

<p>California Department of Justice DIVISION OF LAW ENFORCEMENT Patrick Lunney, Director</p>	<p>INFORMATION BULLETIN</p>	
<p><i>Subject:</i> Proposition 69 – DNA Fingerprint, Unsolved Crime and Innocence Protection Act, Effective November 3, 2004</p>	<p><i>No.:</i> 04-BFS-03 <i>Date:</i> 3/15/2005</p>	<p><i>For further information contact:</i> Bureau of Forensic Services DNA Laboratory, Richmond Phone: (510) 620-3300</p>

To: California Law Enforcement Agencies and Personnel

Effective November 3, 2004, voter initiative **Proposition 69** amended portions of the California Penal Code and California Government Code with the **DNA Fingerprint, Unsolved Crime and Innocence Protection Act**. Proposition 69 expands and modifies state law related to collection and use of criminal offender DNA samples and palm print impressions.

This Information Bulletin addresses central features of Proposition 69, including the responsibilities of law enforcement, correctional agencies, and mental health and sex offender treatment facilities with respect to the State's DNA Data Bank Program (PC 295 et seq.).

- **Buccal Swabs:** DNA is collected from qualifying persons by buccal swab (inner cheek scrapings), unless the Department of Justice requests a blood sample. (PC 295(e).) Until buccal swab collection kits are distributed to agencies following training, existing blood/saliva collection kits should be used. Note the following regarding buccal swab collection:
 - **Thumbprint, Palm Prints.** The buccal swab sample must be accompanied by two right thumbprints. A full palm print impression of each hand must be collected and submitted separately from the DNA kit. The preferred, but not required, method of palm print submissions is electronic transmission via a live scan device. (PC 296(a).)
 - **Training.** The Department of Justice provides training in buccal swab sample collection. Training began on August 5, 2004. Questions about remaining training dates and locations may be directed to the DNA Data Bank Program at PC296.PC296@doj.ca.gov. Buccal kits will be distributed to an agency only after it undergoes DOJ-approved training.
 - **Funding.** Because Proposition 69 provides for substantial funding routed directly to counties, the Department of Justice will not reimburse collecting agencies for buccal swab or palm print collection expenses. Reimbursement will continue for collections using existing blood/saliva kits, until an agency begins buccal collections.
 - **Re-testing.** Based on agency experience and initial testing, DOJ estimates that approximately 5% of buccal swab collections may fail to generate a full DNA profile. In these circumstances, DOJ will require the supplemental collection of blood samples. Therefore, if an agency has a phlebotomist under contract, we

advise that it continue this arrangement. DOJ also recommends collecting blood samples when an offender refuses to cooperate with sample collection.

□ **Sample Collection:**

- **One-time collection.** A qualifying person must provide a DNA sample and palm print impressions for California’s DNA Data Bank Program only if his/her sample and print impressions are not already on file with DOJ. Before collection occurs, the collecting agency should check the person’s criminal history record(s) for a DNA collection flag.¹ In addition, individual counties should establish a means of communicating the fact of collection between local agencies that might otherwise collect duplicate samples. Questions concerning an offender’s correct collection status may be directed to DOJ’s Richmond DNA Laboratory via e-mail, fax, or telephone (see contact information below). DOJ staff will respond promptly to inquiries received during normal business hours.
- **Collection noted on abstract of judgment.** The trial court is required to note on the abstract of judgment or juvenile disposition order the fact that DNA samples and palm print impressions have been collected from qualifying offenders. (PC 296(f).)

□ **Persons Who Qualify For DNA Sample Collection:**

- Adults and juveniles who are convicted or adjudicated of any felony crime and are currently in custody or on probation, parole, or other supervised release or otherwise under any government control in conjunction with that conviction or adjudication. (PC 296.1(a)(2), (3), (4).) Generally:
 - “Conviction” means that a guilty verdict has been returned or that a guilty or no contest plea has been entered and accepted.
 - “Adjudication” means that a juvenile petition has been sustained.
 - Not guilty by reason of insanity findings also trigger DNA collection requirements.
- Adults and juveniles who are currently in custody or on probation, parole, or other supervised release or otherwise under any government control in conjunction with a conviction or adjudication for a misdemeanor or other offense and who also have a past California or out-of-state or military or federal qualifying felony conviction or adjudication of record. (PC 296.1(a)(2), (3), (4).)
- Adults and juveniles who are required to register under Penal Code section 290 or Penal Code section 457.1 for felony or misdemeanor sex or arson offenses. (PC 296(a)(3); 299(e), (f).)
- Adults and juveniles referred to and housed in mental health treatment programs for felony offenses. (PC 296(a)(3), 296(c).) This includes persons found incompetent to stand trial under Penal Code section 1368, those committed to a state hospital upon a finding of not guilty by reason of insanity, and those classified as mentally disordered sex offenders.

¹ See Appendix A for sample rap sheet “flags.”

- Adult and juvenile out-of-state offenders accepted into California for service of custody, probation, or parole under an interstate compact or other agreement, following a qualifying conviction or adjudication, or with a prior felony of record. (PC 296.1(a)(5).)
- Federal prison inmates with a prior California or out-of-state qualifying felony conviction or adjudication of record. Requires California connection (e.g., the inmate will be released in California) and approval of the FBI Director. (PC 296.1(a)(6).)
- Adults and juveniles who enter a plea conditioned upon collection of a DNA sample. (PC 296(a)(5).)
- Adults arrested on or after November 3, 2004 for felony PC 290 sex crimes, murder, voluntary manslaughter, or attempts to commit those crimes. (PC 296(a)(2).) Note: The arrestee provision is not retroactive to arrests that took place before November 3, 2004. Also as authorized by statute, and as augmented by DOJ policy, samples taken from arrestees are expunged upon appropriate notice to DOJ verifying that the sample donor has not been convicted of a qualifying offense or referred to a designated institution in the case as described above.
- Beginning in 2009, all adults arrested for any felony offense on or after January 1, 2009. (PC 296(a)(2)(C).) This expansion of the arrestee provision is not retroactive to arrests that took place before January 1, 2009.

□ **Timing of DNA Sample Collections:**

Qualifying individuals are sampled as an administrative consequence of felony conviction/adjudication (PC 295(d)), or of a judicial finding that a felony has been committed with concurrent referral to designated institutions, as described above. (Individuals sampled at arrest on certain felony crimes ultimately must be convicted of a qualifying offense or referred to a designated institution for the sample to be retained.) Accordingly, samples are required from qualifying persons as soon as possible after a current qualifying felony arrest, a current qualifying conviction/ adjudication, and in any event prior to completion of a term of probation, parole, or before a nexus with criminal justice system or any government control has ended. Thus, courts must verify *before sentencing or disposition* that samples have been obtained. (PC 296(f).) The timing of collection is generally as follows:

- Persons arrested on or after November 3, 2004, for murder, voluntary manslaughter, a felony PC 290 sex offense, or an attempt to commit one of those crimes must provide DNA samples and palm print impressions immediately following arrest or during booking. (PC 295(i)(1)(A); 296.1(a)(1)(A).)
- Persons convicted or adjudicated of a felony, or of a misdemeanor or other offense with a prior felony conviction, shall provide DNA samples and palm print impressions “immediately following . . . conviction [i.e., plea or verdict] . . . or adjudication.” (PC 295(i)(1)(A).)
 - Applies whether the adult or juvenile is in-custody or out-of-custody on the present offense, as long as the individual is under any government or criminal justice system control or supervision with respect to that offense. (PC 296.1(a)(2), (3).)

- Out-of-custody adults or juveniles pending sentencing or dispositional order must appear for collection within five days of notice. (PC 296.1(a)(3)(B).)
- There is no bar to collection of DNA samples and palm print impressions after sentencing or disposition, where the adult or juvenile is in state or local custody, or on probation, parole, or “other release.” (PC 296.1(a)(2), (3).)
 - Out-of-custody adults or juveniles under government or state control or supervision must appear for collection within five days of notice, if collection already has not taken place. (PC 296.1(a)(3)(B).)
- A person required to register as a sex offender under Penal Code section 290, but who has not yet provided a DNA sample and palm print impressions must provide samples at registration update or at an appointed time thereafter, or within 10 days of notification. (PC 296.2(c).)

□ **Limitations on Collection:**

- **Training.** Only persons trained to monitor and/or perform buccal collections on behalf of a collecting agency may do so.
- **Suspect Samples.** Proposition 69 DOES NOT authorize law enforcement to collect DNA samples from criminal suspects solely based upon their status as suspects. Law enforcement agencies may, however, submit to their primary lab services provider for DNA testing and entry into the State Database a known sample of a suspect’s blood, saliva, or other biological substance that has been otherwise legally obtained. (PC 297(b)(1).) Once a suspect sample has been accepted for inclusion in the State’s DNA Data Bank Program, the submitting agency must notify the Department of Justice within two years whether the person remains a suspect in that particular investigation.
- **Arrestee samples.** Proposition 69 does not authorize DNA sample collection upon arrest based on prior felony convictions or adjudications of record. DNA samples should not be collected for any arrests that occurred before November 3, 2004. Likewise, the broader collection of felony arrestee samples from adults that will begin January 1, 2009, is not retroactive to arrests that took place before January 1, 2009. (PC 296(a)(2)(C).)

□ **Verification Procedures:**

- The collecting agency has exclusive responsibility for verifying an offender’s identity and status as a person qualifying for DNA collection. (PC 295(i)(1); 298(b)(5).) The Department of Justice’s DNA collection kits will include a card requiring collecting personnel to certify the identity of the person providing the DNA sample, as well as the fact that the person’s offense, conviction, adjudication, or other status qualifies him/her for DNA collection. Collecting agencies should use all means reasonably available to certify the offender’s identity and qualifying status. This includes review of all available criminal history records.

□ **Expungement Procedures:**

- A person who has provided a DNA sample under Proposition 69 may request that his/her blood or buccal specimen be destroyed and corresponding profile expunged from searchable databases if any of the following circumstances exist, and the person has no other qualifying offense of record:
 - A DNA sample was collected upon the person's arrest, but no charges were filed within the applicable statute of limitations. (PC 299(b)(1).)
 - A DNA sample was collected upon the person's arrest, but the person was found not guilty or otherwise acquitted of the charges. (PC 299(b)(4).)
 - A DNA sample was collected based on conviction for a qualifying offense, but the conviction was subsequently reversed and the case dismissed. (PC 299(b)(2).)
 - A DNA sample was collected based on conviction for a qualifying offense, but a court subsequently found the person to be factually innocent of that crime. (PC 299(b)(3).)
 - A DNA sample for a suspect was profiled and entered into the Database, but the person is no longer considered a suspect by the investigating agency. (PC 297(b)(2).)
- The California District Attorneys Association is working with the California Department of Justice to develop a streamlined procedure to facilitate the expungement process. Further information will be provided when this procedure is finalized.

□ **Related Crimes:**

- **Misdemeanor refusal to provide sample.** A person who refuses to provide a mandated DNA sample or accompanying thumb or palm print impressions is guilty of a misdemeanor punishable by up to one year in county jail and a \$500 fine. (PC 298.1(a).) California law continues to authorize a collecting agency to use reasonable force to collect DNA samples, specimens and print impressions from a qualifying offender who refuses to provide them. (PC 298.1(b) and (c).) There is no need for a court order, as long as mandated regulations are in place. (PC 298.1(c).)
- **Felony sample tampering.** It is a felony for any qualifying offender to knowingly facilitate the collection of a wrongfully-attributed DNA sample or identification information, or to knowingly tamper with any DNA sample or collection container with the intent to deceive the government as to his or her identity. (PC 298.2.)
- **Unauthorized use and/or disclosure.** Any person who knowingly misuses or discloses to an unauthorized entity a DNA sample collected or profile obtained for DNA Database purposes may be charged with a felony or misdemeanor offense. (PC 299.5(i)(1)(A).) Imposition of substantial fines may also occur if the unlawful act was undertaken for financial gain. (PC 299.5(i)(1)(B).) Civil damages are also authorized. (PC 299.5(i)(2)(A).)

- **Please inform the Department of Justice’s DNA Legal Unit immediately if your agency is named in a lawsuit involving DNA Data Bank sample collection, sample use, or any aspect of the State’s DNA Data Bank Program.**

Department of Justice Contact Information

Jan Bashinski DNA Laboratory, Richmond

PC296.PC296@doj.ca.gov or (510) 620-3300 [for collection confirmation press “1-1” in the automated answering system; for other inquiries, contact Stacy Fox at ext. 3372]

Fax (510) 231-8744

DNA Legal Unit

Michael.Chamberlain@doj.ca.gov or (415) 703-5892

Automated Latent Print Section

Palm.Print@doj.ca.gov or (916) 227-3314

Administrative Services Division, Accounting Office

(916) 324-6678

Sincerely,

PATRICK N. LUNNEY, Director
Division of Law Enforcement

For BILL LOCKYER
Attorney General

RAP Sheet Flags for ACHS after Proposition 69

The following language currently appears in the Automated Criminal History System and on Summary Criminal Histories (rap sheets) representing the status of DNA and Palm Print collection. This language may change in the future, but the general types of flags will include those as follows:

Flags showing DNA samples have already been collected:

****DO NOT COLLECT DNA. SAMPLES VERIFIED BY SUBMITTING AGENCY RECEIVED BY THE CAL-DNA LAB. FOR INFO (510) 620-3300 OR PC296.PC296@DOJ.CA.GOV.**

****DO NOT COLLECT DNA. VERIFIED DNA SAMPLES ARE ON FILE WITH THE CAL-DNA LAB.**

****DO NOT COLLECT DNA. DNA SAMPLES HAVE BEEN RECEIVED, TYPED, AND UPLOADED INTO THE CAL-DNA DATA BANK.**

Flags showing DNA has not been collected and under what conditions it can be:

(New sample required)

****COLLECT DNA. THE DNA SAMPLE PREVIOUSLY SUPPLIED IS INADEQUATE. REQUEST KITS AND INFO AT (510) 620-3300 OR PC296.PC296@DOJ.CA.GOV.**

(Collect from qualified sex & arson registrants under PC 290/457.1)

****COLLECT DNA IF PC 290 SEX or PC 457.1 ARSON REGISTRANT. REQUEST KITS AND INFO AT (510) 620-3300 OR PC296.PC296@DOJ.CA.GOV.**

(Collect from qualified offenders under specified conditions)

****COLLECT DNA IF INCARCERATED, CONFINED, OR ON PROBATION OR PAROLE FOLLOWING ANY MISDEMEANOR OR FELONY CONVICTION. REQUEST KITS AND INFO AT (510) 620-3300 OR PC296.PC296@DOJ.CA.GOV.**

Flags showing Palm Print collection status:

(Palm prints already collected, additional Live Scan palm print collections welcome, but not required)

**** PALM PRINT ON FILE AT DOJ FOR ADDITIONAL INFORMATION PLEASE E-MAIL PALM.PRINT@DOJ.CA.GOV**

No palm print flag is listed if no palm prints are on file with DOJ, but palm prints may be taken at any time 10-print cards would be collected, for instance on arrest, independent of PC 296.