SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	SB 1355	**Hearing Date:**	April 19, 2016
Author:	Glazer		
Version:	February 19, 2016		
Urgency:	No	**Fiscal:**	Yes
Consultant:	MK		

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

HISTORY

Source: Author

Prior Legislation: 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: California District Attorneys Association; California State Sheriffs' Association; Crime Victims United of California; Peace Officers Research Association of California; California Police Chiefs Association; Crime Victims United of California; San Diego County District Attorney; Sacramento County District Attorney's Office

Opposition: California Attorneys for Criminal Justice; American Civil Liberties Union; Legal Services for Prisoners with Children

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, 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.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several 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 December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 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).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 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 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:

> DNA evidence has proven to be a powerful and reliable form of forensic evidence that can conclusively reveal guilt or innocence.
>
> In 2014, California voters passed Proposition 47, which reduced specified non-serious, nonviolent crimes from felonies to misdemeanors.
>
> While Prop 47 was successful in refocusing resources on more serious offenses and maximizing alternatives for non-serious, nonviolent crime, it also had the unintended consequence of taking away an effective tool used by law enforcement to catch serious and violent offenders, namely DNA collection for those crimes downgraded from a felony to a misdemeanor.
>
> Data from the Attorney General's office shows that it is not uncommon for those who commit certain non-violent crimes to also commit more serious offenses.
>
> The reforms contained within SB 1355 will keep intact the intent of Prop 47 while ensuring law enforcement has the tools necessary to investigate unsolved rapes, murders, and other serious and violent crimes.
> 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.
>
> 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 and subsequent "hit" in CODIS. Specifically, these crimes included 54 murders, 4 attempted murders, 196 rapes, 1 assault to commit rape, and 1 kidnapping with intent to commit rape.
>
> It is imperative that we do not limit an effective tool that is already currently in use by law enforcement to investigate and arrest those who commit rape, murder, or other serious and violent felonies.
>
> With preliminary 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.

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 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. Support

The San Diego District Attorney supports this bill stating:

> DNA evidence has proven to be a powerful and reliable form of forensic evidence that can conclusively reveal guilt or innocence. In 2014, California voters passed Proposition 47, which reduced specified non-serious, nonviolent crimes from felonies to misdemeanors. While Prop 47 was successful in refocusing resources on more serious offenses and maximizing alternatives for non-serious, nonviolent crime, it also had the unintended consequence of taking away an effective tool used by law enforcement to catch serious and violent offenders, namely DNA collection for those crimes downgraded from a felony to a misdemeanor.
>
> Data from the Attorney General's office shows that it is not uncommon for those who commit certain non-violent crimes to also commit more serious offenses. In 2013, 2014, and 2015, 1,396 total crimes were linked to DNA samples taken from certain non-violent offenders. Specifically, these crimes included 54 murders, 4 attempted murders, 196 rapes, 1 assault to commit rape, and 1 kidnapping with intent to commit rape. Unfortunately, DNA is no longer collected for these same qualifying arrest offenses.
>
> It is imperative that we do not limit an effective tool that is already currently in use by law enforcement to investigate and arrest those who commit rape, murder, or other serious and violent felonies. With preliminary 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.
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> Specifically, SB 1355 will allow for the collection of a DNA sample upon the conviction for any of the following, newly reclassified crimes:
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> - Shoplifting
> - Forgery
> - Insufficient funds for a check
> - Grand theft
> - Receiving stolen property
> - Petty theft with a prior conviction
> - Possession of a controlled substance (cocaine, heroin, methamphetamines, etc.)
> - Possession of concentrated cannabis
>
> The reforms contained within SB 1355 will keep intact the intent of Prop 47 while ensuring law enforcement has the tools necessary to investigate unsolved rapes, murders, and other serious and violent crimes.

7. Opposition

The ACLU opposes this bill stating:

> 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 rate[1] 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.[2] 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.
>
> 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.[3] 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 identifying deficiencies in the current testing and tracking of rape kits.[4]
>
> 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

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[1] 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.*)

[2] 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.)

[3] Interview with Sheldon Krimsky 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.

[4] *See* AB 1848 (Chiu); AB 1744 (Cooper); AB 2499 (Maienschein).

cases in which individuals were charged and convicted without the use of DNA – for example, if the hit occurs subsequent to the conviction.[5]

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Like any procedure that relies on human precision, DNA testing is susceptible to human error. There are already innumerable opportunities for error in the DNA sampling process, and putting more people into the DNA database could create backlogs and undermine quality control at crime laboratories. Even without the thousands of new samples that would require testing under SB 1355, 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.[6] At the time the mistake was discovered, Mr. Lukis was facing life in prison and possibly the death penalty for the crime.[7]

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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.[8]

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[5] 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.

(Declaration of Bruce Budowle in Support of Motion for Preliminary Injunction, *Haskell v. Brown*, No. 09-4779 (N.D. Cal. Oct. 30, 2009), ECF No. 17.)

[6] 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.

[7] *Id.*

[8] *See Maryland v. King* (U.S. 2013) 133 S. Ct. 1958.

SB 1355 – 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. While most states, like California, require DNA collection from people convicted of misdemeanor sex offenses, less than half require DNA samples from people convicted of misdemeanors other than sex offenses.[9] Of those, most states limit collection to individuals convicted of serious misdemeanors.[10] Alabama, for example, collects misdemeanor DNA samples only from people convicted of offenses involving danger to the person.[11] North Carolina limits its misdemeanor collection to people convicted of certain sex offenses, certain arson-related offenses, assaults on handicapped persons, and stalking.[12]

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People of color – who are stopped, searched, and arrested at much higher rates than white people – are disproportionately represented in DNA databases.[13] This racial disparity means that communities of color will be exposed to the negative effects of crime lab error and intrusive police investigations far more often than white people. Expanding the DNA database as SB 1355 proposes to include low level, nonviolent misdemeanors could result in additional people of color being falsely accused and convicted of crimes they did not commit. This will only add to the existing racial inequalities in our criminal justice system.

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[9] *See e.g.* 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).

[10] *Id.*

[11] Ala. Code §§ 36-18-25; 36-18-24; 13a, et seq. .

[12] N.C. Gen. Stat. Ann. §15A-266.4.

[13] 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.