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Chapter 906: California's DNA Data Bank Joins the Modern Trend of Expansion

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Code Sections Affected

Penal Code §§ 296, 299.5, 299.6 (amended).
AB 673 (Migden); 2001 STAT. Ch. 906.

"We can't just be tough on crime, we must be smart on crime."[1]

I. INTRODUCTION

The California Department of Justice estimates that up to thirty thousand rape and rape-murder cases where deoxyribonucleic acid (DNA) evidence exists remain unsolved in California.[2] This DNA evidence contains "blueprints" of the suspects who committed these horrible crimes.[3] The DNA evidence from these crimes is to be compared to California's DNA data bank[4] by July of 2003 with the hope that these crimes will be solved.[5] Yet, under existing law, only those convicted of some of the most violent crimes are required to submit blood samples to the DNA data bank for comparison.[6] Chapter 906 expands the list of

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1. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 673, at 3 (Apr. 3, 2001) (quoting the author of the bill, Assemblymember Carole Migden).

2. *See id.* at 4 (discussing estimates provided by the California Department of Justice of unsolved rape and rape-murder cases); *see also* CALIFORNIA DEPARTMENT OF JUSTICE, CAL-DNA FACT SHEET 6 (2001) [hereinafter CAL-DNA FACT SHEET] (copy on file with the *McGeorge Law Review*) (declaring that the evidence from these unsolved crimes may have DNA evidence which can be tested against the DNA data bank for crime solving).

3. *See* OFFICE OF TECHNOLOGY ASSESSMENT, 101ST CONG., GENETIC WITNESS: FORENSIC USES OF DNA TESTS 3 (July 1990) (describing the DNA double helix as a "blueprint for an organism" because the pattern of "chemical subunits" defines the characteristics of an individual).

4. *See infra* Part II (elaborating on the features and processes of the California DNA data bank which stores evidentiary samples of DNA).

5. *See* CAL-DNA FACT SHEET, *supra* note 2 at 6-7 (declaring that the thirty thousand unsolved rape and rape-murder cases with DNA evidence are stored in "rape kits" in various evidence facilities in California and that the Department of Justice expects these samples to be entered into the data bank by July 2003).

6. *See* 1998 Cal. Legis. Serve. ch. 696, sec. 2, at 3717 (enacting CAL. PENAL CODE § 296) (requiring DNA sampling from individuals convicted of certain sex offenses, murder, voluntary manslaughter, felony spousal abuse, aggravated sexual assault of a child, certain felony offenses of assault and battery, kidnapping, mayhem, or torture).

felony convictions which result in the mandatory submission of a felon's blood sample to the data bank.[7]

The expansion of DNA data bank legislation to include more felonies is part of a modern crime-solving trend in the United States.[8] Advocates of Chapter 906 believe that expanding the scope of the DNA data bank will result in more criminal convictions and provide a sense of "closure and justice" for victims and their families.[9] Several states already require mandatory blood sampling for the offenses added by Chapter 906.[10] Nonetheless, in California, Chapter 906 has provoked Fourth Amendment and state constitutional challenges regarding unreasonable searches and seizures and public policy concerns that the data bank could become disproportionately populated with samples from people of color.[11]

II. LEGAL BACKGROUND

In 1998, in order to aid public agencies in solving crimes, the Legislature enacted Chapter 696 to create the "DNA and Forensic Identification Data Bank."[12] The California DNA data bank is managed by the California Department of Justice (DOJ) at the DOJ's DNA laboratory in Berkeley.[13] The data bank is a computerized system that matches DNA evidence from crime scenes with DNA "profiles."[14] These profiles are of convicted felons who were required by law to provide DNA samples from blood and saliva.[15]

Existing California law requires that "two specimens of blood, a saliva sample, right thumbprints, and a full palm print impression of each hand" be given by anyone convicted of certain sex offenses, murder, voluntary manslaughter, felony spousal abuse, aggravated sexual assault of a child, certain

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7. *See* CAL. PENAL CODE § 296 (amended by Chapter 906) (enumerating the newly added offenses of first degree burglary, first degree robbery, specific types of arson, and carjacking to the list of crimes which require DNA sampling upon conviction).

8. *See* Michelle Hibbert, *DNA Data banks: Law Enforcement's Greatest Surveillance Tool?*, 34 WAKE FOREST L. REV. 767, 773-79 (1999) (discussing the trend in various state legislatures of adopting DNA data bank statutes).

9. *See* Letter from Nick Warner, Legislative Advocate, California State Sheriffs' Association, to Carole Migden, Assemblymember [hereinafter Warner Letter] (Mar. 26, 2001) (on file with the *McGeorge Law Review*) (stating that "[t]he benefits of a beefed up DNA data base result in crimes being solved and in the families of victims getting the closure and justice they deserve"); *see also* Tony Perry, *California and the West DNA Bank Helps Find Suspects in Rape Cases*, L.A. TIMES, Feb. 26, 2001, at A3 (elaborating on specific examples of how the California DNA data bank has solved crimes throughout the state).

10. *See infra* Part IV.A (expanding on the DNA data bank statutes of other states).

11. *See infra* Part IV.B-D (discussing legal and policy based challenges to the drawing of blood from individuals convicted of crimes such as those enumerated in Chapter 906).

12. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 673, at 3 (Apr. 3, 2001).

13. *See* CAL. PENAL CODE § 295 (West 1999) (establishing that the California Department of Justice shall be responsible for the "management and administration" of the California DNA data bank).

14. *See* CAL-DNA FACT SHEET, *supra* note 2, at 1 (describing the process of matching the sample profile to evidence from a crime scene).

15. *See id.* at 1-2 (listing those offenses which require a sample to be provided in the DNA data bank).

felony offenses of assault and battery, kidnapping, mayhem, or torture.[16] While each of the fifty states has enacted DNA data bank legislation,[17] California's list of crimes requiring DNA samples is more limited than the lists of several other states.[18]

The DNA specimens are analyzed by a process known as Short Tandem Repeats (STR).[19] This analysis only reveals the offender's identity and gender.[20] The analysis does not reveal other private information such as disease predisposition, medical information, or other physical characteristics.[21] Only medically trained personnel are permitted to extract blood samples from offenders.[22] The offender's thumbprint is placed directly on the sample tube of blood to reduce the chance of error from switched specimens.[23]

Furthermore, the DOJ's DNA laboratory is linked to the Federal Bureau of Investigation's (FBI) Combined DNA Index System (CODIS) that allows states to share DNA records.[24] The FBI created the CODIS system in response to the DNA Act of 1994.[25] The DOJ's DNA laboratory must adhere to stringent security standards or risk being disqualified from participating in CODIS.[26] The laboratory is periodically audited to ensure compliance with CODIS requirements.[27]

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16. 1998 Cal. Legis. Serv. ch. 696, sec. 2, at 3717 (enacting CAL. PENAL CODE § 296); *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1332, at 2 (Apr. 15, 1997) (elaborating on the author's statement that AB 1332 will help apprehend and convict criminals as well as "exonerat[e] the innocent").

17. *See, e.g., infra* note 48 (providing citations to various state DNA data bank statutes); *see also* Aaron P. Stevens, *Arresting Crime: Expanding the Scope of the DNA Databases in America*, 79 TEX. L. REV. 921, 922 n.12 (2001) (enumerating DNA data bank statutes for all fifty states); *see also* Warren R. Webster, *DNA Database Statutes & Privacy in the Information Age*, 10 HEALTH MATRIX 119, 127 n.44 (2000) (providing citations to the DNA data bank statutes in all fifty states).

18. *See infra* Part IV.A (discussing the states that have broader DNA legislation than California and the greater number of cases solved in those states).

19. *See* CAL-DNA FACT SHEET, *supra* note 2, at 4 (comparing the STR analysis process, conducted in California since 1998, to the older Restriction Fragment Polymorphism (RFLP) process and explaining that STR sampling requires less DNA and can therefore be performed on older evidence).

20. *See* CAL. PENAL CODE § 295.1 (West 1999) (providing that the DOJ shall use the DNA data bank "only for identification purposes").

21. *See* CAL-DNA FACT SHEET, *supra* note 2, at 4 (explaining that the DNA laboratory in Berkeley does not have the required chemicals or software to conduct non-forensic DNA testing and that the laboratory is limited by "state and national standards" as to the types of tests that can be conducted).

22. *See* CAL. PENAL CODE § 298(b)(2) (West 1999 & Supp. 2001) (mandating that only healthcare professionals who are trained and certified to draw blood may obtain the offender's DNA sample).

23. *See* CAL-DNA FACT SHEET, *supra* note 2, at 2 (remarking on the 1994 policy of placing the offender's thumbprint directly on the sample blood tube).

24. *See* CAL. PENAL CODE § 295(d) (West 1999) (requiring the DOJ to utilize the DNA data bank in conjunction with CODIS).

25. *See* 42 U.S.C.A. § 14132 (West 1995 & Supp. 2001) (authorizing the FBI to create an index of DNA records and DNA analyses).

26. *See* CAL-DNA FACT SHEET, *supra* note 2, at 5 (remarking that the DNA "[l]aboratory must adhere to standards for privacy, security, and quality control set forth by state and national governing bodies").

27. *Id.*

III. CHAPTER 906

Chapter 906 expands existing California DNA data bank legislation[28] to require compulsory blood and saliva samples from those persons convicted of committing or attempting, or found not guilty by reason of insanity of first-degree burglary,[29] first-degree robbery,[30] specific types of arson,[31] and carjacking.[32] The expansion of the DNA data bank to include these offenses broadens the scope of the data bank to contain "virtually all persons convicted of 'violent' felonies."[33] There are approximately six thousand convictions per year of the felonies added by Chapter 906.[34] Supporters of Chapter 906 assert that the inclusion of these additional records in the California DNA data bank will result in more felony convictions.[35]

In addition to the above, Chapter 906 specifies that the Attorney General's office, the prosecuting city attorney's office, probation officers, courts, and administrative tribunals are to be included in the list of law enforcement agencies that may request DNA information from the DNA data bank.[36] Chapter 906 also provides that any person who knowingly releases DNA information from the DNA data bank, for purposes other than criminal identification or suspect elimination, may be imprisoned for up to one year.[37] Moreover, if the illegal use is for financial gain, the offender will be fined.[38] Lastly, Chapter 906 provides a civil cause of action for the DNA donor in the event the DNA is used unlawfully by a DOJ employee.[39]

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28. CAL. PENAL CODE § 296 (amended by Chapter 906).

29. *See id.* § 460(a) (West 1999) (declaring burglary of inhabited dwellings to be first-degree burglary).

30. *See id.* § 212.5(a)-(b) (West 1999) (proclaiming robbery of a transit operator, transit passenger, inhabitant of a dwelling, or person at an automated teller machine, to be first-degree robbery).

31. *See id.* § 296 (amended by Chapter 906) (declaring that, among other felonies, a conviction of arson violating subsections (a) or (b) of section 451 of the Penal Code requires the offender to submit DNA samples); *see also id.* § 451(a)-(b) (West 1999) (defining arson which causes great bodily injury and arson of an inhabited dwelling as felonies).

32. *See id.* § 215 (West 1999) (describing carjacking as the taking of an occupied vehicle by force).

33. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 673, at 4 (Apr. 3, 2001) (elaborating that the inclusion of these violent felonies in a DNA data bank is not uncommon in other states); *see also, e.g.*, CAL. PENAL CODE § 667.5 (West 1999 & Supp. 2001) (defining "violent felony," for the purpose of enhancing prison terms, by providing a list of enumerated felonies).

34. *See* Warner Letter, *supra* note 9 (reasoning that Chapter 906 "increases the universe of available samples that can be used to match unsolved crimes with the perpetrators of that crime").

35. *See* Letter from Pat McNamara, President, and Timothy H. B. Yaryan, Legislative Counsel and Advocate, Riverside Sheriffs' Association, to Carole Migden, Assemblymember (May 10, 2001) (on file with the *McGeorge Law Review*) (describing the benefits of the expansion of the DNA data bank to include "apprehending perpetrators").

36. CAL. PENAL CODE § 299.5 (amended by Chapter 906).

37. *Id.*

38. *See id.* (declaring that any person convicted of an unauthorized use of DNA from the data bank, who does so for financial gain, will, in addition to the jail time, be subject to a fine equal to "three times that of any financial gain received or ten thousand dollars, whichever is greater").

39. *See id.* (adding that if a DOJ employee is responsible for the unlawful use of DNA from the data

IV. ANALYSIS OF CHAPTER 906

Expanding the scope of DNA data banks has become a modern trend in the United States.[40] Beginning in 1989, Virginia was the first state to enact legislation requiring those convicted of certain felonies to submit blood samples.[41] Now, several states, including Virginia, have expanded the scope of their DNA data bank legislation to include many, if not all felonies.[42] With Chapter 906, California now joins this modern trend.[43] However, because these convicted felons are required to provide a blood sample without a warrant or suspicion of a specific crime, Fourth Amendment, California state constitutional, and public policy concerns are being raised.[44]

A. Joining the Modern Trend of Expanding the DNA Data Bank

Each of the fifty states currently has legislation enabling the collection of DNA samples from certain convicted felons.[45] At a minimum, all states collect compulsory DNA samples from sex offenders.[46] However, California is not the first state to expand its DNA data bank to include violent felonies.[47] Rather, twenty-seven other states already require DNA samples from individuals convicted of robbery,[48] and twenty-four states require samples from individuals

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bank, the DOJ will be liable to the donor for five thousand dollars for each violation, not to exceed fifty thousand dollars for multiple violations).

40. *See infra* Part IV.A nn.48-50 (providing examples of various states' statutes that have enlarged the list of felonies that result in a compulsory blood sample being submitted to a DNA data bank).

41. *See* Hibbert, *supra* note 8, pp. 774-75 (discussing the evolution of Virginia's DNA data bank legislation).

42. *See infra* Part IV.A note 50 (enumerating the states which have expanded their DNA data bank statutes to all felonies).

43. *See supra* Part III (explaining the expansion of California's current DNA data bank legislation).

44. *See infra* Part IV.B-D (discussing the various arguments in opposition to Chapter 906, particularly those offered by the ACLU).

45. *See* Stevens, *supra* note 17, at 922 n.12 (enumerating DNA data bank statutes for all fifty states).

46. *See* OFFICE OF THE ATTORNEY GENERAL, DOCUMENTS IN SUPPORT OF EXPANSION OF DNA DATA BANK, attachment 3 (Jan. 2001) (copy on file with the *McGeorge Law Review*) (showing graphically that all fifty states require DNA sampling for sex offenses, including California, before and after the enactment of Chapter 906).

47. *See* Hibbert, *supra* note 8, 775-779 (discussing the expanding scope of DNA data banks in several states).

48. ALA. CODE § 36-18-25 (Supp. 2000); ALASKA STAT. § 44.41.035 (Michie Supp. 1995); ARIZ. REV. STAT. ANN. § 13-4438 (West 2001); ARK. CODE ANN. § 12-12-1109 (Michie 1999); COLO. REV. STAT. § 17-2-201 (1998); FLA. STAT. ANN. § 943.325 (West 2001); GA. CODE ANN. § 24-4-60 (Harrison 1995 & Supp. 2000); IDAHO CODE § 19-5506 (Michie 1997 & Supp. 2001); 730 ILL. COMP. STAT. ANN. 5/5-4-3 (West 1997 & Supp. 2001); IND. CODE ANN. § 10-1-9-10 (West Supp. 2000); ME. REV. STAT. ANN. tit. 25, § 1574 (West Supp. 2000); MD. ANN. CODE art. 88B, § 12A (1998 & Supp. 2000); MASS. GEN. LAWS ANN. ch. 22E, § 3 (West Supp. 2001); MINN. STAT. ANN. § 609.117 (West Supp. 2001); MONT. CODE ANN. § 44-6-103 (2001); N.M. STAT. ANN. § 29-16-3 (Michie Supp. 1997); N.Y. EXEC. LAW § 995 (McKinney 1996 & Supp. 2001); N.C. GEN. STAT. § 15A-266.4 (1999); S.C. CODE ANN. § 23-2-620 (Law. Co-op. 2000); S.D. CODIFIED LAWS § 23-5-14 (Michie 1998 & Supp. 2000); TENN. CODE ANN. § 40-35-321 (1997 & Supp. 2000); VT. STAT. ANN.

convicted of burglary.[49] Moreover, seven states have legislation that requires DNA samples from individuals convicted of any felony.[50]

For eleven years, Virginia has collected DNA samples from individuals convicted of any felony.[51] Since 1992, Virginia has solved 283 crimes with its DNA data bank.[52] The sponsors of Chapter 906 note that approximately 158 of these 283 crimes would not have been solved if Virginia restricted its DNA data collection to the enumerated felonies in section 296 of the California Penal Code before being amended by Chapter 906.[53]

Sponsors of Chapter 906 also note that between January 1, 2000 and February 27, 2001, the California DNA data bank solved six crimes—all were sexual assaults, three of which resulted in murder.[54] Five of the six offenders had prior convictions of robbery, burglary, or both.[55] However, in order to collect DNA samples from persons convicted of first-degree robbery, first-degree burglary, arson, or carjacking, section 296 of the Penal Code needed the

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tit. 20, § 1932 (2000); VA. CODE ANN. § 19.2-310.2 (Michie 2000); WASH. REV. CODE ANN. § 43.43.754 (West 1998 & Supp. 2001); W. VA. CODE ANN. § 15-2B-6 (Michie 2000 & Supp. 2000); WIS. STAT. ANN. § 165.76 (West 1997 & Supp. 2000); WYO. STAT. ANN. § 7-19-403 (Michie 1999).

49. ALA. CODE § 36-18-25 (Supp. 2000); ARIZ. REV. STAT. ANN. § 13-4438 (West 2001); COLO. REV. STAT. § 17-2-201 (1998); FLA. STAT. ANN. § 943.325 (West 2001); GA. CODE ANN. § 24-4-60 (1995 & Supp. 2000); 730 ILL. COMP. STAT. ANN. 5/5-4-3 (West 1997 & Supp. 2001); IND. CODE ANN. § 10-1-9-10 (West Supp. 2000); IOWA CODE ANN. § 13.10 (West 2000 & Supp. 2001); ME. REV. STAT. ANN. tit. 25, § 1574 (West Supp. 2000); MASS. GEN. LAWS ANN. ch. 22E, § 3 (West Supp. 2001); MINN. STAT. ANN. § 609.117 (West Supp. 2001); NEV. REV. STAT. ANN. 176.0913 (Michie 2001); N.M. STAT. ANN. § 29-16-3 (Michie Supp. 1997); N.Y. EXEC. LAW § 995 (McKinney 1996 & Supp. 2001); OR. REV. STAT § 137.076 (Supp.1996); S.C. CODE ANN. § 23-2-620 (Law. Co-op. 2000); S.D. CODIFIED LAWS § 23-5-14 (Michie 1998 & Supp. 2000); TENN. CODE ANN. § 40-35-321 (1997 & Supp. 2000); TEX. GOV'T CODE ANN. § 411.148 (Vernon 1998 & Supp. 2001); VT. STAT. ANN. tit 20, § 1932 (2000); VA. CODE ANN. § 19.2-310.2 (Michie 2000); W. VA. CODE ANN. § 15-2B-6 (Michie 2000 & Supp. 2000); WIS. STAT. ANN. § 165.76 (West 1997 & Supp. 2000); WYO. STAT. ANN. § 7-19-403 (Michie 1999).

50. ALA. CODE § 36-18-25 (Supp. 2000); GA. CODE ANN. § 24-4-60 (1995 & Supp. 2000); N.M. STAT. ANN. § 29-16-3 (Michie Supp. 1997); TENN. CODE ANN. § 40-35-321 (1997 & Supp. 2000); VA. CODE ANN. § 19.2-310.2 (Michie 2000); WIS. STAT. § 165.76 (1997 & Supp. 2000); WYO. STAT. ANN. §7-19-403 (Michie 1999).

51. VA. CODE ANN. § 19.2-310.2 (Michie 2000) (declaring that "[e]very person convicted of a felony on or after July 1, 1990" must provide a DNA sample to the Virginia Department of Criminal Justice Services).

52. *See* Letter from Bill Lockyer, Attorney General, State of California, Office of Attorney General, to Carole Migden, Assemblymember, 1 (Feb. 27, 2001) [hereinafter Lockyer Letter] (on file with the *McGeorge Law Review*) (citing the number of crimes solved with Virginia's DNA data bank since 1992); *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 673, at 3 (Apr. 3, 2001) (providing a supporting statement of Virginia's crime solving statistics using the Virginia DNA data bank).

53. *See* Lockyer Letter, *supra* note 52, at 1 (comparing the scope of the California DNA data bank with that of Virginia); *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 673, at 3 (Apr. 3, 2001) (elaborating on the comparison between the scope of Virginia's DNA data bank to the scope of California's data bank).

54. *See* Lockyer Letter, *supra* note 52, at 2 (describing the six "cold hits" made by the DNA data bank between the dates specified).

55. *See id.* (analyzing the prior arrests of the offenders whose crimes where solved in the six "cold hits" made by the DNA data bank between the dates specified).

additional language provided by Chapter 906.[56]

Like Virginia, the expanded California DNA data bank has the potential to solve more crimes.[57] Notwithstanding this benefit, opponents assert that the extraction of blood from the persons convicted of the felonies added by Chapter 906 violates the Fourth Amendment of the United States Constitution and the California State Constitution, while contravening public policy.[58]

B. *Fourth Amendment Issues*

1. *Protection Against Unreasonable Searches and Seizures*

The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures."[59] Typically, an individual's assurance against an unreasonable search is the requirement of a judicially granted warrant.[60] A judge who approves a warrant, may only do so upon a showing of probable cause.[61] However, not all warrantless searches are unconstitutional.[62] When determining if a particular warrantless search technique or practice violates the Fourth Amendment, the court must balance the intrusiveness of the search against the interests of the government.[63]

The drawing of blood from the human body is included in the meaning of "search and seizure" in the Fourth Amendment.[64] In *Schmerber v. California*,[65] a drunk-driving suspect had his blood drawn while hospitalized after an auto accident.[66] The Court upheld the constitutionality of the search and seizure in *Schmerber* because, ultimately, the search was not unreasonable.[67]

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56. *See* People v. Sanchez, 52 Cal. App. 4th 997, 1002, 60 Cal. Rptr. 2d 880, 883 (Ct. App. 1997) (holding that the defendant could not be required to provide blood and saliva samples because the Legislature had not specifically enumerated the defendant's offense in the enabling statute).

57. *See supra* note 35 and accompanying text (supporting the expansion of DNA data banks to secure more felony convictions).

58. *See infra* Parts IV.B-D (explaining the challenges offered by the American Civil Liberties Union).

59. U.S. CONST. amend. IV.

60. *See* Trupiano v. United States, 334 U.S. 699, 705 (1948) (holding that, when police officers seize goods, they must first obtain a search warrant "wherever reasonably practicable").

61. *See* U.S. CONST. amend. IV (stating that "no warrants shall issue, but upon probable cause").

62. *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE §§ 12.01–19.06 (2d ed. 1998) (covering several exceptions to the warrant process).

63. *See* Delaware v. Prouse, 440 U.S. 648, 654 (1979) (applying the balancing test to hold that a police officer's suspicionless stop of a motor vehicle violated the Fourth Amendment).

64. *See* Schmerber v. California, 384 U.S. 757, 767 (1966) (declaring that a "compulsory administration of a blood test . . . plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment").

65. 384 U.S. 757.

66. *Id.* at 758.

67. *Id.* at 770-72.

2. *Does Chapter 906 Enact an Unreasonable Search and Seizure?*

a. *Lack of Individualized Suspicion*

Courts have upheld DNA data bank statutes, even though the mandatory blood sampling lacks individualized suspicion that the felon committed some other particular crime. The Fourth Circuit in *Jones v. Murray*,[68] in upholding the Virginia DNA data bank statute,[69] stated that there is no "per se Fourth Amendment requirement" of individualized suspicion when the purpose of the search is for identifying prison inmates.[70] The Ninth Circuit, in *Rise v. Oregon*,[71] upheld the Oregon DNA data bank statute, stating that Oregon could conduct such a search if it "is justified by law enforcement purposes."[72] Also, the "special needs doctrine," which allows a warrantless search in situations presenting demands "beyond the normal need for law enforcement,"[73] is used in cases without an individualized suspicion.[74] The Second Circuit, in *Roe v. Marcotte*,[75] utilized the "special needs doctrine" to uphold Connecticut's DNA legislation.[76] In *Roe*, the court found that there was indeed a "special need" for blood-testing sex offenders because of the high rate of recidivism for these crimes.[77] Moreover, the *Roe* court cited the usefulness and reliability of DNA evidence in its reasoning.[78]

However the American Civil Liberties Union (ACLU) points out that, unlike the offenses listed in the Connecticut statute,[79] the additional felonies added by

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68. 962 F.2d 302 (4th Cir. 1992).

69. *See* VA. CODE ANN. § 19.2-310.2 (Michie 2000) (requiring a blood sample from persons convicted of any felony).

70. *Jones*, 962 F.2d at 306.

71. 59 F.3d 1556 (9th Cir. 1995).

72. *Id.* at 1559.

73. *See* Griffin v. Wisconsin, 483 U.S. 868, 873-75 (1987) (holding a warrantless search of a probationer's home to be constitutional because the operation of a probation system presented "special needs beyond normal law enforcement") (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985)).

74. *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619-24 (1989) (holding that blood and urine samples of certain railroad employees, without a warrant or individualized suspicion, did not violate their Fourth Amendment rights because of "special needs beyond normal law enforcement").

75. 193 F.3d 72 (2d Cir. 1999).

76. *See id.* at 79 (utilizing the special needs doctrine to uphold Connecticut's DNA data bank legislation); *see also* Stevens, *supra* note 17 (quoting the decision in *Roe* as it relates to the special needs doctrine); *cf.* Letter from Francisco Lobaco, Legislative Director, and Valerie Small Navarro, Legislative Advocate, California Legislative Office, American Civil Liberties Union, to Carole Migden, Assemblymember, 4 (Mar. 26, 2001) (on file with the *McGeorge Law Review*) [hereinafter ACLU Letter] (noting that the holding in *Roe* is relevant "with respect to crimes for which there is a high rate of recidivism").

77. *See Roe*, 193 F.3d at 79 (noting that DNA data banks help prevent offenders from committing crimes in the future).

78. *See id.* (elaborating that DNA evidence is useful in sex offense crimes because of the very nature of the evidence).

79. *See* CONN. GEN. STAT. ANN. § 54-102g (West Supp. 2001) (requiring felons convicted of sex offenses and kidnapping to submit a DNA blood sample to the Connecticut DNA data bank).

Chapter 906 do not have a high rate of recidivism and are only for "law enforcement purposes."[80] As the ACLU notes, the U.S. Supreme Court held that a roadside checkpoint program to search for unlawful drugs was unconstitutional because it did not go "beyond a general interest in crime control."[81] Moreover, the U.S. Supreme Court rejected the "special needs" exception as a justification for reporting to law enforcement the presence of cocaine in urine tests of pregnant women.[82] Consequently, the ACLU asserts that Chapter 906 could be found unconstitutional because mandatory blood sampling does not extend beyond "law enforcement purposes."[83]

b. Reduced Expectations of Privacy

Courts have also made use of the reduced expectations of privacy for imprisoned convicted felons in upholding DNA data bank statutes.[84] The *Rise* court noted that prison inmates who were required to submit blood samples under the Oregon DNA data bank statute "lost any legitimate expectation of privacy in the identifying information derived from the blood sampling."[85] Furthermore, the *Jones* court found that a convicted felon had no right to privacy protections under the Fourth Amendment.[86] The *Jones* court further applied this reasoning to assert that Fourth Amendment cases involving prison inmates fall into a "special category" in which there is no "per se requirement of probable cause."[87]

However, the ACLU notes that the Ninth Circuit, in *Walker v. Sumner*,[88] held that there is no "prison inmate exception" to the Fourth Amendment, unless the search is related to a penological need such as prison safety.[89] The *Walker* court reversed and remanded a lower court's determination that a prison inmate's civil rights were not violated when he was forced to submit to an AIDS blood test

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80. *See* ACLU Letter, *supra* note 76, at 2-5 (comparing the decision in *Rise* to that of Indianapolis v. Edmond, 531 U.S. 32 (2000)).

81. *See id.* at 2 (quoting Indianapolis v. Edmond, 531 U.S. 32 (2000)).

82. *See id.* at 3 (citing Ferguson v. City of Charleston, 532 U.S. 67 (2001)).

83. *See id.* at 2 (noting the *Rise* court holding that DNA data banks are necessary "for law enforcement purposes" appears to be in conflict with the Supreme Court's holding in *Edmond* that vehicle checkpoint searches must go "beyond a general interest in crime control").

84. *See Jones*, 962 F.2d at 306 (upholding the Virginia DNA data bank legislation and noting the reduced expectations of privacy for prison inmates). *But see* Hibbert, *supra* note 8, at 775 (discussing the dissenting opinion within *Jones* which analogizes the search of a person's genome to a search of a persons prison cell).

85. *Id.* at 1560 (upholding Chapter 669, Oregon Laws 1991); *but see* ACLU Letter, *supra* note 76 (distinguishing the Oregon statute upheld in *Rise* from Chapter 906 on the basis that Chapter 906 adds "offenses to the California DNA testing statute for which there is neither evidence of a high rate of recidivism nor an automatic likelihood of substantial personal contact between the victim and the perpetrator").

86. *See Jones*, 962 F.2d at 306 (elaborating that "probable cause had already supplied the basis for bringing the person within the criminal justice system").

87. *Id.* at 307 n.2.

88. 917 F.2d 382 (9th Cir. 1990).

89. *See* ALCU Letter, *supra* note 76, at 4.

because the defense had failed to show the penological need.[90] The dissenting opinion in *Rise* applied the holding of *Walker* to assert that DNA testing of prison inmates should be held unconstitutional.[91]

C. *State Constitutional Issues*

In 2000, a California Court of Appeals, in *People v. King*,[92] upheld blood-sampling under the DNA data bank statute, section 296 of the Penal Code (prior to amendment by Chapter 906), without reference to the California Constitution.[93] The *King* court reasoned that the Fourth Amendment to the U.S. Constitution is not violated because imprisonment results in lower expectations of privacy.[94] The *King* court stated that this lower expectation of privacy extended to a person's identity as would be revealed by his DNA.[95]

Nonetheless, the ACLU asserts that Chapter 906 may violate the California Constitution.[96] The ACLU notes that while the California Constitution's provisions do not provide broader privacy protections than the Fourth Amendment,[97] they do provide independent privacy protections.[98] This assertion is based on the California Supreme Court's analysis of employee drug-testing under both the Fourth Amendment and the California Constitution.[99] In *Loder v. City of Glendale,* the California Supreme Court stated that the California Constitution protected both autonomous privacy interests and informational privacy interests.[100] These state constitutional interests were used to hold that the drug-testing of employees for promotions was unconstitutional.[101] By analogy, the ACLU asserts that the same reasoning may show that Chapter 906 violates these

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90. *See Walker*, 917 F.2d at 386 (holding that not only must the defense identify a penological need, but the defense must also show that the relationship of the search to the need).

91. *See Rise*, 59 F.3d at 1568 (Nelson, Circuit Judge, dissenting) (asserting the Oregon DNA data bank statute should be held unconstitutional because there should not be a prison inmate exception to the Fourth Amendment when the statutes only function is to aid in the solving of future crimes).

92. 82 Cal. App. 4th 1363, 99 Cal. Rptr. 2d 220 (Ct. App. 2000).

93. *See generally King*, 82 Cal. App. 4th at 1363-79, 99 Cal. Rptr. 2d at 220-30 (illustrating a case where samples gathered during imprisonment were later used against a suspect after his release from prison).

94. *See King*, 82 Cal. App. 4th at 1378, 99 Cal. Rptr. 2d at 230 (upholding the defendant's conviction because the DNA evidence was not collected in violation of the Fourth Amendment). *But see* ACLU Letter, *supra* note 76, at 2 n.1 (explaining that the holding in *King* should be limited to the facts of that case, where the defendant was convicted of sexual assault, rather than being read as automatically applying to other enumerated felonies within the statute).

95. *See King*, 82 Cal. App. 4th at 1374, 99 Cal. Rptr. 2d at 226-27 (analogizing blood sampling for DNA evidence to finger-printing).

96. *See* ACLU Letter, *supra* note 76, at 6.

97. *See id.* (citing In re York, 892 P.2d 804, 813, 9 Cal. 4th 1133, 1149 (1995)).

98. *See id.* (citing Loder v. City of Glendale, 927 P.2d 1200, 1232, 14 Cal. 4th 846, 896 (1997)).

99. *Loder*, 927 P.2d at 1232, 14 Cal. 4th at 896.

100. *Id.*

101. *See Loder*, 927 P.2d at 1234-35, 14 Cal. 4th at 900 (holding that a particular drug testing program was unconstitutional for existing employees but was constitutional for screening new job applicants).

privacy interests because imprisoned felons have less freedom of choice to participate in a DNA test than a promotional candidate has to participate in a drug test.[102] These state constitutional assertions must not be overlooked as it is the California Constitution, in conjunction with the U.S. Constitution, that define the privacy interests of Californians.[103]

D. Public Policy Considerations

Supporters of Chapter 906 believe that it "makes good policy sense," as Chapter 906 will ultimately result in crimes being solved and provide justice for the families of victims.[104] However, the ACLU raises strong policy considerations against allowing DNA sampling from those persons accused of the crimes added by Chapter 906.[105] The ACLU believes that the enactment of Chapter 906 could lead to future legislation requiring DNA sampling from all convicts and start a "slippery slope that must be assiduously avoided."[106] Furthermore, the ACLU contends that, because people of color have already been found to have been inappropriately targeted by law enforcement,[107] the DNA data bank could become disproportionately populated with profiles of people of color.[108]

102. *See* ACLU Letter, *supra* note 76, at 6 (comparing the privacy interests of job applicants "who may freely drop their application if they do not want to be tested" to "prison inmates who have no choice under [Chapter 906] but to be tested").

103. *See* NEIL C. MCCABE & CATHERINE G. BURNETT, STATE CONSTITUTIONAL CRIMINAL PROCEDURE 1 (1994) (noting that a state constitution and the United States constitution cannot stand alone, but together they provide the "total framework for government within the United States").

104. *See* Warner Letter, *supra* note 9 and accompanying text (noting the California State Sheriffs' Association's support of Chapter 906 and its assertion that Chapter 906 "makes good policy sense").

105. *See* ACLU Letter, *supra* note 76 at 6-7 (discussing policy concerns such as privacy and Equal Protection).

106. *Id.* at 7.

107. *See id.* at 7 (stating that "African-American and Latino civilians are targeted by law enforcement at a significantly higher rate than whites" and citing the authority of United States v. Montero-Camargo, 208 F.3d 1122, 1135 n.24 (9th Cir. 2000), as well as Washington v. Lambert, 98 F.3d 1181, 1182 (9th Cir. 1996)).

108. *Id.*

V. CONCLUSION

Proponents of Chapter 906 assert that it will ultimately result in more crimes being solved because of the larger pool of potential suspects contained in California's DNA data bank.[109] This expansion is part of a growing trend in the United States to include more categories of felons into DNA data banks.[110] However, Fourth Amendment concerns remain unsettled, and the California judiciary may have to balance the government's interest in obtaining the data with the privacy interests of the persons convicted of felonies enumerated in section 296 of the Penal Code.[111] Moreover, the ACLU's state constitutional concerns and policy considerations present other potential future challenges.[112]

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109. *See* Letter from Pat McNamara, President, and Timothy H. B. Yaryan, Legislative Counsel and Advocate, Riverside Sheriffs' Association, to Carole Migden, Assemblymember (May 10, 2001) (on file with the *McGeorge Law Review*) (describing the benefits of the expansion of the DNA data bank to include "apprehending perpetrators" and "reducing crime").

110. *See supra* Part IV.A (discussing the states that have DNA data bank legislation which is broader than California's legislation).

111. *See supra* Part IV.B (analyzing the Fourth Amendment issues involved with mandatory blood sampling from convicted felons).

112. *See supra* Parts IV.C-D (elaborating on the ACLU's position regarding Chapter 906 in the context of the state constitution and policy considerations).