SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	AB 390	**Hearing Date:**	July 14, 2015
Author:	Cooper		
Version:	July 6, 2015		
Urgency:	No	**Fiscal:**	Yes
Consultant:	MK		

Subject: ***Criminal Law: DNA Evidence***

HISTORY

Source: Sacramento County District Attorney

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: Dave Jones, Insurance Commissioner; Alameda County District Attorney; Association of Deputy District Attorneys; Association for Los Angeles Deputy Sheriffs; California Association of Code Enforcement Officers; California Association of Crime Laboratory Directors; California College and University Police Chiefs Association; California District Attorneys Association; California Fraternal Order of Police; California Narcotic Officers Association; California Peace Officers' Association; California Police Chiefs Association; California State Association of Counties; California State Sheriffs' Crime Victims United; Chief Probation Officers of California; Fresno County District Attorney; Kern County District Attorney; Long Beach Police Officers Association; Los Angeles Deputy Sheriffs; Los Angeles County District Attorney's Office; Los Angeles County Professional Peace Officers Association; Los Angeles County Sheriff's Department; The Los Angeles Police Protective League; Orange County District Attorney; Peace Officers Research Association; Riverside Sheriffs Association; Rural County Representatives of California; Sacramento County Deputy Sheriffs' Association; San Luis Obispo District Attorney; San Diego County District Attorney; Santa Ana Police Officers Association; Santa Clara District Attorney

Opposition: ACLU; Alameda County Public Defender; American Friends Committee; California Attorneys for Criminal Justice; California Civil Liberties Advocacy; California Public Defenders Association; Californians for Safety and Justice; Ella Baker Center for Human Rights; Friends Committee on Legislation of California; Justice Now; Legal Services for Prisoners with Children

Assembly Floor Vote: 74 - 2

PURPOSE

The purpose of this bill is to require DNA collection of people who commit the crimes that used to be wobblers but are now misdemeanors after the passage of Proposition 47.

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 offenders
- 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 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.

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 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;
- The underlying conviction or disposition serving as the basis for including 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 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 nonappealable 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; and
- 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 DOJ shall not destroy 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 DOJ 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 expands these provisions to require persons convicted of 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 provides that the following misdemeanor offenses will 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, 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.

Existing law provides that notwithstanding any other provision of law, including specified sections, a judge is not authorized to relieve a person of the separate administrative duty to provide specimens, samples, or print impressions required if a person has been found guilty or was adjudicated a ward of the court by a trier of fact of an offense requiring the submission of a DNA sample, or was found not guilty by reason of insanity or pleads no contest to an offense requiring the submission of a DNA sample. (Penal Code § 299)

This bill includes the provision allowing the recall of a sentence where a person was convicted of a felony that has been reduced to a misdemeanor after Proposition 47, as one of the specified sections in Penal Code Section 299.

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 This Bill

According to the author:

> AB 390 will allow for restoration of DNA sample collection for crimes which were previously felonies but were reclassified as misdemeanors by Proposition 47. The passage or Proposition created an unintended consequence which will limit the ability of law enforcement to solve rapes, murders, robberies and other serious and violent crimes through reliable DNA evidence. With one of the largest databases in the world, California has been able to accurately identify those who have committed prior unsolved violent crimes. This has benefited the people of California by allowing for the introduction of reliable scientific evidence that provides powerful proof of identity, both in exonerating some individuals and convicting others.
>
> It has been said that DNA technology "constitutes the single greatest advance in the 'search for truth', and the goal of convicting the guilty and acquitting the innocent, since the advent of cross-examination." (See *United States v. Kincade* (9th Cir. 2004) 379 F. 3d 813; *People v. Robinson* (2010) 47 Cal. 4th 1104; *People v. Wesley* (1998) 533 N.YS. 2d 643, 644)

AB 390 reaffirms Proposition 69 by making the criminal justice system more reliable and more just thorough accurate and expeditious identification using DNA of recidivist criminal offenders, and by focusing investigations on existing unsolved rapes, murders, robberies and other serious and violent cases.

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. 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

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 specifies 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.

Assembly Appropriations Committee limited the Proposition 47 misdemeanors that will be included in the data bank to those instances where the person has a prior conviction for one of specified misdemeanors; that limitations was taken out of the bill with the last set of amendments.

6. Can't Have DNA Removed if Felony is Now a Misdemeanor

Proposition 47 set up a process for people currently serving a sentence for a conviction of a felony, who would have been guilty of a misdemeanor now that Proposition 47 has passed, to have his or her sentence recalled and to be resentenced as a misdemeanor under specified circumstances. (Penal Code § 1170.18)

This bill provides that even if a person is resentenced under the above provision, a court could not relieve their duty to give a DNA sample and thus the person could not seek to have his or her DNA removed from the data bank.

7. Support

According to one of the sponsors, the Sacramento County District Attorney's Office:

> With the passage of recently enacted 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. AB 390 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.
>
> Allowing collection of DNA samples from adults convicted of recently reduced "Prop 47" misdemeanor crimes and other specified sex and violent offenses will better protect public safety and allow improved allocation of law enforcement resources to focus on serious violent offenders.

> 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 serious violent and sexual offenders to conceal their identities for their serious crimes and repeat them again. If 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.

In support of this bill the Los Angeles County District Attorney's Office states:

> According to the Attorney General's Office, 61% of the DNA samples entered into California DNA Datatbank that resulted in a "cold hit" were for non-violent, "lower-level" felony crimes such as drug offenses, fraud or other property crimes. Without legislative correction Proposition 47's unintended consequence would lead to a disastrous reduction in "cold hits." Solving rapes, murders and other violent crimes through reliable DNA evidence will help meet Prop 47's safety goals by keeping neighborhoods safe from dangerous recidivist sex and vi9oletn offenders who would otherwise remain undetected for their worst offenses.

8. Opposition

The ACLU opposes this bill stating in part:

> 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. Permanent collection and storage of our genetic blueprints represents a serious threat of governmental intrusion when this database is inevitably used for other purposes. 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.[1]
>
> AB 390 – which seeks to add minor misdemeanor offenses, such as simple drug possession and shoplifting, to the list of crimes that trigger DNA collection – goes far beyond the scope of what most of the country has determined is necessary or reasonable. In 2013, while 41 other states required DNA collection from people convicted of misdemeanor sex offenses, only 18 required DNA samples from people convicted of misdemeanors other than sex offenses.[2] Of those, most states limit collection to individuals convicted of serious misdemeanors.[3] Alabama, for example, collects misdemeanor DNA samples only from people convicted of

[1] *See Maryland v. King* (U.S. 2013) 133 S. Ct. 1958.
[2] Convicted Offenders Required to Submit DNA Samples: National Conference of State Legislatures, available at http://www.ncsl.org/Documents/cj/ConvictedOffendersDNALaws.pdf (data based on 2013 numbers).
[3] *Id.*

> offenses involving danger to the person.[4] North Carolina limits its misdemeanor collection to people convicted of certain sex offenses, certain arson-related offenses, assaults on handicapped persons, and stalking.[5]

Californians for Safety and Justice oppose this bill stating:

> Our sister 501(c)(4) organization, Vote Safe, was the sponsor of Proposition 47, the Safe Neighborhoods and Schools Act. California voters overwhelmingly passed Proposition 47 in November 2014, a measure that reclassified six low---level nonviolent drug possession and petty theft crimes from potential felonies to misdemeanors and reallocates prison cost savings to mental health treatment, school programs and victim services.
>
> We are concerned about AB 390 because it seeks to require DNA testing specifically for the six crimes Proposition 47 changed to misdemeanors, without clarity as to how these particular crimes are more deserving of DNA testing than any of the other hundreds of misdemeanors that exist in California's Penal Code.

9. Other legislation

AB 1492 (Gatto) also set for hearing today, authorizes samples collected during felony arrests to be forwarded to Department of Justice (DOJ) upon a judicial finding of probable cause, if the California Supreme Court upholds the decision in *People v. Buza*. It also streamlines the process to expunge DNA samples and profiles, if the California Supreme Court upholds the decision in *People v. Buza* and it allows DNA searches against any a "publicly available" database.

-- END –

[4] Ala. Code §§ 36-18-25; 36-18-24; 13a, et seq. .
[5] N.C. Gen. Stat. Ann. §15A-266.4.