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**AB-1492 Forensic testing: DNA samples.** (2015-2016)

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**Assembly Bill No. 1492**

**CHAPTER 487**

An act to amend and add Sections 298 and 299 of the Penal Code, relating to DNA samples.

[ Approved by Governor October 04, 2015. Filed with Secretary of State October 04, 2015. ]

**LEGISLATIVE COUNSEL'S DIGEST**

AB 1492, Gatto. Forensic testing: DNA samples.

(1) Existing law, as amended by the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, Proposition 69, approved by the voters at the November 2, 2004, general election (the DNA Act) requires any adult person who is arrested or charged with any felony offense to provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required for law enforcement identification analysis. Existing law requires that blood specimens and buccal swab samples be forwarded promptly to the Department of Justice for analysis. Existing case law, *People v. Buza* (2014) 231 Cal.App.4th 1446, for which review has been granted by the California Supreme Court, holds that the DNA Act, to the extent it requires felony arrestees to submit to a DNA sample for law enforcement analysis and inclusion in the state and federal DNA databases, without independent suspicion, a warrant, or a judicial or grand jury determination of probable cause, unreasonably intrudes on the arrestee's expectation of privacy and is invalid under the California Constitution. The DNA Act provides that it may be amended by a statute passed by each house of the Legislature that furthers the purpose of the measure.

This bill would state that it is the intention of the Legislature to further the purposes of the DNA Act in light of the above-specified case law. The bill would, if the California Supreme Court rules to uphold *People v. Buza*, require that a blood specimen or buccal swab sample taken from a person arrested for the commission of a felony be forwarded to the department after a felony arrest warrant has been signed by a judicial officer, a grand jury indictment has been found and issued, or a judicial determination of probable cause to believe the person has committed the offense for which he or she was arrested has been made.

(2) Existing law, as amended by the DNA Act, requires that a DNA specimen and sample be destroyed and that a searchable database profile be expunged from that databank program if the person from whom the specimen or sample was collected has no past or present offense or pending charge which qualifies that person for inclusion in the database and if that person submits an application, as specified. Existing law gives the court discretion to grant or deny the application.

This bill would, if the California Supreme Court rules to uphold *People v. Buza*, require the DNA specimen and sample to be destroyed and the searchable database profile expunged from the database without the requirement of an application.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

**SECTION 1.** It is the intent of the Legislature to limit the analysis of buccal swab samples and blood samples taken from felony arrestees for purposes of DNA analysis only to the extent required by the decision in *People v. Buza*, and to further the purposes of the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, Proposition 69, approved by the voters at the November 2, 2004, statewide general election, in light of that decision.

**SEC. 2.** Section 298 of the Penal Code is amended to read:

**298.** (a) The Secretary of the Department of Corrections and Rehabilitation, 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 shall cause these specimens, samples, and print impressions to be forwarded promptly to the Department of Justice. The specimens, samples, and print impressions shall be collected by a person using a Department of Justice approved collection kit and in accordance with the requirements and procedures set forth in subdivision (b).

(b) (1) The Department of Justice shall provide all blood specimen vials, buccal swab collectors, mailing tubes, labels, and instructions for the collection of the blood specimens, buccal swab samples, and thumbprints. The specimens, samples, and thumbprints shall thereafter be forwarded to the DNA Laboratory of the Department of Justice for analysis of DNA and other forensic identification markers.

Additionally, the Department of Justice shall provide all full palm print cards, mailing envelopes, and instructions for the collection of full palm prints. The full palm prints, on a form prescribed by the Department of Justice, shall thereafter be forwarded to the Department of Justice for maintenance in a file for identification purposes.

(2) The withdrawal of blood shall be performed in a medically approved manner. Only health care providers trained and certified to draw blood may withdraw the blood specimens for purposes of this section.

(3) Buccal swab samples may be procured by law enforcement or corrections personnel or other individuals trained to assist in buccal swab collection.

(4) Right thumbprints and a full palm print impression of each hand shall be taken on forms prescribed by the Department of Justice. The palm print forms shall be forwarded to and maintained by the Bureau of Criminal Identification and Information of the Department of Justice. Right thumbprints also shall be taken at the time of the collection of samples and specimens and shall be placed on the sample and specimen containers and forms as directed by the Department of Justice. The samples, specimens, and forms shall be forwarded to and maintained by the DNA Laboratory of the Department of Justice.

(5) The law enforcement or custodial agency collecting specimens, samples, or print impressions is responsible for confirming that the person qualifies for entry into the Department of Justice DNA Database and Databank Program prior to collecting the specimens, samples, or print impressions pursuant to this chapter.

(6) The DNA Laboratory of the Department of Justice is responsible for establishing procedures for entering databank and database information.

(c) (1) Persons authorized to draw blood or obtain samples or print impressions under this chapter for the databank or database shall not be civilly or criminally liable either for withdrawing blood when done in accordance with medically accepted procedures, or for obtaining buccal swab samples by scraping inner cheek cells of the mouth, or thumb or palm print impressions when performed in accordance with standard professional practices.

(2) There is no civil or criminal cause of action against any law enforcement agency or the Department of Justice, or any employee thereof, for a mistake in confirming a person's or sample's qualifying status for inclusion within the database or databank or in placing an entry in a databank or a database.

(3) The failure of the Department of Justice or local law enforcement to comply with Article 4 or any other provision of this chapter shall not invalidate an arrest, plea, conviction, or disposition.

(d) This section shall become inoperative if the California Supreme Court rules to uphold the California Court of Appeal decision in *People v. Buza* (2014) 231 Cal.App.4th 1446 in regard to the provisions of Section 298 of the Penal Code, as amended by Section 6 of the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, Proposition 69, approved by the voters at the November 2, 2004, statewide general election, in which case this section shall become inoperative immediately upon that ruling becoming final.

**SEC. 3.** Section 298 is added to the Penal Code, to read:

**298.** (a) (1) (A) The Secretary of the Department of Corrections and Rehabilitation, 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 shall cause these specimens, samples, and print impressions to be forwarded promptly to the Department of Justice, except that a blood specimen or buccal swab sample taken from a person arrested for the commission of a felony as specified in paragraph (2) of subdivision (a) of Section 296 shall be forwarded to the Department of Justice only after one of the following has occurred, which shall be deemed a finding of probable cause, whichever occurs first:

(i) A felony arrest warrant has been signed by a judicial officer pursuant to Section 813 or 817.

(ii) A grand jury indictment has been found and issued pursuant to Section 939.8, 940, or 944.

(iii) A judicial officer has determined that probable cause exists to believe the person has committed the offense for which he or she was arrested.

(B) The specimens, samples, and print impressions shall be collected by a person using a Department of Justice approved collection kit and in accordance with the requirements and procedures set forth in subdivision (b).

(2) A blood specimen or buccal swab sample taken from a person arrested for the commission of a felony as specified in paragraph (2) of subdivision (a) of Section 296 that has not been forwarded to the Department of Justice within six months following the arrest of that person because the agency that took the blood specimen or buccal swab sample has not received notice to forward the DNA specimen or sample to the Department of Justice for inclusion in the state's DNA and Forensic Identification Database and Databank Program pursuant to paragraph (1) following a determination of probable cause, shall be destroyed by the agency that collected the blood specimen or buccal swab sample.

(b) (1) The Department of Justice shall provide all blood specimen vials, buccal swab collectors, mailing tubes, labels, and instructions for the collection of the blood specimens, buccal swab samples, and thumbprints. The specimens, samples, and thumbprints shall thereafter be forwarded to the DNA Laboratory of the Department of Justice for analysis of DNA and other forensic identification markers.

Additionally, the Department of Justice shall provide all full palm print cards, mailing envelopes, and instructions for the collection of full palm prints. The full palm prints, on a form prescribed by the Department of Justice, shall thereafter be forwarded to the Department of Justice for maintenance in a file for identification purposes.

(2) The withdrawal of blood shall be performed in a medically approved manner. Only health care providers trained and certified to draw blood may withdraw the blood specimens for purposes of this section.

(3) Buccal swab samples may be procured by law enforcement or corrections personnel or other individuals trained to assist in buccal swab collection.

(4) Right thumbprints and a full palm print impression of each hand shall be taken on forms prescribed by the Department of Justice. The palm print forms shall be forwarded to and maintained by the Bureau of Criminal Identification and Information of the Department of Justice. Right thumbprints also shall be taken at the time of the collection of samples and specimens and shall be placed on the sample and specimen containers and forms as directed by the Department of Justice. The samples, specimens, and forms shall be forwarded to and maintained by the DNA Laboratory of the Department of Justice.

(5) The law enforcement or custodial agency collecting specimens, samples, or print impressions is responsible for confirming that the person qualifies for entry into the Department of Justice DNA and Forensic Identification Database and Databank Program prior to collecting the specimens, samples, or print impressions pursuant to this chapter.

(6) The DNA Laboratory of the Department of Justice is responsible for establishing procedures for entering databank and database information.

(c) (1) Persons authorized to draw blood or obtain samples or print impressions under this chapter for the databank or database shall not be civilly or criminally liable either for withdrawing blood when done in accordance with medically accepted procedures, or for obtaining buccal swab samples by scraping inner cheek cells of the mouth, or thumb or palm print impressions when performed in accordance with standard professional practices.

(2) There is no civil or criminal cause of action against any law enforcement agency or the Department of Justice, or any employee thereof, for a mistake in confirming a person's or sample's qualifying status for inclusion within the database or databank or in placing an entry in a databank or a database.

(3) The failure of the Department of Justice or local law enforcement to comply with Article 4 or any other provision of this chapter shall not invalidate an arrest, plea, conviction, or disposition.

(d) This section shall only become operative if the California Supreme Court rules to uphold the California Court of Appeal decision in *People v. Buza* (2014) 231 Cal.App.4th 1446 in regard to the provisions of Section 298 of the Penal Code, as

amended by Section 6 of the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, Proposition 69, approved by the voters at the November 2, 2004, statewide general election, in which case this section shall become operative immediately upon that ruling becoming final.

**SEC. 4.** Section 299 of the Penal Code is amended to read:

**299.** (a) A person whose DNA profile has been included in the databank pursuant to this chapter shall have his or her DNA specimen and sample destroyed and searchable database profile expunged from the databank program pursuant to the procedures set forth in subdivision (b) 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 Databank Program and there otherwise is no legal basis for retaining the specimen or sample or searchable profile.

(b) Pursuant to subdivision (a), a person who has no past or present qualifying offense, and for whom there otherwise is no legal basis for retaining the specimen or sample or searchable profile, may make a written request to have his or her specimen and sample destroyed and searchable database profile expunged from the databank program if any of the following apply:

(1) Following arrest, no accusatory pleading has been filed within the applicable period allowed by law, charging the person with a qualifying offense as set forth in subdivision (a) of Section 296 or if the charges which served as the basis for including the DNA profile in the state's DNA and Forensic Identification Database and Databank Program have been dismissed prior to adjudication by a trier of fact;

(2) The underlying conviction or disposition serving as the basis for including the DNA profile has been reversed and the case dismissed;

(3) The person has been found factually innocent of the underlying offense pursuant to Section 851.8, or Section 781.5 of the Welfare and Institutions Code; or

(4) The defendant has been found not guilty or the defendant has been acquitted of the underlying offense.

(c) (1) The person requesting the databank entry to be expunged must 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.

(2) Except as provided in this section, the Department of Justice shall 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:

(A) The written request for expungement pursuant to this section.

(B) 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.

(C) Proof of written notice to the prosecuting attorney and the Department of Justice that expungement has been requested.

(D) 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.

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

The Department of Justice is not required to destroy analytical data or other items obtained from a blood specimen or saliva, or buccal swab sample, if evidence relating to another person subject to the provisions of this chapter would thereby be destroyed or otherwise compromised.

Any identification, warrant, probable cause to arrest, or arrest based upon a databank or database match is not invalidated due to a failure to expunge or a delay in expunging records.

(e) Notwithstanding any other law, the Department of Justice DNA Laboratory is not required to expunge DNA profile or forensic identification information or destroy or return specimens, samples, or print impressions taken pursuant to this section if the duty to register under Section 290 or 457.1 is terminated.

(f) Notwithstanding any other law, including Sections 17, 1170.18, 1203.4, and 1203.4a, a judge is not authorized to relieve a person of the separate administrative duty to provide specimens, samples, or print impressions required by this chapter if a person has been found guilty or was adjudicated a ward of the court by a trier of fact of a qualifying offense as defined in subdivision (a) of Section 296, or was found not guilty by reason of insanity or pleads no contest to a qualifying offense as defined in subdivision (a) of Section 296.

(g) This section shall become inoperative if the California Supreme Court rules to uphold the California Court of Appeal decision in *People v. Buza* (2014) 231 Cal.App.4th 1446 in regard to the provisions of Section 299 of the Penal Code, as amended by Section 9 of the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, Proposition 69, approved by the voters at the November 2, 2004, statewide general election, in which case this section shall become inoperative immediately upon that ruling becoming final.

**SEC. 5.** Section 299 is added to the Penal Code, to read:

**299. (a)** A person whose DNA profile has been included in the databank pursuant to this chapter shall have his or her DNA specimen and sample destroyed and searchable database profile expunged from the databank 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 Databank Program and there otherwise is no legal basis for retaining the specimen or sample or searchable profile.

(b) Pursuant to subdivision (a), a person who has no past or present qualifying offense, and for whom there otherwise is no legal basis for retaining the specimen or sample or searchable profile shall have his or her specimen and sample destroyed and searchable database profile expunged from the databank program if any of the following apply:

(1) Following arrest, and after the applicable law enforcement agency has provided notice to the prosecuting attorney that the criminal case will not be presented to the prosecuting attorney for review, or after the applicable law enforcement agency has submitted a criminal case to the prosecuting attorney for review, no accusatory pleading has been filed within the applicable period allowed by law, charging the person with a qualifying offense as set forth in subdivision (a) of Section 296, in which case the prosecuting attorney shall immediately, or as soon as practically possible, submit a letter to the Department of Justice indicating that an accusatory pleading has not been filed.

(2) The charges which served as the basis for including the DNA profile in the state's DNA and Forensic Identification Database and Databank Program have been dismissed prior to adjudication by a trier of fact, in which case the court shall forward an order to the Department of Justice upon disposition of the case, indicating that the charges have been dismissed.

(3) The underlying conviction or disposition serving as the basis for including the DNA profile has been reversed and the case dismissed, in which case the court shall forward its order to the Department of Justice upon disposition of the case.

(4) The person has been found factually innocent of the underlying offense pursuant to Section 851.8, or Section 781.5 of the Welfare and Institutions Code, in which case the court shall forward its order to the Department of Justice upon disposition of the case.

(5) The defendant has been found not guilty or the defendant has been acquitted of the underlying offense, in which case the court shall forward its order to the Department of Justice upon disposition of the case.

(c) Except as provided in this section, the Department of Justice shall 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 the following:

(1) 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.

(2) A court order verifying that no retrial or appeal of the case is pending.

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

The Department of Justice is not required to destroy analytical data or other items obtained from a blood specimen or saliva, or buccal swab sample, if evidence relating to another person subject to the provisions of this chapter would thereby be destroyed or otherwise compromised.

Any identification, warrant, probable cause to arrest, or arrest based upon a databank or database match is not invalidated due to a failure to expunge or a delay in expunging records.

(e) Notwithstanding any other law, the Department of Justice DNA Laboratory is not required to expunge DNA profile or forensic identification information or destroy or return specimens, samples, or print impressions taken pursuant to this section if the duty to register under Section 290 or 457.1 is terminated.

(f) Notwithstanding any other law, including Sections 17, 1170.18, 1203.4, and 1203.4a, a judge is not authorized to relieve a person of the separate administrative duty to provide specimens, samples, or print impressions required by this chapter if a person has been found guilty or was adjudicated a ward of the court by a trier of fact of a qualifying offense as defined in subdivision (a) of Section 296, or was found not guilty by reason of insanity or pleads no contest to a qualifying offense as defined in subdivision (a) of Section 296.

(g) This section shall only become operative if the California Supreme Court rules to uphold the California Court of Appeal decision in *People v. Buza* (2014) 231 Cal.App.4th 1446 in regard to the provisions of Section 299 of the Penal Code, as amended by Section 9 of the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, Proposition 69, approved by the voters at the November 2, 2004, statewide general election, in which case this section shall become operative immediately upon that ruling becoming final.