill raises the question of whether California should allow such a significant intrusion based on conviction of a low level, non-violent misdemeanor offense.

7. Arguments in Support

Sacramento County District Attorney's Office supports this bill stating:

With the passage of Proposition 47 (The Safe Neighborhoods and Schools Act), many of the goals of the State DNA Act have been thwarted by allowing serious offenders to escape detection and entry into the DNA database. SB 781 links the goals of Proposition 69 passed in 2004 with Proposition 47 and ensures that dangerous criminals do not get an unintended benefit by reclassification of certain felony crimes to misdemeanors.

The California Department of Justice, Bureau of Forensic Services has had tremendous success in identifying recidivist sex offenders and violent offenders. Limiting the number of collections, as Proposition 47 did by making certain felony offenses misdemeanors negatively impacts the goal of Proposition 69 by allowing serious violent and sexual offenders to conceal their identities for their serious crimes and repeat them again. If the collection of samples is allowed to remain severely limited, many more sexual and violent offenders will never be identified for their crimes and other innocent individuals may be investigated while the real perpetrator goes free.

The Contra Costa District Attorney's Office supports this bill stating:

It is imperative that we do not limit an effective tool that is currently in use by law enforcement to investigate arrest and prosecute rapists, murders and other serious and violent felons. With FBI data showing California's violent crime rate rose for the

first time in 2015 after years of decline, it is more important than ever to make sure we preserve law enforcement's ability to solve serious and violent crimes.

8. Argument in Opposition

The ACLU opposes this bill for a number of reasons:

1. Expansion of the DNA database will reinforce racial disparities in the criminal justice system, and expand the reach of law enforcement agencies into communities of color.

People of color – who are stopped, searched, arrested, and convicted at much higher rates than white people – are already disproportionately represented in DNA databases.¹ Expanding the DNA database as SB 781 proposes, to include crimes like simple drug possession, is likely to exacerbate that disparity.

In California, being included in the database not only subjects a person to criminal investigation, but also potentially subjects that person's family members to investigation. Law enforcement agencies have begun utilizing a controversial technique called "familial DNA searching," which extends the size and reach of the California database to effectively include the parents, children, and siblings of the millions of convicted and arrested people whose DNA profiles are already stored in the database.

Expanding the DNA database could likewise result in more communities of color being mistakenly identified as suspects of crimes they did not commit simply because they happen to leave their DNA at a place where a crime was committed – for instance, on a cup or a napkin at a restaurant in their neighborhood, or at a bus stop where they wait for the bus.

Even without the thousands of new samples that would require testing under SB 781, a number of cases have already come to light in which people have been wrongly convicted because of mishandled DNA evidence or mistakes made in DNA testing. Most notably, in Santa Clara County in 2013, Lukis Anderson, a 26-year-old man of color, spent six months in jail for a murder he could not possibly have committed, after paramedics accidentally transferred his DNA to the body of the crime victim.² At the time the mistake was discovered, Mr. Anderson was facing life in prison and possibly the death penalty for the crime.³

2. Permanent collection and storage of our genetic blueprints represents a serious threat of governmental intrusion when this database is inevitably used for other purposes.

¹ Michael Risher, *Racial Disparities in Databanking of DNA Profiles*, ACLU of Northern California, available at https://www.aclunc.org/sites/default/files/racial_disparities_in_databanking_dna_profiles.pdf.

² Henry K. Lee, *How innocent man's DNA was found at killing scene*, SFGate, June 26, 2013, available at <http://www.sfgate.com/crime/article/How-innocent-man-s-DNA-was-found-at-killing-scene-4624971.php>.

³ *Id.*

DNA collection has very serious privacy implications. Unlike fingerprints, which are merely two dimensional representations of the surface of a person's finger and reveal nothing other than a person's identity, DNA contains our genetic codes, which reveal the most intimate, private information, not only about the person whose DNA is collected but for everyone else in that person's extended family. A single breach of security could divulge sensitive information that a person might not even know about him or herself to employers, insurance companies, and identity thieves. For this reason, most state legislatures and the United States Supreme Court have taken great care to limit collection of DNA to more serious crimes.⁴

California participates in the Combined DNA Index System (CODIS) as well as the National DNA Index System (NDIS) – both managed by the Federal Bureau of Investigation (FBI). This means that when a person's DNA is collected following a conviction in California, it is then uploaded into a database that can be accessed by local, state, and federal law enforcement agencies across the country. Expanding DNA collection in California to include minor crimes like simple drug possession means that these law enforcement agencies will then have access to more Californians' DNA.

3. The use of DNA in solving crimes is limited by the ability to detect and collect DNA at crime scenes, not by the number of profiles in the DNA database.

Historically, increasing the number of people from whom DNA is collected in California has not increased the overall rate at which law enforcement have been able to identify perpetrators of violent crimes. In fact, just the opposite is true. According to the California Department of Justice (DOJ), the clearance rate⁵ for unsolved violent crimes in California was higher in 2004 – the year voters passed Prop 69, expanding the database – than it was nearly 10 years later, in 2013.⁶ This means that while more people have been added to the DNA database, and additional taxpayer dollars have gone towards greater collection efforts, the rate at which law enforcement officers have been able to solve violent crimes has not increased.

⁴ See *Maryland v. King* (U.S. 2013) 133 S. Ct. 1958.

⁵ While the DOJ reports overall violent crime clearance rates for the state, there is no standard definition of a "clearance," as different law enforcement agencies label their cases differently. (Ryan Gabrielson, *Homicide 'clearance rate' offers more questions than answers*, California Watch: Founded by the Center for Investigative Reporting (March 7, 2011), available at <http://californiawatch.org/dailyreport/homicide-clearance-rate-offers-more-questions-answers-9037>.) For example, while in one county a cleared homicide may mean a solved crime, in another it may mean that a crime simply results in an arrest, with no reference at all as to whether the case actually resulted in a valid conviction. (*Id.*) Even greater divergences appear with regard to forcible rape, robbery, and aggravated assault cases. Law enforcement agencies can clear these types of cases either by making an arrest or by labeling them: 1) "Inactive," when officers have exhausted all investigative leads without securing enough evidence to make an arrest; 2) "Unfounded," when an investigation reveals that no crime was committed; 3) "By exception," when officers have enough evidence to make an arrest, but are unable to proceed because the suspect cannot be detained, and generally limited to instances when police cannot extradite a suspect, or when the suspect is dead. (*Id.*)

⁶ In 2004, 47.2% of the unsolved violent crimes were cleared; whereas in 2013, the violent crime clearance rate was only 45.6%. (State of California Department of Justice, Office of the Attorney General Criminal Justice Statistics Center Statistics: Crimes and Clearances, available at <http://oag.ca.gov/crime/cjsc/stats/crimes-clearances>.)

The use of DNA in solving crimes is limited by the ability to detect and collect DNA at crime scenes, not by the number of profiles in the DNA database.⁷ Needless expansion of the database could further overwhelm already backlogged crime labs, delaying investigations and forcing victims of crimes to wait even longer for evidence from their crime to be processed. Just this year, there are three separate bills addressing deficiencies in the current testing and/or tracking of rape kits.⁸

Law enforcement and governmental agencies often point towards higher “hit” rates as evidence of successful DNA database expansion. However, hit rates are misleading. Hits only indicate that a match was made – not whether the hit resulted in a person being apprehended and prosecuted, or, more importantly, whether the right person was apprehended and prosecuted. In addition, hit rates are not an accurate measure of cases solved by DNA evidence because such figures include cases in which individuals were charged and convicted without the use of DNA – for example, if the hit occurs subsequent to the conviction.⁹

9. Other Legislation

SB 1355 (Glazer) (2016) and AB 390 (Cooper) (2015) were identical to this bill and both were held in the Senate Public Safety Committee.

AB 16 (Cooper) is almost identical to this bill and is currently in the Assembly Public Safety Committee. Testimony was taken on the bill on 3/14/17 but no vote was taken at that time and no further hearing has been set as of the date of this analysis.

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⁷ Interview with Sheldon Krinsky and Tania Simcelli, coauthors of Genetic Justice: DNA Data Banks, Criminal Investigations, and Civil Liberties, Columbia University Press blog (March 28, 2011), <http://www.cupblog.org/?p=3314>.

⁸ See AB 280 (Low); AB 41 (Chiu); AB 1744 (Cooper); AB 1312 (Gonzalez-Fletcher).

⁹ As Bruce Budowle, one of the original architects of the Combined DNA Index System (CODIS) (the national DNA database system accessed by local, state, and federal law enforcement agencies and officials across the country) stated:

...As long as there are a lot of profiles in the database and the search engines are used, there will always be a large number of transactions. But there is no indication if the tax payer has gotten his/her money's worth regarding solving crime or whether a victim's case will be resolved because sufficient resources and processes are not in place to assess the overall performance of CODIS. Simply put, the actual numbers of success are not known. Therefore, we are left only with balancing decisions of expansion and privacy on the value of individual victims, the number of hits, and the assumption that most hits translate into successful investigative leads.