
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 1584 **Hearing Date:** June 12, 2018
Author: Gonzalez Fletcher
Version: June 4, 2018
Urgency: No **Fiscal:** No
Consultant: MK

Subject: *Criminal Law: DNA Collection: Minors*

HISTORY

Source: American Civil Liberties Union

Prior Legislation: Proposition 69, November 2004

Support: Electronic Frontier Foundation; Oakland Privacy

Opposition: California Police Chiefs Association

Assembly Floor Vote: 73 - 0

PURPOSE

This bill provides that a law enforcement officer shall not collect any biological sample of a minor for the purpose of obtaining the DNA of that minor as part of the investigation of a crime in which the minor is alleged to be a suspect or participant.

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:

- a) 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).)
- b) Any adult person who is arrested for or charged with a felony offense. (Penal Code, § 296 (a)(2)(C).)
- 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 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: (Penal Code § 296 (c).)

- a) Any person committed to a state hospital or other treatment facility as a mentally disordered sex offender; (Penal Code § 296 (c)(1).)
- b) Any person who is designated a mentally ordered offender; and, (Penal Code § 296 (c)(2).)
- c) Any person found to be a sexually violent predator. (Penal Code § 296 (c)(3).)

Existing law specifies that nothing in the DNA and Forensic Identification and Database Act shall limit or abrogate any existing authority of law enforcement officers to take, maintain, store, and utilize DNA or forensic identification markers, blood specimens, buccal swab samples, saliva samples, or thumb or palm print impressions for identification purposes. (Penal Code § 300.)

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 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 (Penal Code § 295.1 (c).):

- a) Forensic casework and forensic unknowns; (Penal Code, § 295.1 (c)(1).)
- b) Known and evidentiary specimens and samples from crime scenes or criminal investigations; (Penal Code § 295.1 (c)(2).)
- c) Missing or unidentified persons; (Pen. Code, § 295.1 (c)(3).)
- d) Persons required to provide specimens, samples, and print impressions; (Penal Code, § 295.1 (c)(4).)

- e) Legally obtained samples; and, (Penal Code § 295.1 (c)(5).)
- f) Anonymous DNA records used for training, research, statistical analysis of populations, quality assurance, or quality control. (Pen. Code § 295.1 (c)(6).)

Existing law specifies 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. (Penal Code § 299 (b).)

- a) 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 (Penal Code § 299b)(1).); or
- b) The underlying conviction or disposition serving as the basis for including the DNA profile has been reversed and the case dismissed (Penal Code § 299b)(2).); or,
- c) The person has been found factually innocent of the underlying offense (Penal Code, § 299(b)(3).); or,
- d) The defendant has been found not guilty or the defendant has been acquitted of the underlying offense. (Penal Code, § 299(b)(4).)

This bill provides that a law enforcement officer, employee of law enforcement agency, or any agent thereof, shall not collect any biological sample from a minor for the purposes of obtaining the DNA of that minor, as part of an investigation of a crime in which the minor is alleged to be a suspect or participant.

This bill provides that the above does not apply when the following conditions are met:

- a) The sample is collected pursuant to a valid search warrant or court order.
- b) The sample collection is expressly required pursuant to this chapter.
- c) Both of the following are met:
 - i. The minor consents in writing, after being orally advised of the purpose and manner of the collection, the right to refuse to consent, and the right to consult with an attorney, parent, or legal guardian prior to providing consent.

- ii. A parent or legal guardian of the minor, or an attorney representing the minor, is contacted, is provided the admonition is allowed to privately consult with the minor and after that consultations, concurs with the minor's decision to consent.
- iii. The detention of a minor shall not be extended solely for the purpose of contacting a parent, legal guardian, or attorney if that person cannot be reached after a reasonable attempt has been made.

This bill provides that the court, in adjudicating the admissibility of a DNA sample taken from a minor without a warrant, shall consider the effect of any failure to comply with this section.

This bill provides that except as otherwise required, a DNA sample collected from a minor shall not be added to any DNA and forensic identification database or data bank, including but not limited to any local forensic DNA and forensic identification database or databank, the state DNA and forensic identification database and databank, or any national or international DNA database and data bank.

This bill provides that this section does not apply to a suspected offender DNA that is collected as evidence from a person of a victim under the age of 18 years.

COMMENTS

1. Need for This Bill

According to the author:

Current law under Proposition 69 from 2004 limits the collection of buccal swab samples from minors to only when they have been convicted of certain specified crimes, such as a sex offense or felony, and then requires those samples to be forwarded to the Department of Justice. However, the proposition also allowed for the maintenance of local databases, which has created a legal loophole wherein samples collected by local law enforcement which are only submitted to the local database, but not to the Department of Justice, are not subject to the same standards.

In practice, this has allowed law enforcement to broaden their scope of those eligible for collection of buccal swab samples. For instance, in San Diego, the police department currently collects samples for 'investigative purposes' simply based on a signed consent form, which is used for both minors and adults, and does not require any parental notification or consent when collecting a sample from a minor.

Not only does this practice violate the intent of Proposition 69, it is unreasonable to assume in such circumstances, as minors are scared and confused while being detained by police, that they are capable of giving informed consent. Pending litigation, from an incident in San Diego where five teen boys were detained and pressured by officers to sign consent forms for the collection of buccal swab samples, states that by not informing a parent or legal guardian before collecting the sample, this DNA collection policy also violates both the minor's and their parent of guardian's privacy, due process and familial association rights.

AB 1584 will help protect minors and strengthen the intent of the safeguards in collecting DNA samples from minors in Proposition 69 by mandating that in order to collect a sample from a minor not already mandated by code, law enforcement must have either a court order, search warrant or written consent of both the minor and the minor's parent or legal guardian.

2. 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, in addition to adults convicted of any felony.

Proposition 69 allowed collection of DNA from juveniles *convicted* of felonies and juveniles required to register for specified offenses.

3. California DNA Database

The profile derived from the DNA sample collected pursuant to Proposition 69 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.

If an NDIS participating laboratory or state does not comply with the FBI Director's [Quality Assurance Standards for Forensic DNA Testing or DNA databasing Laboratories](#) and/or the limited access provisions of the Federal DNA Act, that laboratory or state may lose its ability to search, store, and maintain its DNA records in NDIS.

4. San Diego Police Department Collects DNA Samples from Juveniles That Have Not Been Convicted of a Crime

Proposition 69 (2004) specifically authorized collection of a DNA sample from juveniles when they have been convicted of a felony. Proposition 69 further authorized the inclusion of those DNA sample in a statewide database to be administered by the Department of Justice.

The San Diego Police Department maintains its own DNA database. The DNA database for the San Diego Police Department is not connected to the state or federal DNA databases.

According to department policy, as long as a DNA profile remains in the local database, officers can collect DNA from anyone for “investigative purposes.” The department has been collecting DNA from juveniles that are not convicted, or even arrested, if the juvenile signs a consent form.

The policy requires only that officers get a signed consent from the minor. It doesn’t require them to notify the minor’s parent or guardian until after the sample’s been taken.

(www.voiceofsandiego.org/topics/public-safety/sdpc-has-found-a-way-around-state-law-forbidding-dna-collections-from-juveniles/)

The ACLU of California has filed a lawsuit against the San Diego police department based on their practice of obtaining biological samples from juveniles based on a consent form. The plaintiffs are seeking a permanent injunction from the court that would forbid the San Diego Police Department from enforcing the city’s policy on DNA collection from juveniles without a warrant or parental consent. They are also asking for an order compelling the Police Department to return any DNA samples from the teen identified in the lawsuit.

(<http://www.sandiegouniontribune.com/news/courts/sd-me-dna-lawsuit-20170217-story.html>)

According to the lawsuit, the officers searched a duffel bag the juvenile had with him that afternoon and found an unloaded handgun. They collected DNA samples from him and his four companions after obtaining their signed consent. (Id.)

This bill addresses the practices of the San Diego Police Department described above by prohibiting collection of a biological sample for the purposes of obtaining DNA of that minor unless the minor is informed of the purpose of the sample, has an ability to consult with a parent or an attorney and then agrees to giving the sample..

5. American Academy of Child and Adolescent Psychiatry

In a Policy Statement dated March 7, 2013 the American Academy of Child and Adolescent Psychiatry expressed its beliefs that juveniles should have counsel present when interrogated by law enforcement based on the differences in brain development between juveniles and adults:

Research has demonstrated that brain development continues throughout adolescence and into early adulthood. The frontal lobes, responsible for mature thought, reasoning and judgment, develop last. Adolescents use their brains in a fundamentally different manner than adults. They are more likely to act on impulse, without fully considering the consequences of their decisions or actions.

The Supreme Court has recognized these biological and developmental differences in their recent decisions on the juvenile death penalty, juvenile life without parole and the interrogations of juvenile suspects. In particular, the Supreme Court has recognized that there is a heightened risk that juvenile suspects will falsely confess when pressured by police during the interrogation process. Research also demonstrates that when in police custody, many juveniles do not fully understand or appreciate their rights, options or alternatives.

(https://www.aacap.org/aacap/policy_statements/2013/Interviewing_and_Interrogating_Juvenile_Suspects.aspx)

Similar concerns may apply in the context of juveniles giving consent to provide DNA samples. This bill would provide additional statutory protections in situations where juveniles are asked to give up their constitutional rights and provide a DNA sample.

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