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DNA: Law Enforcement's Miracle of Technology: The Missing Link to Truth and Justice

Jerilyn Stanley

Code Sections Affected

Penal Code §§ 1405, 1417.9, 14250, 14251 (new); §§ 297, 298, 299, 299.5 (amended).

SB 1342 (Burton); 2000 STAT. Ch. 821

SB 1818 (Speier); 2000 STAT. Ch. 822

AB 2814 (Machado); 2000 STAT. Ch. 823

I. INTRODUCTION

Deoxyribonucleic acid, commonly referred to as DNA, is genetic material that is unique to each individual.¹ DNA is the encoded information of specific physical characteristics of each individual.² Practically every human tissue or fluid contains DNA.³ DNA samples from a known individual can be compared to an unknown evidence sample taken from a crime scene to establish that person's presence.⁴ Furthermore, DNA is able to sustain its identifying propensity over time which supports its value in criminal investigations.⁵

DNA test results were first introduced as evidence in 1986 and are currently accepted evidence in all United States courts.⁶ DNA evidence has developed into a useful tool for law enforcement in obtaining convictions as well as exonerating

1. See NATIONAL COMMISSION ON THE FUTURE OF DNA EVIDENCE, NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, POST-CONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 21 (SEPT. 1999) [hereinafter Post-conviction DNA Testing] (excepting twins which have identical DNA).

2. *Id.*

3. See *id.*; *People v. Axell*, 235 Cal. App. 3d 836, 845, 1 Cal. Rptr. 2d 411, 415 (1991) (including scientific and historical discussion of DNA characteristics, fingerprinting and statistical analysis).

4. See POST-CONVICTION DNA TESTING, *supra* note 1, at 1 (discussing general biological characteristics of DNA, testing and identification procedures).

5. See *id.* at 21 (stating that DNA characteristics do not change over time); see also Eric E. Wright, *DNA Evidence: Where We've Been, Where We Are, And Where We Are Going*, 10 ME. B.J. 206, 206 (1995) (noting a sample can be taken and compared against older crime scene evidence).

6. See *id.* (summarizing the current status of DNA evidence in United States courts); see also *United States v. Yee*, 134 FRD 161, 166 (N.D. Ohio 1991); *People v. Axell*, 235 Cal. App. 3d 836, 856, 1 Cal. Rptr 411, 423 (1991); *People v. Castro*, 545 N.Y.S.2d 985, 995 (1989) (leading cases discussing DNA results as admissible evidence under *Frye* standard for scientific evidence).

suspects.⁷ Currently, all fifty states have passed DNA database statutes⁸ and the Federal Bureau of Investigation (FBI) operates a DNA database which allows the states to exchange DNA information.⁹ The FBI's system produced its first "cold" hit¹⁰ in July of last year connecting several sexual assault and rape cases in Florida and Washington DC to a suspect.¹¹

DNA evidence has also been used to exonerate suspects and free wrongly convicted inmates.¹² Nationwide, more than sixty inmates¹³ have been found

7. See U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL iii (JUNE 1996) [hereinafter Case Studies]; POST-CONVICTION DNA TESTING, *supra* note 1, at xiii (noting the usefulness of the conclusive identification results of DNA evidence).

8. Ala. Code § 36-18-20 (1994); Alaska Stat. § 44.41.035 (Michie 1996); Ariz. Rev. Stat. Ann. § 31-281 (1993); Ark. Code Ann. § 12-12-1101 (Michie 1994); Cal. Penal Code § 290.2 (West 1994); Colo. Rev. Stat. Ann. § 17-2-201 (5)(g)(i) (West 1995); Conn. Gen. Stat. Ann. § 54-102g (West 1994); Del. Code Ann. Tit.29, § 4713 (1994); Fla. Stat. Ann. § 943.325 (West 1994); Ga. Code Ann. § 24-4-60 (1992); Haw. Rev. Stat. Ann. § 706-603 (Michie 1992); Idaho Code § 19-5504 (1996); 720 Ill. Comp. Stat. Ann. § 5/12-13 (West 1992); Ind Code Ann. § 10-1-9-8 (West 1996); Iowa Code Ann. § 13.10 (West 1991); Kan. Stat. Ann. § 21-2511 (1991); Ky. Rev. Stat. Ann. § 17.170 (Banks-Baldwin 1992); La. Rev. Stat. Ann. § 15:605 (West 1999); Me. Rev. Stat. Ann. tit. 25, § 1573 (West 1996); Md. Code Ann., Cts. & Jud. Proc. § 10-915 (1994); Mass Gen. Laws Ann. ch. 22E, § 3 (Law. Co-op. 1997); Mich. Comp. Laws Ann. § 750.520m (West 1994); Minn. Stat. Ann. § 299 C.155 (West 1993); Miss. Code Ann § 45-33-15 (1995); Mo. Ann. Stat. § 650.050 (West 1991); Mont. Code Ann. § 44-6-102 (1995); Ned. Rev. Stat. § 29-4104 (1997); Nev. Rev. Stat. Ann. § 176:0913 (Michie 1989); N.H. Rev. Stat. Ann. § 632-A:22 (1996); N.J. Stat. Ann. § 53:1-20.17 (West 1994); N.M. Stat. Ann. § 29-16-2 (Michie 1997); N.Y. Exec. Law § 995 (McKinney 1994); N.C. Gen. Stat. § 15A-266 (1993); N.D. Cent. Code § 31-13-05 (1995); Ohio Rev. Code Ann. § 2901.7 (West 1995); Okla. Stat. Ann. tit. 57, § 584 (West 1996); Or. Rev. Stat. § 181.085 (1998); 35 Pa. Cons. Stat. Ann. § 7651.302 (West 1995); R.I. Gen. Laws § 12-1.5-4 (1998); S.C. Code Ann. § 23-3-600 (Law. Co-op. 1995); S.D. Codified Laws § 23-5-14 (Michie 1990); Tenn. Code Ann. § 38-6-113 (1991); Tex. Gov't Code Ann. § 411.141 (West 1995) Utah Code Ann. § 53-10-406 (1994); Vt. Stat. Ann. tit. 20, § 1931 (1998); Va. Code Ann. § 19.2-310.2 (Michie 1993); Wash. Rev. Code Ann. § 43.43.752 (West 1990); W. Va. Code § 15-2B-1 (1995); Wis. Stat. Ann. § 165.77 (West 1993); Wyo. Stat. Ann. § 7-19-402 (Michie 1997).

9. 42 U.S.C. § 14132; see *DNA Index System*, U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF INVESTIGATION (Press Release, Washington D.C.) Oct. 13, 1998, available at <http://www.fbi.gov/pressrm/pressrel/pressrel98/dna.htm> (last visited Oct. 20, 2000) (copy on file with *McGeorge Law Review*) (announcing the National DNA Index System (NDIS) which will allow laboratories to electronically exchange DNA information in an effort to connect crimes and suspects).

10. A "cold" hit is when DNA information from a suspect or inmate is entered into a DNA database which contains DNA information of evidence taken from crime scenes and the computer generates a match between a specific person and a scene where there was no previous evidence to connect that person to that specific crime scene. *First "Cold" Hit Recorded in National DNA Index System!*, U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF INVESTIGATION (Press Release, Washington D.C.) July 21, 1999, available at <http://www.fbi.gov/pressrm/pressrel/pressrel99/coldhit.htm> (last visited Oct. 20, 2000) (copy on file with *McGeorge Law Review*).

11. *Id.*

12. See Raju Chebium, *DNA Provides New Hope for Wrongly-Convicted Death Row Inmates*, available at <http://www.cnn.com/2000/LAW/06/16/death.penalty.dna.main> (visited Aug. 30, 2000) (copy on file with the *McGeorge Law Review*) (reporting on a death row inmate who used DNA evidence to prove his innocence of the murder and rape of a young child after serving two years, of his eight in prison, on death row). Inmates and defense attorneys are using DNA evidence to exonerate inmates. *Id.* See also Innocence Project, *infra* note 17 (explaining their use of DNA evidence to exonerate wrongly convicted inmates).

13. See Mark Hansen, *DNA Bill of Rights: Activists Call for Standards on Inmate Testing, Evidence Preservation*, 86 Mar. A.B.A.J. 30, 30 (2000) (stating that Calvin Johnson Jr. was the 62nd person to be freed from prison due to DNA evidence).

innocent due to post-conviction DNA evidence after serving sentences ranging from nine months to nineteen years.¹⁴ Such stories prompted Illinois Governor, George Ryan, to suspend all future executions until a determination can be made as to whether there are any innocent people on death row in Illinois.¹⁵ Currently, San Diego County is offering free DNA testing to inmates incarcerated before 1992 in cases where biological evidence still exists.¹⁶ The development of DNA as evidence lead Defense Attorneys Barry Scheck and Peter Neufeld to create the Innocence Project housed at Benjamin N. Cordoza School of Law which utilizes the services of law students in reviewing cases to arrange for post conviction DNA testing of inmates.¹⁷

Due to the apparent benefits of DNA as an investigatory and evidentiary tool, Chapters 821, 822, and 823 further the use of DNA in California.¹⁸ Chapter 821 establishes a post-conviction right for inmates to secure DNA analysis testing.¹⁹ Chapter 822 establishes a database for missing persons,²⁰ and Chapter 823 expands the use of suspect DNA in the criminal DNA database.²¹ All three of these measures expand the use of DNA information within the judicial arena.²²

II. EXISTING LAW

In 1998, the California State Legislature passed the DNA and Forensic Identification Data Base and Data Bank Act of 1998,²³ finding that DNA

14. See *id.* (reporting that Calvin Johnson, Jr. served 16 years before being found innocent due to post conviction DNA evidence); see also Stuart Pfeifer, *Past Due: Cost of Freedom Lost Man Released After 19 Years in Prison Demands \$10 Million for Alleged Wrongful Conviction*, L.A. TIMES, July 29, 2000, at B1 (discussing inmates who were later freed due to DNA evidence proving their innocence: DeWayne McKinney served 19 years for murder, Kevin Green served 16 for attempted murder); see also CASE STUDIES, *supra* note 7, at 34-76 (illustrating varied lengths of prison terms prior to release due to being found innocent based on DNA evidence: Kirk Bloodsworth served 8 years, 2 of which were on death row, Rolando Cruz served 11 years on death row, Alejandro Hernandez served 11 years on death row, and Edward Green served 9 months on death row).

15. William Claiborne, *Illinois Governor Will Halt Executions Pending Inquiry*, L.A. TIMES, Jan. 31, 2000, at A7; see *Illinois to Put Moratorium on Executions*, S.F. CHRON., Jan 31, 2000, at A1 (reporting on Governor's decision).

16. James Sterngold, *San Diego Offers Free Inmate DNA Tests District Attorney Takes Lead in Searching Out Those Who May Be Innocent*, CHIC. TRIB., July 28, 2000, available in 2000 WL 3690509 (on file with the *McGeorge Law Review*).

17. The Innocence Project can be found at Benjamin N. Cardoza School of Law at 55 5th Avenue, 17th Floor, New York, NY 10003, (212) 790-0368. *Id.* CASE STUDIES, *supra* note 7, at xxviii (including statement by Peter Neufeld and Barry C. Scheck who through this project participated in most of the cases listed in the study).

18. See *infra* Part III.A (explaining Chapter 821); *infra* Part III.B (discussing Chapter 822); *infra* Part III.C (describing Chapter 823).

19. CAL. PENAL CODE §§ 1405, 1417.9 (enacted by Chapter 821).

20. *Id.* § 14251 (enacted by Chapter 822).

21. *Id.* §§ 297-299.5 (enacted by Chapter 823).

22. See *infra* Part III.A (explaining Chapter 821); *infra* Part III.B (discussing Chapter 822); *infra* Part III.C (describing Chapter 823).

23. CAL. PENAL CODE § 295 (a) (West 1999).

identification is beneficial to law enforcement in prosecuting crimes.²⁴ This legislation replaced and expanded the existing DNA provisions,²⁵ and created a DNA database²⁶ to improve the State's ability to utilize DNA evidence as an effective tool for law enforcement by establishing guidelines for the approval of laboratories, collection of samples, expungement of information, and limitations on disclosure.²⁷ California's DNA Data Bank Program was designed for the purpose of aiding law enforcement officials in quickly and accurately solving crimes.²⁸ Under this statute, the Department of Justice (DOJ) is required to conduct DNA analysis for identification purposes only, acting as a repository for specimens, profiles, and records.²⁹ The statute requires violent criminals and sex offenders, who have been convicted of felony charges, to submit to the collection of blood, saliva, palm and thumbprint for DNA testing.³⁰ This statute applied retroactively to all prisoners in the State of California regardless of when the underlying offense occurred.³¹ However, any samples taken from a suspect can only be compared to samples taken from investigations where that individual is a suspect.³² Prior to the June 24, 1988 amendment, Assembly Bill 1332 would have allowed the DOJ to compare an individual's DNA sample to "as many cases and investigations as necessary."³³ If a convicted offender who submitted a DNA sample is found to be factually innocent, or the conviction is reversed, or is granted an acquittal, the DOJ is required to expunge all information in the data bank.³⁴ Disclosure limits are also imposed upon the DOJ, restricting the information to law enforcement agencies,³⁵ and establishing that the knowing disclosure to an unauthorized individual or agency as a misdemeanor.³⁶

24. *See id.* (limiting the finding of usefulness to violent or sexual criminals).

25. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1332, at 4 (May 12, 1998) (stating that the purpose of this legislation is to expand the use of DNA samples).

26. CAL. PENAL CODE § 295(d) (West 1999).

27. *Id.* § 295.

28. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1332, at 8 (May 12, 1998) (including the author's statement asserting the problems with the previous measure and how this legislation will increase the effectiveness and consistency of using DNA database in supporting law enforcement).

29. *See* CAL. PENAL CODE § 295.1(a), (c) (West 1999) (listing, in subsection (c), the categories of information the Department of Justice is required to store, analyze, compare and maintain).

30. *See id.* § 296(a) (West 1999 & Supp. 2000) (detailing the specific crimes that qualify for admission into the database and, in addition to listing convictions, includes those defendants who plead guilty, no contest, or were found not guilty by reason of insanity and enforcing collection under threat of misdemeanor penalties).

31. *Id.* § 296.1(c)(2) (West 1999 & Supp. 2000).

32. *Id.* § 297(b)(1) (West 1999 & Supp. 2000).

33. *See* AB 1332, Regular Sess. (Cal. 1998) (deleting the provision in the June 24, 1998 version which would have allowed the Department of Justice more discretion in comparing DNA samples).

34. CAL. PENAL CODE § 299 (West 1999) (listing the procedures for expunging information in the database).

35. *Id.* § 299.5(f) (West 1999 & Supp. 2000) (including district attorneys' and parole officers and a suspect's defense counsel, pursuant to discovery order, within the allowed disclosure).

36. *Id.* § 299.5(g) (West 1999 & Supp. 2000).

California's lack of post-conviction DNA testing procedures required inmates to gain approval from the original prosecutor for testing.³⁷ While some jurisdictions instituted policies for post-conviction DNA testing,³⁸ other offices have been reluctant to re-open cases for DNA testing.³⁹ Time limits for filing appeals based on new evidence are for the purpose of protecting the integrity of the trial procedure and jury verdicts.⁴⁰ However, the innovation of DNA analysis is challenging this belief.⁴¹

III. NEW LEGISLATION

A. Chapter 821

Chapter 821 grants current inmates a post-conviction right to DNA testing under limited circumstances and requires law enforcement to store relevant biological material in criminal cases.⁴² This measure also enables anyone currently serving a felony prison sentence to apply to the trial court for DNA testing.⁴³ An inmate's motion for post-conviction testing must state: (1) why identity is a "significant issue;"⁴⁴ (2) how the testing requested "would raise a reasonable probability" of a different verdict or sentence if the results had been previously available;⁴⁵ (3) which evidence is to be tested using which test;⁴⁶ and (4) whether DNA testing has previously been conducted and if so, the results of those tests.⁴⁷ This motion is to be served to all relevant law enforcement and storage facility agencies who, unless receiving approval for a continuance, has sixty days to respond.⁴⁸

37. See ASSEMBLY PUBLIC SAFETY COMMITTEE, COMMITTEE ANALYSIS OF AB 1342, at 5 (June 20, 2000) (discussing limitations under current California law); see also Henry Weinstein, *New DNA Evidence May Absolve Inmate in 1998 Rape Case Crimes*, L.A. TIMES, Feb. 9, 2000, available in 2000 WL 2209129 (quoting Peter Neufeld of the Innocence Project in his opinion that California's lack of post-conviction statute leaves inmates at the "mercy of the goodwill of the prosecutor").

38. See Richard Willing, *Inmates Offered Free DNA Tests San Diego Tackles Cases in Doubt*, USA TODAY, July 27, 2000, at 1A (announcing San Diego's offer of post-conviction DNA testing and Orange County's plans to offer testing demonstrating their change from resistance allowed under current statutes).

39. See Weinstein, *supra* note 37 (reporting on the resistance by a Riverside County prosecutor to allow post-conviction testing).

40. CASE STUDIES, *supra* note 7, at 28.

41. See POST-CONVICTION DNA TESTING, *supra* note 1, at 9-10 (questioning the policy reasons behind finality of verdicts in light of advances in DNA analysis technology).

42. See CAL. PENAL CODE §§ 1405, 1417.9 (enacted by Chapter 821) (requiring, upon the satisfaction of several conditions, a court to order the requested DNA testing; thereby, establishing a post conviction right for inmates).

43. *Id.* § 1405(a) (enacted by Chapter 821).

44. *Id.* § 1405(a)(1)(A) (enacted by Chapter 821).

45. *Id.* § 1405(a)(1)(B) (enacted by Chapter 821).

46. *Id.* § 1405(a)(1)(C) (enacted by Chapter 821).

47. *Id.* § 1405(a)(3) (enacted by Chapter 821).

48. *Id.* § 1405(a)(2) (enacted by Chapter 821).

This section also establishes a right to counsel for indigent inmates who file a motion.⁴⁹ The court is required to grant an inmate's motion if the motion or hearing⁵⁰ establishes all of the following: (1) the evidence is available and able to be tested by scientifically accepted means;⁵¹ (2) the evidence was properly preserved so as to be reliable;⁵² (3) the court accepts the inmate's declarations;⁵³ (4) the inmate has made a prima facie case that the testing evidence would be material to the identity of the inmate's participation in the crime that lead to the conviction or sentence;⁵⁴ (5) that either a DNA test had not been previously conducted,⁵⁵ or if the evidence had been previously tested, that the requested test would either contradict the previous results, or that it would be reasonably more accurate in identifying the person, or accomplice, who committed the crime;⁵⁶ and (6) that the motion was not filed for delay.⁵⁷ Upon granting this motion, the court is to signify the specific evidence that is to be tested, and the method of testing to be conducted at a mutually agreed upon laboratory.⁵⁸ The test results are to be fully disclosed to all parties, and any other data or notes shall be made available upon request.⁵⁹

Under this motion, DNA testing costs will be paid by the State unless the court makes the dual finding, in the interest of justice, that the inmate is not indigent and is capable of paying.⁶⁰ Any decision on this motion is not appealable, but may be revisited through petitioning for an expedited writ of mandate or prohibition.⁶¹ This measure contains a special provision providing for a California Supreme Court review for any decision that involves a death row inmate.⁶² If the court approves the petition for post-conviction DNA testing, the test is to be completed "as soon as practicable"⁶³ unless the court finds expedition is needed in the interest of justice.

49. *Id.* § 1405(c) (enacted by Chapter 821).

50. *See id.* § 1405(b) (enacted by Chapter 821) (granting the court discretion to hold a hearing on the motion and whether the inmate should be present at the hearing).

51. *Id.* § 1405(d)(1), (d)(7) (enacted by Chapter 821).

52. *See id.* § 1405(d)(2) (enacted by Chapter 821) (requiring the establishment that the evidence has not been "substituted, tampered with, replaced or altered in any material aspect").

53. *See id.* § 1405(d)(3), (d)(5) (enacted by Chapter 821) (requiring that identity be a "significant issue" and that the results establish a "reasonable probability" of a different outcome in conviction or sentencing if these results had been available at trial, and in considering this reasonable probability, the court may consider evidence beyond what was introduced at trial).

54. *See id.* § 1405(d)(4) (enacted by Chapter 821) (noting that an issue of identity may be material regarding an element of special circumstance or sentence enhancement provision that lead to the inmate receiving that specific sentence).

55. *Id.* § 1405 (d)(6)(A) (enacted by Chapter 821).

56. *Id.* § 1405(d)(6)(B) (enacted by Chapter 821).

57. *Id.* § 1405(d)(8) (enacted by Chapter 821).

58. *See id.* § 1405(e) (enacted by Chapter 821) (providing that if the parties can not agree to a laboratory, then the court will decide).

59. *Id.* § 1405(f) (enacted by Chapter 821).

60. *Id.* § 1405(g)(1) (enacted by Chapter 821).

61. *Id.* § 1405(h) (enacted by Chapter 821).

62. *See id.* (stating that noncapital case appeals for writs of petition shall be filed with the Court of Appeals and capitol cases shall be filed with the California Supreme Court).

63. *Id.* § 1405(i) (enacted by Chapter 821).

If interests of justice are concerned, the testing laboratory is ordered to proceed prioritizing the request over other testing requests.⁶⁴

This measure also establishes procedures prior to disposing biological samples in criminal cases so, when needed, post-conviction DNA testing will be possible.⁶⁵ The government is required to keep, in a condition sufficient for DNA testing, any biological material obtained in connection with a criminal case as long as the defendant is imprisoned on a felony conviction.⁶⁶ The government can dispose of DNA evidence only after: (1) notification to the relevant parties of the right of post-conviction testing contained in this article and the impending disposal,⁶⁷ and (2) the court does not receive, within ninety days,⁶⁸ either a motion for post-conviction testing,⁶⁹ an intent to file a motion for testing within one hundred eighty days,⁷⁰ or a filing of a declaration of innocence.⁷¹ However, if an inmate files a declaration of innocence which is found to be false, or if identity is found to be a non-issue, the government is allowed to destroy the evidence.⁷² Without future legislation, this provision requiring the maintenance of biological evidence sunsets on January 1, 2003.⁷³

B. Chapter 822

Chapter 822 enacts the Missing Person DNA Data Base to identify unidentified remains found at scenes of unapproved burial location and to help locate missing persons—cases involving children are given priority.⁷⁴ This measure requires the DOJ to develop and maintain a separate DNA database for unidentified deceased persons and compare these samples with DNA samples taken from personal articles

64. *Id.*

65. *Id.* § 1417.9 (enacted by Chapter 821).

66. *Id.* § 1417.9(a) (enacted by Chapter 821).

67. *See id.* § 1417.9(b) (enacted by Chapter 821) (listing the relevant parties as the inmate serving the felony sentence based on the conviction, the inmate's attorney of record, the local public defender, the district attorney and the Attorney General).

68. *See id.* § 1417.9(b)(2) (enacted by Chapter 821) (stating ninety days begins upon sending of notification).

69. *See id.* § 1417.9(b)(2)(A) (enacted by Chapter 821) (stating that the entity is only required to maintain the evidence until a final ruling on the denied motion).

70. *See id.* § 1417.9(b)(2)(B) (enacted by Chapter 821) (requiring the petitioner to either file a motion within the 180 day period or request and receive approval for an extension from the government office holding the sample).

71. *See id.* § 1417.9(b)(2)(C) (enacted by Chapter 821) (establishing a time limit for filing of the later of either 180 days from conviction or July 1, 2001 to allow previously convicted inmates currently serving felony sentences to have sufficient time to file).

72. *See id.* (providing that the inmate has not met any other provisions in this section to delay the destruction). Additionally the inmate may be cross-examined on the declaration to establish a false statement at a specific hearing on the petition or at a section 1405 hearing requesting testing. *Id.*

73. *Id.* § 1417.9(c) (enacted by Chapter 821).

74. *See* 2000 Cal. Legis. Serv. Ch. 822, sec. 1, at (d) (enacting Title 12.5 DNA CAL. PENAL CODE § 14250 and § 14251) (establishing legislative intent that identifying unidentified remains and locating missing persons, especially children, are a priority in California, and that DNA testing can further the state's goal and help families finding closure for their losses).

of missing persons.⁷⁵ Within thirty days of filing a “high-risk circumstances”⁷⁶ missing persons report, the investigating law enforcement agency is directed to inform the relatives that voluntary DNA testing is available and either parent, if they are still living, may give a voluntary sample or a sample may be obtained from an article belonging to the missing person.⁷⁷ The DOJ is also required, under potential criminal and civil penalties, to destroy all DNA samples after a positive identification is made and a report is issued.⁷⁸ Confidentiality is further protected by limiting the disclosure of samples and findings to law enforcement personnel, district attorneys, and coroners.⁷⁹ In addition, the information in the database is to be kept separate from the criminal offenders database established under Chapter 822.⁸⁰

This data base is funded by a two dollar increase in death certificate fees⁸¹ and potential future federal funding is directed towards assisting the clearing of backlogs of high-risk missing persons and unidentified human remains testing.⁸² This measure also directs the DOJ to establish an advisory committee to establish a priority listing of the backlog.⁸³

C. Chapter 823

Chapter 823 amends the penal code sections regarding the comparison of DNA samples within the Criminal DNA database.⁸⁴ This measure limits law enforcement’s ability to use an unidentified suspect’s DNA test results to link them to a specific criminal investigation.⁸⁵ Furthermore, without a court order, law enforcement can take the DNA testing results of a suspect who has been indicted on at least one of a limited number of charges and place that DNA information on the

75. See CAL. PENAL CODE §§ 14250(a)(1)-(3), 14250(c)(4) (enacted by Chapter 822) (requiring the Department of Justice to develop kits for taking DNA samples).

76. See *id.* § 14250(a)(4) (enacted by Chapter 822) (defining “high-risk circumstances” to include stranger kidnaping, suspicious or unknown circumstances, or where there is reason to assume danger where the person has been missing for over thirty days, or less at the discretion of law enforcement).

77. *Id.* § 14250(c)(2), (3).

78. See *id.* § 14250(c)(6), (e)(1), (e)(2) (enacted by Chapter 822) (establishing intentional mens rea as necessary for failing to destroy evidence and civil liability to the donor for \$5,000, as well as incurred attorney’s fees and costs).

79. See *id.* § 14250(d) (enacted by Chapter 822) (providing exception to confidentiality for police to notify the family as to the results of the DNA testing).

80. *Id.* § 14250(a)(2) (enacted by Chapter 822).

81. See *id.* § 14251(a) (enacted by Chapter 822) (including a sunset date of January 1, 2006 or until federal funding becomes available, and limiting administrative costs to five percent of the increase); see also *id.* § 14251(d)(1) (enacted by Chapter 822) (providing that the initial funds will be expended to establish the database).

82. See *id.* § 14251(b) (enacted by Chapter 822) (establishing the activities the fee increase can fund to include: sample storage, testing, laboratories, retrieving samples, training, and outreach to victims on the availability of the database).

83. *Id.* § 14251(c) (enacted by Chapter 822).

84. *Id.* §§ 297-299.5 (enacted by Chapter 823).

85. *Id.* § 297(b)(1) (enacted by Chapter 823).

criminal DNA data bank to search for any matches against any other criminal investigation for up to two years.⁸⁶

This measure also provides that any arrest, detention, or conviction will not be invalidated if a suspect is mistakenly entered into the database and a match is found between that suspect and a separate criminal investigation.⁸⁷ To protect against any such mistakes, the DNA laboratory is directed to confirm that each suspect qualifies for entry into the database prior to entering the suspect's information.⁸⁸ Chapter 823 also requires the DOJ to "periodically"⁸⁹ review the suspects included in the database and remove those who are no longer eligible due to exceeded time limits or a change to a non-suspect status.⁹⁰

IV. ANALYSIS

All three of these measures expand the use of DNA analysis in California.⁹¹ One concern with this expanded use of DNA testing and results comparison is that it can lead to de-sensitizing society. The intrusion of DNA testing may lead to its general acceptability prior to a thorough understanding of the risks.⁹² However, DNA remains beneficial to society's sense of justice.⁹³

A. Chapters 822 and 823: The Trend of Expanding DNA Databases

1. Expansion of DNA Databases

Current statutes limit the use of DNA databases for law enforcement⁹⁴ and identification purposes,⁹⁵ and only include inmates and suspects of violent crimes or sexual offenses.⁹⁶ However, in the last three years, beginning with the creation of

86. See *id.* § 297(b)(2), (b)(3) (limiting suspect status for this provision until the laboratory receives notice of dismissal or acquittal of the indictment and limiting the relevant charges to those included in section 296, subdivision (a) of the Penal Code which are generally violent crimes).

87. *Id.* § 297(f) (enacted by Chapter 823).

88. *Id.* § 298 (b)(4) (enacted by Chapter 823).

89. *Id.* § 299(d) (enacted by Chapter 823) (failing to more specifically quantify periodically).

90. See *id.* (limiting suspects' inclusion in the database to two years from the date of indictment, and removing any previous suspects who were subsequently acquitted or had the qualifying charges against them dismissed).

91. See *supra* part III (discussing the provisions of Chapter 821, 822, and 823).

92. See Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 WAKE FOREST L. REV. 767, 770 (1999) (discussing the weaknesses in protecting genetic information and quality controls of state DNA database statutes).

93. CASE STUDIES, *supra* note 7, at iii (noting the significance of DNA in the "search for truth" in Attorney General Janet Reno's message included in the report).

94. CAL. PENAL CODE § 295(c) (West 1999) (describing the purpose of the DNA database to assist law enforcement in solving sexual and violent crimes).

95. *Id.* § 295.1(a) (West 1999) (stating that analysis performed will be done for the purpose of identification however, does not affirmatively limit the future use of analyzed information for identification purposes).

96. *Id.* § 296 (West 1999) (listing the specific offenses required for admission into the DNA database).

the current DNA database statutes, the Legislature has expanded the use of DNA analysis and the inclusion of suspects within the database.⁹⁷ Nationally, this expansionist trend is feared to continue until all citizens are required to submit DNA samples for inclusion in the database under the guise of “administrative ease,”⁹⁸ a possibility similar to the current use and requirement of fingerprints.⁹⁹

Although currently excluded from the criminal database, the State’s creation of a missing persons DNA database gives the State additional DNA information to analyze and moves California along the continuum of expanded DNA sample retention and analysis.¹⁰⁰ After the State’s creation of the criminal database, the Legislature twice rejected law enforcement’s request for the ability to reverse search the DNA databases.¹⁰¹

However, this year the Legislature was motivated to remove this limitation in light of the news coverage of Cary Stayner’s confessions to the Yosemite murders.¹⁰² The Legislature realized the limiting effect on law enforcement’s inability to search¹⁰³ DNA database by using Stayner’s DNA sample, given by Stayner as a murder suspect, with other crime scene evidence from prior unsolved cases where Stayner was not a suspect.¹⁰⁴ This limitation on law enforcement’s ability to use existing information, in light of such heinous crimes, disturbed the

97. See A.B. 1332 1998-1999 Reg. Sess. (Cal. 1998) (replacing the previous database statute closing loopholes in preventing inmates from being released without giving DNA samples and protecting the state’s database program from constitutionality challenges); SB 654 1999-2000 Reg. Sess. (Cal. 1999) (clarifying changes to database law and expanding the list of suspects subjected to DNA testing to include all homicide related crimes and allowing for easier coordination with the national data bank); *supra* Part III (explaining current law).

98. See Hibbert, *supra* note 92, at 815 (discussing this expansionist trend reflected in other states’ DNA database statutes and the potential unlimited use).

99. See *id.* (stating that society’s acceptance of DNA databases could lead to unlimited inclusion); Paul E. Tracy, Ph.D. & Vincent Morgan, *Big Brother and His Science Kit: DNA Databases for 21st Century Crime Control?*, J. CRIM. L. & CRIMINOLOGY 635, 673-74 (2000) (discussing trends and costs of total inclusion).

100. See *supra* Part III (discussing the new laws which increase DNA retention and use).

101. See AB 1332 1997-1998 Reg. Sess. (Cal. 1997) (comparing the introduced, Feb. 28, 1997 version, which provided for unlimited search capabilities to the June 24, 1998 version, which shows the amendment limiting searches to that specific investigation); see also SB 654, 1999-2000 Reg. Sess. (Cal. 1999) (comparing the introduced, Feb. 24, 1999 version, which would have allowed the expanded search, to the April 26, 1999 version, which shows the deletion of the amendment).

102. Jon Herron Zamora, *Cops Investigate Stayner in Several Unsolved Slayings Yosemite Suspect’s Whereabouts Scrutinized*, S.F. EXAMINER, July 27, 1999, available in 1999 WL 6875633 (on file with the *McGeorge Law Review*); see *Yosemite Suspect Checked for Ties to Other Crimes*, LAS VEGAS REV. J., July 29, 1999, available in 1999 WL 9289592 (on file with the *McGeorge Law Review*) (reporting on Stayner as the confessed killer of Carole and July Sund, and Silvina Pelossa, and law enforcement official’s efforts to investigate his involvement in other unsolved crimes).

103. Assemblyman Mike Machado, Statement at the Senate Public Safety Committee (June 27, 2000) (on file with the *McGeorge Law Review*) (noting the State’s limitation under current law which prevented law enforcement from searching the database using a suspect’s DNA information to search the entire DNA database for a match with DNA evidence taken from unsolved crime scenes).

104. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2814, at 4 (June 27, 2000) (Stating, in the author’s statement, the problem with the limitations in current law and the need for expanded search capabilities).

Legislature and brought about the impetus for change.¹⁰⁵ The California Legislature's response was Chapter 823, enabling law enforcement to use a suspect's DNA to do a broader search of all criminal investigations.¹⁰⁶

With the enactment of Chapter 822, California will have additional DNA analysis information in this missing persons database.¹⁰⁷ If a highly publicized case emerges demonstrating, once again, the limited effectiveness of the DNA database in law enforcement, the legislature could easily respond by enacting legislation to remove the limitation.¹⁰⁸ This is because the cost of expanding the use of DNA analysis would be minimal in comparison to the increased effectiveness of law enforcement.¹⁰⁹

2. Support of Chapters 822 and 823

Chapter 822 creates a missing persons database utilizing the DNA from family members of missing persons and comparing results to unidentified human remains.¹¹⁰ Law enforcement and victim's advocates supported this legislation, which received no opposition.¹¹¹ Currently, there are over 3,000 missing persons and 2,000 unidentified remains, or samples, in California.¹¹² Compiling a DNA database will help coroners identify found human remains and assist in the resulting criminal investigations.¹¹³ This measure will be especially beneficial for identifying the remains of missing children, since many young children do not have dental charts, identifying x-rays, or fingerprints available to verify the identity of unidentified

105. See CAL. PENAL CODE § 297(b) (enacted by Chapter 823) (showing the change in existing law); *supra* Part III.C (same).

106. *Id.* § 297(b) (enacted by Chapter 823).

107. *Id.* § 14250(a)(1) (enacted by Chapter 822).

108. See DEPARTMENT OF JUSTICE LEGISLATIVE CONCEPT PROPOSAL 1999-2000, at 2 (expressing the public policy need to improve the use of the database and noting the increased media and victim's groups support driven in part by law enforcement's hindrance under current law in the Stayner investigation, which could make a difference in the proposal's reception) (on file with *McGeorge Law Review*).

109. Tracy & Morgan, *supra* note 100, 664-65 (comparing the decreasing costs of DNA analysis with the cost of crime and recognizing the social value in solving a brutal rape).

110. CAL. PENAL CODE §§ 14250, 14251 (enacted by Chapter 822).

111. See SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 1818, at 5-6 (July 21, 2000) (listing supporters, including the Attorney General, the Amber Foundation of Mission Children, and The California State Coroner's Association as co-sponsors, and the California Sexual Assault Investigation, the City of San Rafael Contra Costa County Sheriff, the Crime Victims United, the Colusa County Sheriff/Coroner, the J & L Enterprises, the San Benito County Sheriff, the Santa Clara County Board of Supervisors, the Butte County Sheriff, the California Peace Officers' Association, the California Police Chiefs Association, Klass Kids, Rosemary Judith Olive: the mother of a missing child).

112. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1818, at 4 (June 20, 2000) (containing the author's statement).

113. See Letter from Bill Lockyer, Attorney General, to Senator Jackie Speier, at 1 (June 15, 2000) (on file with the *McGeorge Law Review*) (expressing support for SB 1818).

children remains.¹¹⁴ The use of a DNA databank will provide an efficient mechanism to verify unidentified remains and provide closure for family members.¹¹⁵

Chapter 823 received support from law enforcement and victim advocate groups, finding this additional investigatory tool beneficial in solving crimes.¹¹⁶ Because a suspect's DNA evidence is usually left at sexual assault crime scenes, and because sexual predators are often repeat offenders, the ability to broaden the search in the DNA database will be especially beneficial in solving sexual assault crimes.¹¹⁷ Additionally, this measure will place California in conformity with national standards that do not limit the use of DNA evidence within DNA databanks.¹¹⁸

3. *The Risks of DNA Analysis*

As scientists race towards decoding the human genome,¹¹⁹ the ability to detect a person's disposition towards disease or developmental problems by merely reading their molecular structure is foreseeable.¹²⁰ One cited example of the implications of this information, is that by simply analyzing a cocktail napkin used by President Reagan, a reporter could have predicted and reported on the President's propensity for Alzheimer's disease years before his eventual affliction, which could have

114. See Letter from Kim Swartz, Amber Foundation for Missing Children, to Senator John Vasconcellos, Chairperson of Senate Public Safety Committee, at 1 (Apr. 14, 2000) (on file with the *McGeorge Law Review*) (identifying the Amber Foundation as a sponsor of SB 1818, and encouraging support for the legislation).

115. See *id.* (noting the current lack of uniform standards in utilizing DNA analysis to identify human remains).

116. See Letter from Marybeth Carter, Executive Director of California Coalition Against Sexual Assault, to Assemblyman Mike Machado, at 1 (Apr. 10, 2000) (on file with the *McGeorge Law Review*) [hereinafter Carter Letter] (stating that this measure will be an important tool for identifying criminals and solving crimes); Letter from Nick Warner, Legislative Advocate for California State Sheriff's Association, to Senator John Vasconcellos, Chairperson Senate Public Safety Committee, at 1 (June 22, 2000) (on file with the *McGeorge Law Review*); Letter from Lawrence G. Brown, Executive Director, California District Attorney's Association, to Assemblyman Mike Machado, at 1 (Apr. 7, 2000) (on file with the *McGeorge Law Review*); Letter from Jeff Thompson, Legislative Advocate for Crime Victims United of California, to Assemblyman Mike Machado, at 1 (Apr. 5, 2000) (on file with the *McGeorge Law Review*); Letter from Gary Lowe, Legislative Chair of California Sexual Assault Investigators Association, at 1 (Mar. 30, 2000) (on file with the *McGeorge Law Review*); see also Letter from Jon Lovell, Government Relations Manager for Governmental Relations Oversight Committee, to Assembly Public Safety Committee, at 1 (Apr. 10, 2000) (on file with the *McGeorge Law Review*) (identifying the California Peace Officer's Association and California Peace Chief's Association as supporters).

117. See Carter Letter, *supra* note 117, at 1 (stating that DNA evidence usually applies in sexual assault cases and noting how this measure will be beneficial in preventing additional sexual assault crimes).

118. Letter from Gary J. Lowe, Legislative Chair for California Sexual Assault Investigators Association, to Assemblyman Mike Machado, at 1 (Mar. 30, 2000) (on file with the *McGeorge Law Review*).

119. See Nicholas Wade and John Mangels, *Scientists Complete Draft Map of Genome* NICHOLAS PLAIN DEALER, CLEVELAND, June 27, 2000 (on file with the *McGeorge Law Review*) (announcing the scientific announcement and discussing the decoding of the human genome, which contains two sets of twenty-three DNA molecules).

120. *Id.*

affected public confidence in his ability to lead the nation.¹²¹ This information could also result in denial of insurance benefits or employment.¹²² While these are potential future risks of DNA analysis, there is concern over the use of information that DNA analysis can currently provide.¹²³

For example, the familial similarities contained in DNA samples have already led to the use of a legitimate sample from one suspect in identifying the suspect's brother, where sufficient evidence did not exist to require a DNA sample, as the rapist.¹²⁴ Currently, this use of DNA evidence to identify a suspect through a familial relation is not excluded under California law.¹²⁵ Furthermore, such use would qualify under law enforcement and identification purposes, which falls within the current statutory limits for DNA use.¹²⁶ Without statutory limitations, courts could view California's continual expansion of DNA use as approval of investigatory techniques that would result in the effective inclusion of family members as suspects, even though inclusion in the DNA database is supposed to be limited to those suspects where probable cause exists either through court order, or individual status as an indicted suspect or inmate.¹²⁷

B. Chapter 821 and 822: Effectiveness of DNA Data Bases

1. Funding for DNA Data Bases

Currently only about 88,000 of 145,000 DNA samples taken from inmates have been tested.¹²⁸ Furthermore almost half of those already tested were done using outdated testing methods and will need to be retested.¹²⁹ Costs are estimated to average \$4,000 per case.¹³⁰ While the California Legislature responded earlier this year with increased funding for the State's DNA laboratories,¹³¹ there is no clear

121. See William Porter, *Genes That Fit Revealing DNA Blueprint as a Matter of Courtship Has Ethical Implications*, DENVER POST, Sept. 17, 2000, available in 2000 WL 25828398 (quoting Eric Lander, the head of the Whitehead-MIT Center for Genome Research, as an example of the political ramifications of this information).

122. *Id.*; Hibbert, *supra* note 92, at 770; Mangels, *supra* note 119, at 1.

123. Porter, *supra* note 121.

124. See *Flowers v. Indiana*, 654 N.E.2d 1124, 1124 (Ind. 1995) (describing how police, through DNA evidence, discovered the brother of a rape suspect as the actual perpetrator).

125. CAL. PENAL CODE § 295 (West 1999) (containing no limitation on law enforcement when familial similarities are considered).

126. *Id.* § 295(c) (West 1999) (defining the general law enforcement purpose of the DNA databank).

127. See *id.* § 297 (b)(1) (enacted by Chapter 823) (limiting inclusion for suspects); CAL. PENAL CODE § 296 (West 1999 & Supp. 2000).

128. See Bill Rams, *State Lags in Compiling Inmate DNA Database*, ORANGE CO. REG., Oct. 2, 2000, available in 2000 WL4853290 (reporting on the backlog to the frustration of law enforcement).

129. *Id.*

130. See ASSEMBLY APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS OF SB 1342, at 4 (Aug. 23, 2000).

131. Compare AB 1740, 1999-2000 Leg. (Cal. 2000) (noting the base funding for DNA databank) with SB 160, 1999-2000 Leg. (Cal. 2000) (showing increase in 2001 budget year of \$5.5 million to pay for additional equipment and staff support for the DNA databank).

indication that the funding for the criminal database will be sufficient to finance the additional testing required by the creation of the post-conviction DNA testing rights.¹³² While the Attorney General has stated that with this additional funding the database should be current by 2003,¹³³ he has also stated concerns over the department's ability to handle the additional caseload that would be created due to the expansion of post-conviction testing resulting from Senator's Burton proposal.¹³⁴ Inadequate funding will limit the usefulness of the databases. Although the missing persons database contains its own funding stream, the criminal database is dependent on the legislative budget process.¹³⁵

Another funding issue involves the storage requirement contained in Chapter 821, which requires local agencies to maintain storage of DNA sample evidence.¹³⁶ Estimated costs to already financially strapped local governments for building adequate storage facilities, and the increased energy costs necessary to pay for freezing the evidence are expected to exceed \$8 million dollars statewide.¹³⁷ While under section 1417, enacted by Chapter 821, local agencies are required to maintain adequate storage of samples, there was no increase in local government funding to cover these costs.¹³⁸ Due to the extensive costs and lack of funding, a provision was included to sunset this storage requirement in two years.¹³⁹ Within the next two years additional legislation will be required to continue the storage requirement because additional funding will need to be secured.¹⁴⁰

132. Interview with Eric Ciszmer, Assembly Budget Committee Public Safety Republican Consultant, in Sacramento, Cal. (Nov. 15, 2000) (notes on file with the *McGeorge Law Review*).

133. See Charlie Goodyear and Erin Hallissy, *Big Boost for State DNA Lab Response to Huge Backlog of Samples From Convicts*, S.F. CHRON., Jan. 7, 2000, at A1 (reporting on Attorney General Bill Lockyer's intent to make the DNA database his top priority, quoting him in stating that the \$5 million in the Governor's proposed budget is "sufficient money to get a first-class system in place" and expecting to have the backlog cleared within two years).

134. See Charlie Goodyear & Erin Hallissy, *Flood of DNA Requests Bill Would Give Convicts Broad Right to Genetic Analysis*, S.F. CHRON., Aug. 7, 2000, at A1 (reporting on the Attorney General's concern that allowing post-conviction testing would "jeopardize efforts to compile a comprehensive genetic criminal data base" and that the continual increasing backlog, due in part to an additional 3,000 samples received daily, and the lab's inability to retain trained staff). Subsequent amendments which limited post-conviction rights will limit the number of inmates eligible and may allay the Attorney General's concerns. *Id.*

135. Compare CAL. PENAL CODE § 1405 (enacted by Chapter 821) (noting the lack of a funding provision within this measure) with CAL. PENAL CODE §§ 14250-14251 (enacted by Chapter 822) (establishing a two dollar death certificate increase to fund this database).

136. *Id.* § 1417.9(b) (enacted by Chapter 821).

137. See Goodyear & Hallissy, *supra* note 134, at A10 (reporting on the California Deputy Attorney General's testimony before Congress regarding the expense of preserving evidence).

138. Compare AB 1740, 1999-2000 Leg. (Cal. 2000) (noting the base funding for local government) with SB 160, 1999-2000 Leg. (Cal. 2000) (showing the lack of increased funding for local governments for DNA evidence storage).

139. Interview with Kerry Yoshida, Assembly Public Safety Republican Consultant, in Sacramento, Cal. (Nov. 13, 2000) (notes on file with the *McGeorge Law Review*).

140. *Id.*

Another major barrier to defendants seeking post-conviction DNA analysis is the difficulty in locating stored crime scene evidence samples.¹⁴¹ The new storage requirement will prevent local government officials from destroying DNA evidence and thwarting the purpose behind the allowance of post-conviction testing.¹⁴²

2. Priority of Testing

Another concern regarding the effectiveness of both databases is the priority imposed upon laboratories.¹⁴³ When a court makes the dual finding of a “miscarriage of justice” and “in the interests of justice,” laboratories are required to test post-conviction DNA samples before other casework.¹⁴⁴ Although this legislation does not define any factors relevant to sustaining these findings,¹⁴⁵ questions are raised as to whether incarceration could be viewed as a miscarriage of justice.¹⁴⁶ However, since incarceration is a condition for filing a motion for post-conviction testing basing this priority exception on incarceration would result in the exception consuming the rule.¹⁴⁷ On the other hand, an innocent person incarcerated for a crime she did not commit would appear to be a miscarriage of justice.¹⁴⁸ In establishing this exception, the legislature has chosen to place priority on some post-conviction testing over other testing including current investigations as well as missing person’s database samples.¹⁴⁹

C. Chapter 821: Post Conviction Rights

Supported by United States Attorney General Janet Reno’s recommendation for post-conviction DNA testing,¹⁵⁰ California became the fourth state to create this right for inmates.¹⁵¹ Post-conviction relief, in general, is limited due to the strong

141. Peter J. Boyer, *DNA on Trial*, NEW YORKER, (Jan. 17, 2000), at 42 (reporting that seventy percent of Peter Neufeld and Barry Sheck’s Innocence Project cases are rejected due to unavailability of crime scene evidence).

142. *A Key for the Innocent*, SAN JOSE MERCURY NEWS, Aug. 28, 2000, available at <http://www.mercurycenter.com/premium/opinion/edit/DNA.htm> (last visited Aug. 29, 2000) (reporting that in Harris County, Texas, the prosecutor’s office intentionally destroyed crime scene evidence after a DNA test lead to the reversing of a conviction).

143. Yoshida Interview, *supra* note 139.

144. CAL. PENAL CODE § 1405(i) (enacted by Chapter 821).

145. *Id.*

146. Yoshida Interview, *supra* note 139.

147. *Id.*

148. *Id.*

149. See CAL. PENAL CODE § 1405 (i) (enacted by Chapter 821) (prioritizing “over the laboratory’s other pending casework,” which would include samples from crime scenes, suspects, other inmates, and samples involving missing persons donated pursuant to CAL. PENAL CODE § 14250 (c)(3) (enacted by Chapter 822)).

150. See POST-CONVICTION DNA TESTING, *supra* note 1, at iii (encouraging adoption of post-conviction DNA testing procedures established by the commission and placing the priority in post-conviction criminal cases on truth over appellate time barriers).

151. Fla. Stat. Ann. § 144.244 (West 1998); N.Y. Exec. Law § 440.30 (McKinney 1999); 42 Pa. Cons. Stat. Ann. § 9545(b)(1) (West Supp 2000).

presumptions given to verdicts, the judicial system's need for finality, the conservation of resources, and the decreasing value in accuracy over time.¹⁵² However, the growing acceptance of the accuracy of DNA testing is reconfiguring this balance.¹⁵³ While judicial economy and finality remain constant, the accuracy of DNA testing does not diminish over time which contradicts the belief that the probative value of evidence diminishes over time.¹⁵⁴ Additionally, the increasing number of exonerations is reducing the presumptive value of convictions.¹⁵⁵

In enacting Chapter 821, the Legislature reconsidered this balance, finding greater strength in the probative value of DNA testing in post-conviction cases.¹⁵⁶ Supporters argue that as long as an innocent person remains imprisoned for a crime they did not commit, the offender remains a danger to society and unpunished.¹⁵⁷ Thus, post conviction DNA testing aids in the search for justice by allowing inmates erroneously convicted, before DNA testing was available, to have their cases reevaluated and convictions correctly overturned.¹⁵⁸

D. Chapter 823: 4th Amendment Concerns

Critics of Chapter 823 argue that this expanded use of a suspect's DNA analysis violates the Fourth Amendment.¹⁵⁹ Supporters argue that DNA identification analysis is similar to fingerprints,¹⁶⁰ which are checked against multiple crime scenes and constitutional under the Fourth Amendment.¹⁶¹ However, DNA analysis increases the intrusive nature of the process over fingerprinting because it provides

152. See POST-CONVICTION DATA TESTING, *supra* note 1, at 9 (discussing the general principles behind limiting post-conviction rights prior).

153. *Id.*

154. *Id.* at 9-10.

155. *Id.*

156. ASSEMBLY PUBLIC SAFETY COMMITTEE, COMMITTEE ANALYSIS OF SB 1342, at 5 (June 20, 2000) (quoting the author's statement supporting this measure and noting its limitations as meeting a balance between truth and fairness).

157. Letter from Francisco Lobaco, Legislative Director and Valerie Small Navarro, Legislative Advocate for the ACLU, to Senator John Burton, at 1 (April 6, 2000) [hereinafter Lobaco-Navarro Letter] (on file with *McGeorge Law Review*).

158. See CASE STUDIES, *supra* note 7, at xv (containing a commentary by Walter F. Rowe).

159. See U.S. CONST. amend. IV (stating "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."); Letter from ACLU to Assemblyman Mike Machado (April 7, 2000) (on file with the *McGeorge Law Review*); see Letter from California Attorneys for Criminal Justice (April 7, 2000) (on file with the *McGeorge Law Review*) (stating their opposition to AB 2814, due in part to the 4th amendment concerns).

160. Erin Hallissy, *Prying into DNA Raises Constitutional Questions*, S.F. CHRON., available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/1999/10/20/MN57531.DTL> (last visited Oct. 30, 1999) (copy on file with the *McGeorge Law Review*) (reporting on law enforcement's contention of the similarities).

161. See CAL. PENAL CODE § 11105 (West 1999) (including fingerprints within the list of information contained in the "State summary criminal history information" which is maintained by the Attorney Generals office for use by law enforcement); also see *generally* Turner v. Indiana, 506 N.E.2d 827, 829 (1987) (approving use of fingerprints taken from prior arrest in proving identity in subsequent case); *generally* Stewart v. Georgia, 422 S.E.2d 567, 568 (1992) (stating fingerprints taken in prison were useable to identify defendant in unrelated crime).

greater information.¹⁶² In removing this limitation, the Attorney General argued the courts, not the Legislature, should establish Fourth Amendment limitations on databank searches of suspects.¹⁶³

While prior to the passage of Chapter 823 California was one of only two states to limit the use of suspects' DNA in the criminal databank,¹⁶⁴ to date, no court has ruled upon the generalized use of a suspect's DNA in a database search against crime scenes.¹⁶⁵ However, several courts have ruled that the intrusion protected under the Fourth Amendment is the taking of the DNA sample,¹⁶⁶ and once the sample is lawfully obtained, the suspect loses any claims of privacy or unreasonable search since analysis of a sample does not involve any further intrusion upon the person.¹⁶⁷ In *Washington*,¹⁶⁸ a Florida court held that a blood and hair sample validly obtained pursuant to one investigation could be used as evidence against the suspect in another murder charge.¹⁶⁹ In these cases, although the biological sample was obtained pursuant to another investigation, both individuals were also specific suspects in the subsequent investigations prior to the comparison of their previously obtained DNA samples.¹⁷⁰

Under Chapter 823, the expanded use of suspect DNA's sample increases law enforcement investigating tools to solve current crimes and prevent them in the future.¹⁷¹ While benefitting law enforcement, this measure weakens individual rights

162. See Erin Hallisy, *Prying into DNA Raises Constitutional Questions: Last of Two Parts*, S.F. CHRON., <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/1999/10/20/MN57531.DTL> (last visited Oct. 30, 1999) (copy on file with the *McGeorge Law Review*) (reporting the concerns of Barry Steinhard, Associate Director of the National ACLU, over DNA analysis and the differences between DNA analysis and fingerprinting).

163. See DEPARTMENT OF JUSTICE LEGISLATIVE CONCEPT PROPOSAL, *supra* note 109, at 2 (explaining how this change would allow law enforcement officials to solve serial crimes).

164. See Machado Statement, *supra* note 104, at 1 (commenting that Vermont modeled its DNA database legislation after California's and, thus, adopted the same restriction).

165. See DEPARTMENT OF JUSTICE LEGISLATIVE CONCEPT PROPOSAL, *supra* note 109, at 2 (arguing how the courts should interpret any Fourth Amendment restrictions to limit the statute).

166. See *People v. King*, 232 A.D. 2d 111, 117 (N.Y. 1997) (holding that once a DNA sample has been lawfully obtained under a search and seizure requirement, privacy claims or unreasonable search and seizure arguments with respect to that sample are no longer relevant); *Washington v. State*, 653 So.2d 362, 364 (Florida 1994) (noting that to give a DNA sample in connection with one investigation did not limit law enforcement official's analysis use of the sample in other investigations).

167. See *King*, 232 A.D. 2d at 117 (finding that the use of a DNA sample secured on one rape case investigation could be used to match the defendant to another rape investigation).

168. *Washington*, 653 So.2d at 364.

169. *Id.*

170. See *King*, 232 A.D. 2d at 117 (stating that the local law enforcement officials used the suspect's sample given in one rape case to compare to evidence in that rape case along with another rape case where the defendant was also a suspect); *Washington*, 653 So.2d at 364 (explaining that law enforcement officials considered the defendant a suspect in the murder charge, even though the evidence was obtained pursuant to another investigation and the defendant was not told he was a suspect in the subsequent murder charge for which his DNA matched crime scene evidence).

171. *Supra* Part IV.D.

by increasing law enforcement's encroachment at the expense of personal liberty protections.¹⁷²

V. CONCLUSION

DNA evidence is considered the greatest modern invention in solving crime.¹⁷³ DNA testing can accurately link saliva, semen, or blood evidence found at a crime scene to a suspect providing greater proof of guilt or innocence.¹⁷⁴ California, like forty-eight other states, has enacted a criminal DNA database statute to provide for the collection and retention of DNA, which can present extremely compelling information with regard to a suspect's guilt or innocence.¹⁷⁵ By establishing a post-conviction right for inmates to obtain DNA testing, Chapter 821 expands the use of DNA analysis to post-conviction remedies and requires local governments to maintain storage for DNA sample evidence.¹⁷⁶ This right is limited to those cases where DNA evidence is available and previously untested, or tested by a less reliable test, and where identity of the perpetrator was an issue.¹⁷⁷ California became the third state¹⁷⁸ to allow inmates this post conviction right, finding the probative value of DNA evidence in correcting erroneous convictions to outweigh the desire for finality in verdicts.¹⁷⁹ However, this measure does not contemplate funding for the additional testing or storage requirements.¹⁸⁰

Chapter 822 creates a missing persons database utilizing the DNA from family members of missing persons and comparing results to unidentified human remains.¹⁸¹ This measure, which grants priority to missing children,¹⁸² will be especially effective in identifying child remains, as children often lack other identifying features.¹⁸³ However due to this year's expansion of the use of the criminal database as a result of a high profile crime, the privacy protections

172. *Id.*

173. Charlie Goodyear & Erin Hallissy, *Dangerous Delay on DNA State Struggles to Gather Genetic Profiles of Violent Felons First of Two Parts*, S.F. CHRON., Oct. 19, 1999, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/1999/10/19/MN05DNA.DTL> (last visited on Aug. 30, 2000) (copy on file with the *McGeorge Law Review*) (reporting how such a great crime fighting tool is not being used effectively in California).

174. David Williams, *DNA Evidence Presents Opportunities and Challenges for Criminal Lawyers*, at <http://www.cnn.com/LAW/trials.and..../0006/deathpenalty/dnaincourt.html> (last visited Aug. 30, 2000) (copy on file with the *McGeorge Law Review*).

175. See CAL. PENAL CODE § 295 (West 1999) (containing authority and procedures for California's criminal DNA database).

176. CAL. PENAL CODE §§ 1405, 1417 (enacted by Chapter 821); *supra* Part II.A.

177. CAL. PENAL CODE § 1405 (enacted by Chapter 821); *supra* Part II.A.

178. *Supra* note 127.

179. See *supra* Part IV.C (discussing how DNA testing is changing the policy balance of post-conviction relief).

180. See *supra* IV.B.1 (noting the lack of funding for local governments).

181. CAL. PENAL CODE §§ 14250, 14251 (enacted by Chapter 822).

182. *Supra* note 74.

183. See *supra* Part IV.A.2 (explaining how this measure will be especially beneficial for identifying children).

contained in this measure could easily be weakened.¹⁸⁴ The state will have the information and technological ability to expand the use of the missing persons DNA.¹⁸⁵

Chapter 823 expands the use of an unindicted suspect's DNA within the criminal DNA database.¹⁸⁶ In response to statewide publicity of a horrific crime, law enforcement demonstrated frustration over the limited ability to use suspect DNA analysis to search the crime scene DNA information in order to match the suspect with other unsolved crimes.¹⁸⁷ However, this expansion raises untested Fourth Amendment concerns.¹⁸⁸ While there is some precedent limiting Fourth Amendment concerns to the obtaining of a DNA sample and not the use of the sample for another investigation,¹⁸⁹ the cases to date involve inmates or indicted suspects who had a lower expectation of privacy.¹⁹⁰ However, this statute expands the taking of DNA samples to unindicted suspects who have a higher expectation of privacy than inmates or indicted suspects.¹⁹¹ While the previous California statute was limiting relative to Fourth Amendment concerns, the constitutionality of this expansion will need to be addressed by the courts.¹⁹²

In adopting these measures, California continues to follow the national trend of expanding the use of DNA technology in criminal investigations and proceedings.¹⁹³ As DNA database searches are expanding, states are finding more matches between suspects and inmates and unsolved crime scene evidence.¹⁹⁴ Hopefully, California will see the same results.

184. See *supra* Part IV.A (asserting the current trend of expanding use of DNA databases and analysis information and the associated risks).

185. See *Infra* IV.A (discussing the current trend of expanding use of DNA databases and analysis information and the associated risks).

186. CAL. PENAL CODE §§ 297-299.5 (enacted by Chapter 823).

187. See *supra* Part IV.A.1 (describing the motivation behind the Legislature for implementing this change).

188. *Supra* Part IV.D.

189. See *id.* (listing relevant cases in notes).

190. See *Daniel*, 73 Cal. Rptr. 2d at 399 (noting that a sample was taken after an arrest for drunk driving); see also *King*, 232 A.D. 2d. at 112 (stating that a sample was taken from the bed sheets after a family member had consented to a search of the defendant's home); *Goodyear & Hallissy*, *supra* note 134, at A1 (reporting on Deputy Attorney General Enid Camps' statement that the taking of DNA samples does not violate prisoners' rights).

191. See *supra* Part III.C (discussing this expansion).

192. See *supra* note 159 (arguing that the courts should limit the use of DNA information in database searches under Fourth Amendment guidelines, instead of the Legislature).

193. See *Hibbert*, *supra* note 92, at 815 (discussing this expansionist trend, reflected in other states' DNA database statutes, and the potential unlimited use).

194. See Erin Hallissy & Charlie Goodyear, *How DNA Fights Crime Other States Make Better Use of Technology*, S.F. CHRON., available at <http://www.sfgate.com/cgi-bin/article.cgi?file=?chronicle/archive/1999/10/20/MN 74854.DTL> (last visited Nov. 23, 1999) (copy on file with the *McGeorge Law Review*) (reporting the success of Florida and Virginia's DNA database matches and California's backlog of samples).

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