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# The Continued Expansion of the DNA Database: California's Response to September 11th

*John P. Tribuiano III*

## *Code Section Affected*

Penal Code § 296 (amended).  
AB 2105 (La Suer); 2002 STAT. Ch. 160.

*"In light of the events of September 11th, it is necessary to add acts of terrorism to the laundry list of crimes requiring a convicted person to submit DNA samples."*<sup>1</sup>

## I. INTRODUCTION

On September 11, 2001, the worst terrorist attack in the history of the United States took place when terrorists hijacked four commercial airliners and crashed three of them into American buildings.<sup>2</sup> Within forty-eight hours four thousand special Federal Bureau of Investigation (FBI) agents and three thousand support personnel began an investigation using about four hundred FBI laboratory specialists deployed to examine the forensic evidence.<sup>3</sup>

In response to these horrific and tragic events, state legislatures throughout the United States began reviewing anti-terrorism laws in their criminal codes.<sup>4</sup> Many passed comprehensive schemes making terrorism and the support of terrorism state crimes.<sup>5</sup> California took action by enacting Chapter 160, which requires individuals convicted of felonious terrorist offenses to provide deoxyribonucleic acid (DNA) for inclusion in the state database.<sup>6</sup>

All fifty states have passed DNA database statutes for the purpose of solving various classes of unsolved crimes.<sup>7</sup> Although these DNA database laws have been challenged, "no court has yet struck down a statute compelling the DNA testing of convicts."<sup>8</sup>

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1. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2105, at 3 (June 25, 2002).

2. CNN, *Backgrounder: Attack on the U.S.—What Happened?* (Sept. 17, 2001), at [http://www.fyi.cnn.com/fyi/news/09/17/back\\_grounder.what.happened.html](http://www.fyi.cnn.com/fyi/news/09/17/back_grounder.what.happened.html) (copy on file with the *McGeorge Law Review*).

3. *Id.*

4. Blake Harrison, *Protecting Democracy: States Respond to Terrorism*, National Conference of Legislators, at <http://www.ncsl.org/programs/press/2002/issues/criminalcode.html> (last visited Sept. 17, 2002) (copy on file with the *McGeorge Law Review*).

5. *Id.*

6. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2105, at 3 (June 25, 2002).

7. Jerilyn Stanley, *Law Enforcement's Miracle of Technology: The Missing Link to Truth and Justice*, 32 MCGEORGE L. REV. 601, 602 (2001).

8. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 673, at 4 (Apr. 3, 2001) (stating the American Civil Liberty Union's argument in opposition to AB 673).

DNA is a complex molecule found in the nuclei of human cells that carries an individual's genetic information.<sup>9</sup> The genetic material found in DNA is unique to each individual.<sup>10</sup> Thus, the DNA from convicted criminals, who are required to supply a sample under DNA database laws, can be compared to unknown evidence samples collected at crime scenes as a means of identifying or vindicating a particular criminal suspect.<sup>11</sup>

In 1998, California established the "DNA and Forensic Identification Database and Data Bank Act" for the purposes of assisting federal, state, and local law enforcement agencies inside and outside California in the prompt "detection and prosecution of individuals responsible for sex offenses and other violent crimes" and to exclude suspects who are being investigated for these crimes.<sup>12</sup> Prior to the passage of Assembly Bill 2814 (AB 2814) in 2000, "any samples taken from a suspect could be compared only to samples taken from investigations where that individual was a suspect."<sup>13</sup> However, since the passage of AB 2814, the California Department of Justice (DOJ) can compare an individual's DNA to any crime-scene DNA.<sup>14</sup> The DOJ administers the state DNA Data Bank program and acts as a liaison with the FBI regarding participation in a national DNA database.<sup>15</sup> This national database allows the storage and exchange of DNA records submitted by state and local forensic DNA laboratories nationwide.<sup>16</sup> Using a computerized system, the database allows individuals to search and cross-reference a convicted offender's and a suspect's DNA profile from crime-scene DNA evidence.<sup>17</sup>

DNA testing has become a powerful and revolutionary tool for the identification of criminal suspects, obtaining convictions, and exonerating the wrongfully accused.<sup>18</sup> Chapter 160 requires individuals found guilty of felonious terrorist offenses in violation of the Hertzberg-Alarcon California Prevention of Terrorism Act<sup>19</sup> to provide DNA samples for inclusion in the state database.

9. Jones v. Murray, 962 F.2d 302, 303 (4th Cir. 1992).

10. Stanley, *supra* note 7, at 601.

11. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 673, at 4 (Apr. 3, 2001).

12. CAL. PENAL CODE § 295(c) (West 1999).

13. Stanley, *supra* note 7, at 604.

14. CAL. PENAL CODE § 297(b) (West Supp. 2002).

15. *Id.* § 295(d).

16. See CAL. PENAL CODE § 295(d) (regarding the State's participation in the FBI's Combined DNA Index System (CODIS)); 42 U.S.C.A. § 14132 (West Supp. 2002).

17. CAL. DEP'T OF JUSTICE, CAL-DNA FACT SHEET 1 (2001) [hereinafter CAL-DNA FACT SHEET] (copy on file with the *McGeorge Law Review*).

18. Joyce Howard Price, *DNA Backlog Slows Judicial Process: Labs Cannot Keep Pace with Test Requests*, WASH. TIMES, July 22, 2001, at A1.

19. See CAL. PENAL CODE § 11415-11419 (West 2000) (stating the new series of criminal violations: sections 11418, 11418.5, and 11419 of the California Penal Code were enacted for the purpose of penalizing the use of weapons of mass destruction, chemical warfare agents, nuclear or radiological agents, living organisms or molecules engineered to carry a biological agent or toxin and weaponization, the action of processing, preparing, packaging, or synthesis of any substance for use as a weapon or munition).

## II. EXISTING LAW

Section 296 of the California Penal Code requires a select group of convicted felons to submit DNA samples for inclusion in the Data Bank.<sup>20</sup> California created the DNA Data Bank for the purpose of aiding law enforcement officials in quickly and accurately solving crimes.<sup>21</sup> As originally enacted, the law specified nine felonious offenses that required mandatory collection of a DNA sample.<sup>22</sup> However, the passage of Assembly Bill 673 in 2000 added four new categories of felonious crimes, which required a convicted individual to submit to DNA testing.<sup>23</sup>

Under existing law, specified felony offenders are required to provide blood and saliva samples along with their fingerprint impressions to law enforcement officials for inclusion in the DNA Data Bank.<sup>24</sup> The DNA is collected by detention facilities or designated state, local, or private agencies, and forwarded to the DOJ for the purpose of DNA identification analysis.<sup>25</sup> As currently

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20. Section 296 of the California Penal Code requires blood and saliva samples, as well as finger and palm print impressions, for any person convicted of the following offenses:

(A) Any offense or attempt to commit any felony offense described in Section 290, or any felony offenses that imposes upon a person the duty to register in California as a sex offender under Section 290.

(B) Murder in violation of Section 187, 190, 190.5, or any degree of murder as set forth in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 of the Penal Code, or any attempt to commit murder.

(C) Voluntary manslaughter in violation of Section 192 or an attempt to commit voluntary manslaughter.

(D) Felony spousal abuse in violation of Section 273.5.

(E) Aggravated sexual assault of a child in violation of Section 269.

(F) A felony offenses of assault or battery in violation of Section 217.1, 220, 241.1, 243, 243.1, 243.3, 243.4, 243.7, 244, 245, 245.2, 245.3, or 245.5.

(G) Kidnapping in violation of subdivisions (a) to (e), inclusive, of Section 207, or Section 208, 209, 209.5, or 210, or an attempt to commit any of these offenses.

(H) Mayhem in violation of Section 203 or aggravated mayhem in violation of Section 205, or an attempt to commit either of these offenses.

(I) Torture in violation of Section 206 or an attempt to commit torture.

(J) Burglary as defined in subdivision (a) of Section 460 or an attempt to commit this offense.

(K) Robbery as defined in subdivision (a) or (b) of Section 212.5 or an attempt to commit either of these offenses.

(L) Arson in violation of subdivision (a) or (b) of Section 451 or an attempt to commit either of these offenses.

(M) Carjacking in violation of Section 215 or an attempt to commit this offense.

*Id.* § 296(a)(1) (West Supp. 2002).

21. Stanley, *supra* note 7, at 603-04.

22. CAL. PENAL CODE § 296 (West 1999).

23. *See id.* (West Supp. 2002) (adding robbery, burglary, carjacking, and arson).

24. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2105, at 1 (Apr. 2, 2002) (stating that the purpose of Chapter 160 is to expand the use of DNA samples).

25. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2105, at 1 (Apr. 3, 2002).

conducted, the DNA sample is compared with unsolved crime-scene DNA evidence.<sup>26</sup> If a match is found between crime-scene DNA evidence and recorded DNA in the database from a convicted offender, a full investigation takes place to establish enough evidence to bring the suspect to trial.<sup>27</sup>

#### A. Similar Legislation Enacted in Other States

Every state has enacted laws creating DNA databases,<sup>28</sup> as has the federal government,<sup>29</sup> for use in solving various classes of crimes.<sup>30</sup> “State statutes outline which crimes trigger the requirement for individuals to provide a biological sample to be used in the creation of a DNA profile for inclusion in a DNA database.”<sup>31</sup> There is a developing national trend toward increasing the number of crimes that would require a convicted offender to submit DNA samples for the inclusion into DNA databases. Currently “thirty-two states have tougher DNA collection laws than California.”<sup>32</sup> Arkansas,<sup>33</sup> Delaware,<sup>34</sup> and New Mexico’s<sup>35</sup> DNA laws, which were enacted prior to September 11, require

26. CAL-DNA FACT SHEET, *supra* note 17, at 1.

27. D.H. Kaye, *Bioethical Objections to DNA Databases for Law Enforcement: Questions and Answers*, 31 SETON HALL L. REV. 936, 938 (2001).

28. ALA. CODE § 36-18-20 (2001); ALASKA STAT. § 44.41.035 (Michie 1995); ARIZ. REV. STAT. ANN. § 31-281 (West 2002); ARK. CODE ANN. § 12-12-1101 (Michie 1999); CAL. PENAL CODE § 290.3 (West 1999); COLO. REV. STAT. § 17-2-201 (2002); CONN. GEN. STAT. ANN. § 54-102(g) (West 2001); DEL. CODE ANN. tit. 29, § 4713 (1997); FLA. STAT. ANN. § 943.325 (West 2001); GA. CODE ANN. § 24-4-60 (1995); HAW. REV. STAT. § 706-603 (2001); IDAHO CODE § 19-5501 (Michie 1997); ILL. COMP. STAT. ANN. § 105/5.457 (West 2001); IND. CODE ANN. § 10-1-9-1 (West 2002); IOWA CODE ANN. § 13.10 (West 2000); KAN. STAT. ANN. § 21-2511 (2001); KY. REV. STAT. ANN. § 17.170 (Banks-Baldwin 2002); LA. REV. STAT. ANN. § 15:605 (West 2003); ME. REV. STAT. ANN. tit. 25, § 1573 (West 2002); MD. CODE ANN., CTS. & JUD. PROC. § 12A (2002); MASS. GEN. LAWS ANN. ch. 22E § 3 (West 2002); MICH. COMP. LAWS ANN. § 750.520m (West 2002); MINN. STAT. ANN. § 299C.11 (West 2003); MISS. CODE ANN. § 45-33-37 (2000); MO. ANN. STAT. § 650.050 (West 2000); MONT. CODE ANN. § 44-6-102 (2002); NEB. REV. STAT. § 29-4104 (2002); NEV. REV. STAT. ANN. § 176.0913 (Michie 2001); N.H. REV. STAT. ANN. § 651-C:1 (2002); N.J. STAT. ANN. § 53:1-20.17 (West 2001); N.M. STAT. ANN. § 29-16-2 (Michie 2001); N.Y. EXEC. LAW § 995 (McKinney 1996); N.C. GEN. STAT. § 15A-266 (2002); N.D. CENT. CODE § 31-13-05 (2001); OHIO REV. CODE ANN. § 109.57.3 (Anderson 2001); OKLA. STAT. ANN. tit. 57, § 584 (West 2003); OR. REV. STAT. § 181.085 (2001); 35 PA. CONS. STAT. ANN. tit. 35 § 7651.302 (West 2002); R.I. GEN. LAWS § 12-1.5-4 (2002); S.C. CODE ANN. § 23-3-600 (Law. Co-p. 2002); S.D. CODIFIED LAWS § 23-5-14 (Michie 2002); TENN. CODE ANN. § 38-6-113 (2001); TEX. GOV'T CODE ANN. § 411.142 (Vernon 2003); UTAH CODE ANN. § 53-10-406 (2002); VT. STAT. ANN. tit. 20, § 1931 (2000); VA. CODE ANN. § 19.2-310.2 (Michie 2002); WASH. REV. CODE ANN. § 43.43.7532 (West 2003); W.VA. CODE § 15-2B-6 (2002); Wis. STAT. ANN. § 165.77 (West 2002); WYO. STAT. ANN. § 7-19-402 (Michie 2001).

29. 42 U.S.C.A. § 14132 (West Supp. 2002).

30. Robin Cheryl Miller, Annotation, *Validity, Construction, and Operation of State DNA Database Statutes*, 76 A.L.R.5th 239 (2000).

31. Martha L. Lawson, *Personal Does Not Always Equal “Private”*: The Constitutionality of Requiring DNA Samples from Convicted Felons and Arrestees, 9 WM. & MARY BILL RTS. J. 645, 645 (2001).

32. *DNA Sleuthing Arrest in Year-Old SR Rape Case Shows Benefits of DNA Database*, PRESS DEMOCRAT (Santa Rosa, Cal.), Feb. 18, 2001, at G2.

33. ARK. CODE ANN. § 12-12-101 (Michie 1994).

34. DEL. CODE ANN. tit. 29, § 4713 (1994).

35. N.M. STAT. ANN. § 29-16-2 (Michie 1997).

individuals convicted of terrorism or terrorist crimes to submit DNA samples for insertion in their respective DNA databases. Furthermore, there are thirteen states that require all convicted felons to submit DNA samples.<sup>36</sup> Out of these thirteen states, Alabama,<sup>37</sup> Michigan,<sup>38</sup> Washington,<sup>39</sup> and Wyoming<sup>40</sup> have specific terrorist statutes making it a felony to commit an act of terrorism. Thus, an individual convicted under a terrorist statute in these four states, would be automatically required to submit DNA for inclusion in each state's DNA database.

On September 1, 1999, Louisiana enacted the most inclusive DNA database statute to date.<sup>41</sup> "This Louisiana law allows for the mandatory collection of DNA samples from any person arrested for a felony sex offense or other specified offense"<sup>42</sup> to be later determined by a state law enforcement agency.<sup>43</sup> "Under Louisiana law, DNA samples are taken from specified arrestees at the

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36. See ALA. CODE § 36-18-24 (2001) (stating that the DNA database shall contain DNA records of persons convicted after May 6, 1994 for a felony offense); COLO. REV. STAT. ANN. § 17-2-201(5)(a) (2002); see also FLA. STAT. ANN. § 943.325(1)(a) (West Supp. 2002) (stating that "[a]ny person who is convicted for . . . any [forcible felony] . . . shall be required to submit two specimens of blood or other biological specimens"); GA. CODE ANN. § 24-4-60 (2001) (stating that a person who has been convicted of a felony "shall have a sample of his or her blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA . . . analysis"); MICH. COMP. LAWS ANN. § 750.520m (2002) ("[A] person shall provide sample for chemical testing for DNA identification profiling" if the person is convicted of a felony.); MONT. CODE ANN. § 44-6-103 (2001) (stating that collection of DNA samples are required from "a person convicted of a felony offense"); N.M. STAT. ANN. § 29-16-3 (Michie Supp. 2001) (defining "covered offender" as "any person convicted of a felony offense as an adult"); OR. REV. STAT. § 181.085(2)(c) (2002) ("After analyzing samples from persons described in paragraphs (a) and (b) of this subsection, the department shall analyze samples from persons convicted of any other felony."); TENN. CODE ANN. § 40-35-321(d)(2) (2001) (stating that a person convicted of a felony offense must "provide a biological specimen for the purpose of DNA analysis"); TEX. GOVT. CODE ANN. § 411.148 (West Supp. 2002) (stating that "[a]n inmate serving a sentence for a felony . . . shall provide one or more blood samples or other specimens for the purpose of creating a DNA record"); VA. CODE ANN. § 19.2-310.2 (Michie 2000) (stating that "blood, saliva or tissue samples" are required for DNA analysis upon conviction of a felony); WASH. REV. CODE ANN. § 43.43.754 (West 1998) (stating that "the county shall be responsible for obtaining blood samples" for every adult or juvenile convicted of a felony); WIS. STAT. ANN. § 165.76 (West Supp. 2001) (stating that "a person shall comply with the requirements under this section if he or she is in prison . . . for a felony committed in the state"); WYO. STAT. ANN. § 7-19-402 (Michie 2001) (stating that "the . . . division shall establish a DNA database for convicted felons"); Dawn Herkenham, *DNA Database Legislation and Legal Issues* (Feb. 2002), at <http://www.promega.com> (copy on file with the *McGeorge Law Review*) (providing an excerpt from a presentation given by Dawn Herkenham at the CODIS Seventh Annual User's Conference in Arlington, Virginia).

37. See ALA. CODE § 13A-10-15 (2001) (stating that the "crime of making a terrorist threat is a class C felony").

38. See MICH. COMP. LAWS ANN. § 750.204 (2002) (stating that it is a felony for a person to "send or deliver to another person . . . any kind of explosive substance or any other dangerous thing with the intent to frighten, terrorize, threaten, harass, injure, or kill any person, or with the intent to destroy any real or personal property").

39. WASH. REV. CODE ANN. §§ 70.74.270, 70.74.272, 70.74.280 (West 2002) (stating that terrorist crimes are all felonies).

40. See WYO. STAT. ANN. § 6-2-505 (Michie 2001) (stating that a "terroristic threat" is a felony).

41. Lawson, *supra* note 31, at 651.

42. *Id.*

43. LA. REV. STAT. ANN. § 15:602-609 (West 2000).

same time they are fingerprinted and booked.”<sup>44</sup> Potentially, this Louisiana statute may authorize the collection of DNA samples from all arrestees.

### III. NEW LEGISLATION: CHAPTER 160

The California Legislature created Chapter 160 to expand the list of specified offenses requiring a convicted individual to give DNA samples to law enforcement for inclusion in the California Data Bank.<sup>45</sup> The new law adds those individuals convicted under the Prevention of Terrorism Act of 1999 to the list of criminals required to submit DNA samples. The Prevention of Terrorism Act “guard[s] against the threat of terrorism involving weapons of mass destruction, including chemical, biological, nuclear, and radiological agents.”<sup>46</sup> Chapter 160 adds possession or use of weapons of mass destruction,<sup>47</sup> making a terrorist threat by use of a weapon of mass destruction,<sup>48</sup> and possession of biological agents<sup>49</sup> to the list of the crimes in section 296 of the California Penal Code that require mandatory collection of an individual’s DNA upon conviction.<sup>50</sup>

The objective of Chapter 160 is to enhance law enforcement’s ability to “link terrorists to crimes of terror.”<sup>51</sup> Thus, the DOJ will be able to compare “DNA from current crime scenes against DNA collected from convicted terrorists.”<sup>52</sup> As Assemblymember Dick Dickerson, Chapter 160’s co-author stated, “This legislation is just common sense when you look at who is already having their

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44. Lawson, *supra* note 31, at 651.

45. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2105, at 1 (Apr. 2, 2002).

46. 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Public Peace and Welfare* § 29 (3d ed. 2000).

47. See CAL. PENAL CODE § 11418 (West 2000) (stating that the following crimes were enacted by this statute: possessing, developing, manufacturing, producing, transferring, acquiring, or retaining any weapon of mass destruction).

48. See *id.* § 11418.5(a) (West Supp. 2002) (stating that:

[a]ny person who knowingly threatens to use a weapon of mass destruction, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication devise, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety, or for his or her immediate family’s safety, which results in an isolation, quarantine, or decontamination effort, shall be punished by imprisonment in a county jail for up to one year or in the state prison for 3, 4, or 6 years, or by a fine of not more than two hundred fifty thousand dollars (\$250,000), or by both that fine and imprisonment.)

49. See *id.* § 11419(b)(1)-(5) (stating that the possession of one of the following categories of biological agents by an individual other than a physician, veterinarian, pharmacists, or licensed medical practitioner is a felony: viruses, bacteria, rickettsiae, fungi, and toxins).

50. See *id.* § 296 (West 1999).

51. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2105, at 3 (June 25, 2002).

52. *Id.*

DNA collected—cowardly terrorists certainly belong on the list with the other scum of the earth who are convicted of the list of offenses already defined in law.”<sup>53</sup>

#### IV. ANALYSIS OF CHAPTER 160

The California Legislature quickly and decisively responded to the September 11th terrorist attacks by enacting Chapter 160. Chapter 160 passed both the Assembly and the Senate without opposition.<sup>54</sup> It adds possessing or manufacturing weapons of mass destruction,<sup>55</sup> threatening to use a weapon of mass destruction,<sup>56</sup> and possessing restricted biological agents,<sup>57</sup> or an attempt to commit these offenses, to the list of crimes which require an individual convicted of such offenses to submit DNA samples to be entered into the DNA database.<sup>58</sup>

##### A. *The Impact of Chapter 160*

Supporters of Chapter 160 believe that it is “vital to tracking criminals and terrorists.”<sup>59</sup> However, the practical impact of the legislation will be minimal. According to the Assembly Appropriations Committee, “[i]n most cases, the offenses referenced in this bill would be covered under existing law requiring violent felons to provide DNA samples to law enforcement.”<sup>60</sup> Thus, Chapter 160 is essentially redundant legislation. Individuals who commit and are charged with the crimes outlined in Chapter 160 are also typically charged with murder or attempted murder because, in the majority of the cases, the very nature of the “terrorist” crime is to commit murder.<sup>61</sup>

For example, on December 22, 2001, Richard Reid boarded American Airlines Flight 63 with an explosive device concealed in his shoe.<sup>62</sup> Reid was charged with the following crimes: attempted homicide of U.S. nationals, attempted murder of passengers on an aircraft, and attempted use of a weapon of mass destruction.<sup>63</sup> If this crime had taken place in California and Reid was

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53. Press Release, California State Assembly Republican Caucus, Assemblyman Dickerson Joint Authors Terrorist DNA Collection Bill, (Feb. 20, 2002), at <http://www.republican.assembly.ca.gov/members/2/Pressrelease4092.html> [hereinafter Dickerson Press Release] (on file with the *McGeorge Law Review*).

54. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2105, at 3 (June 25, 2002).

55. CAL. PENAL CODE § 11418 (West 2000).

56. *Id.* § 11418.5 (West Supp. 2002).

57. *Id.* § 11419 (West 2000).

58. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF AB 2105, at 3 (June 25, 2002).

59. Dickerson Press Release, *supra* note 53.

60. ASSEMBLY APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS OF AB 2105, at 1 (May 8, 2002).

61. See CAL. PENAL CODE §§ 187, 190, 190.5 (West 1999).

62. U.S. Dep’t of Justice, *Attorney General Transcript, News Conference, Regarding Richard Reid*, (Jan. 16, 2002), at <http://www.fas.org/irp/news/2002/01/ag11602.html> (copy on file with the *McGeorge Law Review*).

63. *Id.*



convicted, his DNA would have been collected by law enforcement.<sup>64</sup> Reid's DNA would have been obtained because of the attempted murder and attempted homicide convictions regardless of whether he was ever charged with or convicted of attempted use of a weapon of mass destruction.

### B. Federal Justice Statistics on Terrorism

According to the United States DOJ, "[t]he FBI recorded ten terrorist incidents,<sup>65</sup> two suspected terrorist incidents,<sup>66</sup> and seven terrorist preventions<sup>67</sup> in the United States during 1999."<sup>68</sup> Over a nineteen-year period, from 1980 to 1999, a total of thirty-one events occurred in California including: twenty-one terrorist incidents, nine suspected terrorist incidents, and one prevention of a terrorist attack.<sup>69</sup> In 1999, California had two terrorist incidents and one prevention of a terrorist attack.<sup>70</sup>

### C. Federal Preemption

"The existence of concurrent criminal jurisdiction between state and federal governments gives rise to the possibility that a single criminal act may be simultaneously a violation of federal and state law."<sup>71</sup> However, "[w]here a law is cognizable exclusively in the courts of the United States, state regulation and jurisdiction is preempted" by federal law.<sup>72</sup> Thus, a violation of federal statutes is

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64. See CAL. PENAL CODE § 296 (West 1999).

65. FED. BUREAU OF INVESTIGATION, TERRORISM IN THE UNITED STATES 1999 ii (1999) [hereinafter TERRORISM], available at <http://www.fbi.gov/publications/terror/terrorists.htm> (defining "terrorist incident" as "a violent act or an act dangerous to human life, in violation of the criminal laws of the United States, or of any state, to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives")

66. *Id.* (defining "suspected terrorist incident" as "a potential act of terrorism for which responsibility cannot be attributed to a known or suspected group").

67. See *id.* (defining "terrorism prevention" as "a documented instance in which a violent act by a known or suspected terrorist group or individual with the means and the proven propensity for violence is successfully interdicted through investigative activity").

68. *Id.* at 3.

69. *Id.* at 48-49, 54-61.

70. See *id.* at 5 (reporting that the first incident occurred in Granada Hills on August 10, 1999, when Buford O'Neal Furrow fired gunshots into the North Valley Jewish Community Center). Furrow was charged with murder in violation of title 18, section 1114 of the United States Code. *Id.* The second incident occurred in Orange on August 28, 1999 when the Animal Liberation Front broke into a BioDevices Laboratory resulting in loss to the laboratory of \$240,000, "including the loss of 55 dogs implanted with pacemakers, 12 lead X-ray gowns, and several bottles of medication." *Id.* The third incident of terrorism occurred in Elk Grove on December 3, 1999 when Kevin Ray Patterson and several associates planned to attack a large propane facility. *Id.* at 8.

71. 26 MOORE'S FED. PRACTICE, *Federal Rules of Criminal Procedure* § 629.24[1] (Michael G. Millman et al. eds., 3d ed. 2001).

72. 1 CAL. CRIMINAL DEFENSE PRACTICE § 2.11[11] (2002); see CAL. PENAL CODE § 777 (West 1985) (stating that

an area in which state courts do not have jurisdiction to proceed.<sup>73</sup> The United States Congress has enacted federal terrorist statutes almost identical to California's terrorist statutes.<sup>74</sup> Out of the three terrorist incidents that occurred in California in 1999, two of the cases were prosecuted by the United States DOJ. Since the United States DOJ prosecuted these individuals under federal law, California terrorism law had no impact on the convicted individuals. Thus, if Chapter 160 was in effect in 1999, it would have had no effect upon the individuals convicted of these terrorist crimes and it will not impact present and future federal prosecutions of convicted terrorists. Therefore, the passage of Chapter 160 may have no impact on reducing terrorist activity in California.

## V. CONCLUSION

Since September 11th, at least twenty-eight states have passed measures creating new crimes and penalties for acts of terrorism.<sup>75</sup> The California Legislature passed Chapter 160 with the anticipation of linking convicted terrorists to other crimes of terror through DNA evidence.<sup>76</sup> However, the acknowledgment by the Assembly Appropriations Committee that the individuals convicted of terrorist crimes referenced in Chapter 160 would already be covered under existing law reveals the nominal impact this legislation will have in reducing crime in California.<sup>77</sup> Furthermore, the Federal Government prosecutes the majority of terrorist crimes committed in California applying federal law.<sup>78</sup> Enactment of Chapter 160 appears to be merely a symbolic act of California's fight against atrocities like those committed on September 11, 2001. Chapter 160 will have little impact on terrorist activity committed within California and appears to be more of a token effort to combat terrorism.

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[e]very person is liable to punishment by the laws of this State, for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States; and except as otherwise provided by law the jurisdiction of every public offense is in any competent court within the jurisdictional territory of which it is committed).

73. 1 CAL. CRIMINAL DEFENSE PRACTICE, *supra* note 72, § 2.11[11]; *People v. Kelly*, 38 Cal. 145, 150 (1869).

74. 18 U.S.C.A. § 2332a (West 1995 & Supp. 2002) (stating that the use of weapons of mass destruction and offenses against a national of the United States or within the United States is a federal crime).

A person who, without authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction (other than a chemical weapon as that term is defined in section 229f), including any biological agent, toxin, or vector (as those terms are defined in section 178) . . . shall be imprisoned for any term of years or for life, and if death results, shall be punished by death or imprisoned for any term of years or for life.

*Id.*

75. Nat'l Conference of St. Legislatures, *State Legislation Addressing Terrorism*, at <http://www.ncsl.org/programs/press/2001/freedom/terrorism01.htm> (Dec. 2001) (copy on file with the *McGeorge Law Review*).

76. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2105, at 3 (June 25, 2002).

77. See ASSEMBLY APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS OF AB 2105, at 2-3 (June 11, 2002) (stating the fiscal effect of AB 2105).

78. TERRORISM, *supra* note 65.

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