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# MARYLAND V. KING: POSSIBLY THE MOST IMPORTANT CRIMINAL PROCEDURE CASE IN DECADES

*An Exchange Between Greg Brower & Norman Reimer*

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## **Maryland v. King: Textualism Meets Reason**

*By Greg Brower\**

### **Introduction**

Many Supreme Court observers, including no less than Justice Samuel Alito himself, have described *Maryland v. King*<sup>1</sup> as perhaps the most important criminal procedure case that the Court has decided in decades.<sup>2</sup> While this may well be true, the question presented to the Court was actually quite simple: Is the warrantless collection of DNA from arrestees unreasonable under the Fourth Amendment? In answering that question in the negative, the Court arguably did nothing more than apply the plain text of the Fourth Amendment to an increasingly common fact of modern law enforcement life—the collection of DNA. However, the 5-4 split among the Justices suggests that the majority’s conclusion was not so obvious to everyone. Nevertheless, it seems that, all things considered, the majority got it right.

### **I. CASE BACKGROUND**

In 2003, a stranger concealing his identity broke into the home of a woman in Maryland and raped her. She quickly reported the attack, submitted to a rape exam, and a DNA sample was obtained, analyzed, and entered into the Maryland state DNA database. No match was immediately found. Several years later, in 2009, one Alonzo King was arrested in Maryland on assault charges unrelated to the 2003 rape. Pursuant to Maryland law,<sup>3</sup> a sample of his DNA was taken by means of a cheek, or buccal, swab. That DNA sample was also analyzed and entered into the Maryland database, and was found to match the sample from the 2003 rape investigation. After a Maryland grand jury indicted King on rape charges, he pled not guilty, and eventually moved the trial court to suppress from evidence the results of his post-arrest DNA sampling. That motion was denied and King was ultimately convicted of the rape.

On appeal, a divided court reversed the trial court’s decision as to the admissibility of the DNA evidence, ruling that the State’s collection of King’s DNA upon arrest without a warrant violated his Fourth Amendment right against unreasonable search.<sup>4</sup> Maryland’s petition to the United States Supreme Court for a writ of certiorari was granted, oral argument was heard on February 26, 2013, and on June 3, 2013, in one of the most eagerly anticipated decisions of the term, a slim 5-4 majority of the Supreme Court reversed the Maryland Court of Appeals, deciding that the Maryland law did not violate

the Fourth Amendment. Justice Kennedy wrote for the Court, and was joined by Chief Justice Roberts and Justices Thomas, Breyer, and Alito. An unfamiliar foursome in Justices Scalia, Ginsburg, Sotomayor, and Kagan dissented.

### **II. MARYLAND’S DNA LAW AND SIMILAR LAWS OF OTHER JURISDICTIONS**

Maryland’s DNA law, known as the Maryland DNA Collection Act, was passed in 2008, and authorizes Maryland law enforcement authorities to collect a DNA sample from anyone charged with a crime of violence or an attempt to commit a crime of violence.<sup>5</sup> Under the Act, a DNA sample, once taken, may not, without consent, be processed in a database before the arrestee is arraigned.<sup>6</sup> In the event that the arrestee is not bound over for trial, is not convicted, has his conviction reversed on appeal, or is pardoned, the DNA sample must be destroyed. The Act also limits the way in which information from the DNA sample can be added to the state’s DNA database and how it may be used. Specifically, the Act makes clear that only DNA records that directly relate to the identification of individuals may be collected and stored, and that no purpose other than identification is permissible.<sup>7</sup>

Maryland’s DNA law is not unique. All fifty states require the collection of DNA from felony convicts.<sup>8</sup> At the time of the Supreme Court’s decision in *Maryland v. King*, twenty-eight states and the Federal Government had adopted laws similar to Maryland’s, authorizing the collection of DNA from some or all arrestees.<sup>9</sup> Indeed, the prevalence of such laws around the country caused the Court, in deciding *Maryland v. King*, to acknowledge that “[a]lthough those statutes vary in their particulars, such as what charges require a DNA sample, their similarity means that this case implicates more than the specific Maryland law. At issue is a standard, expanding technology already in widespread use throughout the Nation.”<sup>10</sup> With that, the Court signaled its intent to render a decision not limited to the particular state law in question, but broad enough to address the issue of DNA collection upon arrest generally.

### **III. THE SUPREME COURT’S ANALYTICAL FRAMEWORK**

Before embarking upon its legal analysis of the case and issue at bar, the Court, with Justice Kennedy writing for the majority, observed that the “utility of DNA identification in the criminal justice system is already undisputed,” and that “law enforcement, the defense bar, and the courts have acknowledged DNA testing’s ‘unparalleled ability both to exonerate the wrongly convicted and to identify the guilty.’”<sup>11</sup> The Court then set about to choose an analytical framework for deciding the issue, noting that “[a]lthough the DNA swab procedure used here presents a question the Court has not yet addressed, the framework for deciding the issue is well established.”<sup>12</sup> After reciting the familiar language of the Fourth Amendment, the Court confirmed that the collection of DNA incident to arrest

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is indeed a search—“It can be agreed that using a buccal swab on the inner tissues of a person’s cheek in order to obtain DNA samples is a search.”<sup>13</sup> The Court went on to explain as follows:

A buccal swab might be a far more gentle process than, for example, the drawing of blood. It involves but a light touch on the inside of the cheek; and although it can be deemed a search within the body of the arrestee, it requires no ‘surgical intrusions beneath the skin.’ The fact that an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines that term.<sup>14</sup>

Thus, at the outset of its opinion, the Court clearly articulates that a DNA collection procedure is, in fact, a search, requiring a Fourth Amendment analysis. However, the Court also includes the following warning: “To say that the Fourth Amendment applies here is the beginning point, not the end of the analysis. ‘[T]he Fourth Amendment’s proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.’”<sup>15</sup> The Court then acknowledges that its cases have previously required “some quantum of individualized suspicion as a prerequisite to a constitutional search or seizure,” but explains that “the Fourth Amendment imposes no irreducible requirement of such suspicion.”<sup>16</sup> This language provides the decision’s first real hint at where the Court is about to go with respect to the conjunctive vs. disjunctive debate concerning the Fourth Amendment, and confirms the Court’s framework for its subsequent legal analysis: (a) DNA collection is a search; (b) the Fourth Amendment, therefore, applies; and (c) despite the requisite Fourth Amendment analysis, individualized suspicion need not be found. The ultimate question for the Court was then reduced to this: Is the warrantless collection of DNA from all arrestees unreasonable under the Fourth Amendment?

#### IV. THE COURT’S LEGAL ANALYSIS

After first reaffirming that the mere fact of a lawful arrest alone authorizes a search,<sup>17</sup> the majority opinion next seeks to establish that the Maryland law serves the legitimate government interest of removing an individual from the “normal channels of society” when probable cause to do so exists, and offers five reasons why DNA collection plays a critical role in serving this interest: (1) arrestee identification; (2) facility staff and inmate safety; (3) availability for trial; (4) public safety; and (5) exoneration of others. The Court’s view of each of these reasons can be summarized as follows.

First, the Court emphasized that because an individual arrestee’s identity is more than just a name and Social Security number, the government’s interest in identification goes beyond the superficial. In this respect, the Court concluded, the use of DNA for identification is just like fingerprinting, only more accurate, or like matching an arrestee’s face to a wanted poster, or matching tattoos. Second, the Court focused on the responsibility born by law enforcement officers to ensure that the custody of an arrestee does not create unreasonable risks for jail staff and inmates, including the arrestee himself. Only through DNA testing, the Court contends, can the authori-

ties know, for sure, who they are dealing with and whether the custody of said person is likely to present certain dangers to himself or others. Third, the Court posits that because the Government has a substantial interest in ensuring that a person accused of a crime is available for trial, it is imperative that it be known whether the new arrestee, according to the DNA database, committed another crime. In other words, if the arrestee knows that he committed another crime, prior to the one for which he was just arrested, he may be more likely to flee the present charges lest he also be charged with the prior offense while in custody. Fourth, the Court contends that it is essential that an arrestee’s past conduct be known, through DNA comparison, so as to allow the authorities to better assess the potential danger he poses to the public if released on bail. Finally, the Court emphasized the importance of DNA collection as a means of positively identifying the perpetrator of a serious crime for which someone may have been wrongfully charged or imprisoned.

Perhaps the most significant of these reasons discussed by the Court, and the one that logically leads the Court to its ultimate decision that DNA collection is not unreasonable under the Fourth Amendment, is that DNA collection is nothing more than 21st century fingerprinting.<sup>18</sup> Citing to a long line of cases holding that fingerprinting upon arrest does not violate the Fourth Amendment, the Court opines that “the most direct historical analogue to the DNA technology used to identify respondent is the familiar practice fingerprinting of arrestees.”<sup>19</sup> The Court goes on to explain that “DNA identification is an advanced technique superior to fingerprinting in many ways, so much so that to insist on fingerprints as the norm would make little sense to either the forensic expert or a layperson.”<sup>20</sup>

Justice Scalia’s dissent enthusiastically points out that to the extent that the Maryland law is being defended as an important means of identifying arrestees, it is flawed. Scalia’s point is that because the Maryland authorities did not, and legally, could not, process King’s DNA until sometime well after his arrest, it cannot be said that the collection was necessary to confirm his identity. On its face, this point is a very good one. In fact, a DNA collection law that requires or, at least, allows for the immediate analysis of a sample taken from an arrestee may be more logical as long as verification of identity is proffered as a justification for the law. This issue may soon be moot, however, as technological advances rapidly close-in on making nearly immediate analysis of DNA samples a reality. One can envision a reality in the very near future in which identity verification through DNA sample will be possible within minutes, if not seconds of collection.

Beyond the identification rationale, the Court observed that DNA testing would not only “speed up apprehension of criminals before they commit additional crimes,” but could also “prevent the grotesque detention of innocent people.”<sup>21</sup> While not as fully developed in the Court’s opinion as might have been warranted, this is perhaps one of the best arguments for a robust, timely, and accurate DNA collection and analysis regime. This argument is especially compelling when one considers the racial make-up of those hundreds of convicts who have been exonerated with DNA evidence since the advent of the technology.

According to the Innocence Project, an organization dedicated to assisting wrongfully convicted prisoners with proving their innocence through DNA testing, there have been 311 post-conviction DNA exonerations in the United States since 1989.<sup>22</sup> Indeed, 18 of the 311 people exonerated with DNA evidence had actually been sentenced to death.<sup>23</sup> The average length of time wrongfully served by these exonerees is 13.6 years.<sup>24</sup> Of the 311 persons exonerated through DNA, nearly 70% were people of color.<sup>25</sup> Of these hundreds of exonerations, one stands out as an example of just how important this technique can be in preventing gross miscarriages of justice.

In 1987, Chester Turner was arrested for assault in California, but was later released for lack of evidence. At the time of his arrest, California law did not provide for the collection of his DNA. Turner was subsequently arrested nineteen more times before finally being convicted on rape charges in 2002. Upon this conviction, because of an intervening change in California law, Turner's DNA was collected, analyzed, and matched to DNA evidence collected from twelve rape and murder victims, the first of which was found dead only two months after his 1987 arrest. Clearly, the subsequent crimes could have been prevented had Turner's DNA profile been obtained upon his initial arrest. The Turner example is made even more compelling, however, by the fact that David Jones, a mentally disabled janitor, was wrongfully convicted of three of Turner's murders and served 11 years in prison for crimes he did not commit. Again, had Turner's DNA been obtained upon his first arrest, Jones' wrongful conviction and more than a decade of incarceration never would have occurred.<sup>26</sup>

So, despite the Court's only brief mention of this issue, it seems to provide a significant justification for the collection of as large a DNA database as possible. The irony here is potentially quite tragic. Many opponents of the Court's decision in *Maryland v. King* contend that DNA collection upon arrest will disproportionately affect persons of color, a fact that is beyond dispute given that a disproportionately large percentage of arrestees are persons of color. As noted above, it is also beyond dispute that a disproportionately large number of those who have been proven to be wrongfully convicted are persons of color. The critics ignore the obvious fact that only with a robust DNA collection regime can the DNA database work to effectively provide evidence of innocence in cases in which a wrongful conviction is alleged.

## V. CONSTITUTIONAL BALANCING

As noted previously, the Court's opinion in *Maryland v. King* makes clear that a warrantless DNA collection does constitute a search. Whether such a search is reasonable therefore rests on a balancing between the needs of the state, and the suspect's reasonable expectations of privacy.<sup>27</sup> After a careful weighing of these competing interests, the Court found the procedure to be reasonable.

In reaching its conclusion, the Court first examined the history of scientific advancements utilized by law enforcement as part of their standard procedures for the identification of arrestees.<sup>28</sup> First with photography, and later "Bertillon" measurements, and eventually fingerprinting, law enforcement

authorities, the Court observed, have long adopted technological advancements to assist with the objective of accurately identifying arrestees as part of the routine booking process. On this point, the Court concluded as follows:

In sum, there can be little reason to question 'the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution.' To that end, courts have confirmed that the Fourth Amendment allows police to take certain routine 'administrative steps incident to arrest—i.e., . . . book[ing], photograph[ing], and fingerprint[ing].' DNA identification of arrestees, of the type approved by the Maryland statute here at issue, is 'no more than an extension of methods of identification long used in dealing with persons under arrest.' In the balance of reasonableness required by the Fourth Amendment, therefore, the Court must give great weight both to the significant government interest at stake in the identification of arrestees and to the unmatched potential of DNA identification to serve that interest.<sup>29</sup>

Even having concluded that the government interests at stake here were significant, the Court acknowledged that that fact alone is not enough to justify a search.<sup>30</sup> "The government interest must outweigh the degree to which the search invades an individual's legitimate expectations of privacy."<sup>31</sup> Relying on its own precedent, the Court then observed that "expectations of privacy of an individual taken into police custody 'necessarily [are] of a diminished scope.'"<sup>32</sup> Quick to clarify that not just any search is reasonable simply because a person is in custody, the Court explained that a warrantless search incident to arrest, in order to be reasonable under the Fourth Amendment, must present only a "brief" and "minimal" intrusion, and concluded that in *King* the intrusion in question "does not increase the indignity already attendant to normal incidents of arrest."<sup>33</sup>

The Court then concluded its analysis by balancing the various government interests discussed above with the minimal intrusion presented by the DNA collection procedure, and finally confronted the question of reasonableness. Summing up the Court's opinion, Justice Kennedy wrote:

Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.<sup>34</sup>

In so concluding, the Court essentially held that DNA collection is, in fact, just another booking procedure, no different, constitutionally, than other police booking procedures like photographing and fingerprinting which are reasonable under the Fourth Amendment.

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## VI. THE DISSENT

Justice Scalia wrote a stinging dissent, and was joined by three Justices not typically associated with his jurisprudential worldview—Justices Ginsburg, Sotomayor, and Kagan. It is interesting to note that in dissenting, President Obama's two appointees on the Court, Justices Sotomayor and Kagan, rejected his own Department of Justice's position in the case, very ably argued by Deputy Solicitor General Michael Dreeben.

In any event, the dissent essentially clung to the view of the Fourth Amendment that holds that a search is unreasonable when there is no basis for believing that the person searched is guilty of a crime or is believed to be in possession of incriminating evidence. Indeed, the dissent opined that the prohibition of such searches "is categorical and without exception; it lies at the very heart of the Fourth Amendment."<sup>35</sup>

The dissent most effectively attacked the "identification" purpose put forth by the Court, correctly noting that because, under the Maryland scheme, the DNA collected was not actually analyzed until well after the booking process was completed and bail decisions were made, the idea that the DNA swab was an important part of simply determining the arrestee's identity wasn't quite right.

At bottom, the dissent espouses a traditional, although perhaps increasingly minority view that the Fourth Amendment's two major clauses, the Warrant Clause and the Reasonableness Clause, are to be read together, conjunctively, leading to an analytical framework in which the Warrant Clause defines, in a way, whether a search is to be deemed reasonable.<sup>36</sup> Although rejected by the majority opinion, this view has long held sway with constitutional scholars and has caused at least one to suggest that Justice Kennedy's opinion in *Maryland v. King* "signals the demise of the warrant standard."<sup>37</sup>

## VII. WHY THE MAJORITY GOT IT RIGHT

Despite a 5-4 split between the members of the Court, with unusual alliances on both sides, and despite a forceful dissent, the majority opinion seems like the right one for two different, but related reasons, one constitutional and the other practical.

First, it seems that the majority opinion reflects an accurate reading of text of the Fourth Amendment. The dissent's reliance on "individualized suspicion" as the basis for all searches doesn't find support in the actual language of the Fourth Amendment. Instead, the Fourth Amendment merely requires that searches and seizures not be "unreasonable." Indeed, nowhere in the dissent is there a citation to any source from the founding documents which would support the dissent's view of the Fourth Amendment as the one intended by the drafters. Although the dissent does correctly describe the Constitution's drafters as being disdainful of "general warrants," this case was, of course, not about a warrant. While the Fourth Amendment does clearly prohibit general warrants, i.e. warrants lacking in probable cause, the part of the Amendment which regulates warrants cannot be said to apply where there is no warrant at issue. As two learned commentators observed about the dissent on the day of the Court's decision: "The words of the Fourth Amendment mean exactly what they say. Warrantless searches

are unconstitutional only if they are 'unreasonable.' That rule, and no other, is the true 'heart of the Fourth Amendment.'"<sup>38</sup> While other commentators clearly disagree, and have reacted with alarm that the majority opinion seems to eviscerate the Fourth Amendment as we know it, it appears more likely that the opinion does nothing more than apply the tried and true, and textually mandated, "unreasonable" standard to a new type of search—the DNA swab. And in doing so, the majority simply concludes that, all things considered, the DNA swab, while clearly a search which involves some minor intrusion, is not unreasonable under the Fourth Amendment.

The second reason why the majority opinion seems like the right one is the practical logic of its conclusion that the DNA swab, while a warrantless search, is not an unreasonable one under the Fourth Amendment. It is obvious to anyone who has seen the criminal justice system up close that arrestees are, as the Court observed, in a unique category as compared with the general population of citizens. By virtue of their presumably lawful arrest, i.e. with probable cause, arrestees are, in fact, in the system, so to speak. Once in the system, and even before conviction, an arrestee simply does not possess the same freedoms as an ordinary person on the streets. This is the reality that is often lost on the critic who is quick to fret about the fact that at the time of arrest, the arrestee hasn't been convicted of anything yet. Of course he hasn't, but his liberty must, nevertheless, be reasonably diminished at the very point of arrest and to some extent until the outcome of the case against him if our system of arrest and trial is to work at all. That reality of diminished liberty before conviction, found to be constitutionally sound by way of a steady string of Supreme Court decisions through the years, typically includes one or more of the following "intrusions"—handcuffing, medical screening, strip searching, forfeiture of personal property, photographing, and fingerprinting. All of these intrusions, clear invasions of privacy and obvious restraints on liberty, have been deemed by the Court, and are considered by citizens generally, to be not "unreasonable" searches that can be considered as part of the legitimate police booking procedure and, therefore, not in violation of the Fourth Amendment. Updating that list to include a DNA swab seems to be an eminently logical step for the Court to take.

## Conclusion

During oral argument in *Maryland v. King*, Justice Alito posed the following question: "Why isn't this [DNA collection upon arrest] the fingerprinting of the 21<sup>st</sup> century?" The inescapable answer seems to be that it is. And because it is, even though a search, it is not an unreasonable search. This is the Court's essential holding of the case. But, beyond the narrow issue presented by case, what exactly is the Court saying with its decision in this case, and how broad is its holding vis-à-vis Fourth Amendment jurisprudence? The answer seems to be that it is *very* broad. In its decision, the Court is clearly not only upholding the Maryland law, but confirming that the disjunctive view of the Fourth Amendment, the one that sees the Warrant Clause and the Reasonableness Clause as two separate standards, as the correct view. Under this view, the

Warrant Clause applies only when an actual warrant is at issue, and the Reasonable Clause provides the default guidepost that applies generally in the absence of a warrant. This was clearly the view of not only the State of Maryland, but also of the United States whose brief argued that “[t]he ‘touchstone’ of a Fourth Amendment analysis ‘is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.’”<sup>39</sup> Indeed, Justice Kennedy’s opinion declared quite clearly, and broadly, that the “touchstone of the Fourth Amendment is reasonableness, not individualized suspicion.”<sup>40</sup> By considering a 21st century law enforcement reality in light of the actual text of the Fourth Amendment, the Court seems to have gotten it right.

## Endnotes

- 1 Maryland v. King, 569 U.S. \_\_\_, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013).
- 2 Transcript of Oral Argument at 35, *Maryland v. King*, 133 S.Ct. 1958 (No. 12-207). See also Colin Stranger, *A Visual Guide to Maryland v. King*, AMERICAN CRIMINAL LAW REVIEW (March 20, 2013, 22:43), available at <http://www.americancriminallawreview.com/Drupal/blogs/blog-entry/visual-guide-maryland-v-king-03-20-2013>; Jennifer K. Wagner, *All Eyes on Maryland v. King: Recapping the Supreme Court Oral Argument*, GENOMICS L. REP. (February 27, 2013); Sona Makker, *Maryland v. King – Supreme Court Says Government Can Take Criminals’ Blood*, ARTICLE3 (June 10, 2013).
- 3 The Maryland DNA Collection Act, MD. CODE ANN. PUB. SAFETY § 2-501 et. Seq. (West 2009).
- 4 *Maryland v. King*, 133 S.Ct. at 1966.
- 5 MD. CODE ANN. PUB. SAFETY § 2-501 et. Seq. (West 2009).
- 6 MD. CODE ANN. PUB. SAFETY § 2-504(d)(1) (West 2009).
- 7 *Id.* at 2-506; *Id.* at 2-511.
- 8 ALA. CODE §§36-18-25 (2009); ALASKA STAT. §44.41.035; ARIZ. REV. STAT. §13-610 (2009); ARK. STAT. ANN. §§12-12-1006, 1105, 1109 (2009); CAL. PENAL CODE §296 (2009); COLO. REV. STAT. §16-23-103; CONN. GEN. STAT. §54-102G (2009); DEL. CODE ANN. TIT. 29, §4713 (2009); FLA. STAT. §943.325 (2009); GA. CODE. §24-4-60 (2009); HAWAII REV. STAT. §844D-31 (2009); IDAHO CODE §19-5506 (2009); ILL. REV. STAT. CH. 730, §5/5 4 3 (2009); IND. CODE, §10-13-6-10 (2009); IOWA CODE §TITLE III SUB. 1 81.2 (2009); KAN. STAT. ANN. §21-2511 (2009); KY. REV. STAT. §17.170 (2009); LA. REV. STAT. ANN. §15:609 (2009); ME. REV. STAT. ANN. TIT. 25, §1574 (2009); MD. PUBLIC SAFETY CODE ANN. §2-504(2009); MASS. GEN. LAWS. ANN. CH.22E, §3 (2009); MICH. COMP. LAWS §750.520M (2009); MINN. STAT. §299C.105 (2009); MISS. CODE ANN. §47-5-183 (2009); MO. REV. STAT. §650.055 (2009); MONT. CODE ANN. §44-6-103 (2009); NEB. REV. STAT. §§29-4103, 4106; NEV. REV. STAT. §176.0913 (2009); N.H. REV. STAT. ANN. §651-C:2 (2009); N.J. REV. STAT. §53:1-20.20 (2009); N.M. STAT. ANN. §29-16-3,6 (2009); N.Y. EXEC. LAW §995-C (McKinney 2009); N.C. GEN. STAT. §15A-266.4 (2009); N.D. CENT. CODE §31-13-03 (2009); OHIO REV. CODE ANN. §2901.07 (PAGE 2009); OKLA. STAT. TIT. 74, CH.5 §150.27A (2009); OR. REV. STAT. §137.076 (2009); PA. CONS. STAT. TIT. 44, §2316 (2009); R.I. GEN. LAWS. §12-1.5-8 (2009); S.C. CODE ANN. §23-3-620 (Law. Co-op 2009); S.D. CODIFIED LAWS ANN. §§23-5A-1,4,5 (2009); TENN. CODE ANN. §40-35-321(2009); TEX. GOVERNMENT CODE ANN. §411.1471(2009); UTAH CODE ANN. §§53-10-403, 403.5, 404 (2009); VT. STAT. ANN. TIT. 20, §§1932, 1933, 1936 (2009); VA. CODE, §19.2-310.2:1 (2009); WASH. REV. CODE ANN. §43.43.754 (2009); W. VA. CODE §15-2B-6 (2009); WIS. STAT. §973.047(2009); WYO. STAT. §7-19-403(2009).
- 9 2 U.S.C. § 14135a(a)(1)(A); ALA. CODE §36-18-24 (2009); ALASKA STAT. §44.41.035; ARIZ. REV. STAT. §13-610 (2009); ARK. STAT. ANN. §§12-12-1006, 1105 (2009); CAL. PENAL CODE §§296, 296.1, 299 (West 2009); COLO. REV. STAT. §§16-23-103 (2009); FLA. STAT. §943.325 (2009); KAN. STAT. ANN. §21-2511 (2009); LA. REV. STAT. ANN. §15:609 (2009); MD. PUBLIC SAFETY CODE ANN. §2-504(2009); MICH. COMP. LAWS §750.520M (2009); MINN. STAT. §§229C.11, 299C.105 (2009); N.M. STAT. ANN. §29-3-10 (1978);

N.C. GEN. STAT. §§15A-266.3A, 502A; N.D. CENT. CODE §31-13-03 (2009); OHIO REV. CODE ANN. §2901.07(PAGE 2009); S.C. CODE ANN. §23-3-620 (Law. Co-op 2009); S.D. CODIFIED LAWS ANN. §§23-5A-5.2,5A-1(2009); TENN. CODE ANN. §40-35-321(2009); TEX. GOVERNMENT CODE ANN. §411.1471(Vernon 2009); UTAH CODE ANN. § 53-10-403; VT. STAT. ANN. TIT. 20 §§1932 ,1933 (2009); VA. CODE. §19.2-310.2:1 (2009).

- 10 *Maryland v. King*, 133 S.Ct. at 1968.
- 11 *Id.* at 1966.
- 12 *Id.* at 1968.
- 13 *Id.* at 1969.
- 14 *Id.*
- 15 *Id.*
- 16 *Id.*
- 17 *Id.* at 1969-70.
- 18 *Id.* at 1976.
- 19 *Id.*
- 20 *Id.*
- 21 *Id.* at 1974.
- 22 *DNA Exonerations Nationwide*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/DNA\\_Exonerations\\_Nationwide.php](http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php) (last visited December 9, 2013).
- 23 *Id.*
- 24 *Id.*
- 25 *Id.*
- 26 Christine Pelisick, *Death Penalty for Chester Turner*, LA WEEKLY, <http://www.laweekly.com/2007-05-17/news/death-penalty-for-chester-turner/> (May 15, 2007).
- 27 *Maryland v. King*, 133 S.Ct. at 1979.
- 28 *Id.* at 1987.
- 29 *Id.* at 1977.
- 30 *Id.* at 1977-78.
- 31 *Id.* at 1977.
- 32 *Id.* at 1978.
- 33 *Id.* at 1979.
- 34 *Id.* at 1980.
- 35 *Id.*
- 36 Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 HARV. L. REV. 161, 183 (2013).
- 37 *Id.* at 184.
- 38 Akhil Reed Amar & Neal K. Katyal, *Why the Court Was Right to Allow Cheek Swabs*, N.Y. TIMES, June 3, 2013.
- 39 Brief for the United States as Amicus Curiae Supporting Petitioner at 11, *Maryland v. King*, 569 U.S. \_\_\_, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013).
- 40 *Maryland v. King*, 133 S.Ct. at 1970.



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## The Scalia Dissent in *Maryland v. King*: Exposing a Contrived Rationale Today and a Dangerous Precedent for Tomorrow

By Norman L. Reimer\*

### Introduction

In one of the most important Fourth Amendment cases the Supreme Court has considered in an era of ever-increasing technological advances, the Court divided sharply. The ideological fault lines, however, were as noteworthy for the lineup as they were for the substance of the disagreement. In *Maryland v. King*,<sup>1</sup> the Court upheld a Maryland statute that requires the compulsory extraction of buccal specimens from the mouths of arrestees to enable law enforcement to try to match the arrestee's DNA profile to DNA associated with unsolved crimes. That Justice Kennedy wrote the majority opinion for the five justices who voted to reverse the Maryland Court of Appeals and uphold the program is hardly surprising. He is frequently the swing vote on the current Supreme Court. And it is not all that unusual to see Justice Antonin Scalia in the dissent. But the fact that his dissent, which was powerful, almost to the point of stridency, was joined by Justices Ginsburg, Sotomayor and Kagan is both unusual and noteworthy.

For a second consecutive Supreme Court term, Justice Scalia found common ground with Justices who are generally characterized as liberal in addressing the Fourth Amendment implications of new technologies.<sup>2</sup> That a staunchly conservative Justice, who has long been viewed as a strict constructionist, is troubled by unchecked law enforcement exploitation of techniques unimaginable when the Constitution and the Bill of Rights were adopted may portend a jurisprudential realignment with profound implications. The sharp divide in *Maryland v. King*, and the nature of the core disagreement, suggests that when it comes to law enforcement's immense capacity to employ technology to the detriment of individual liberty and privacy, traditional ideological perspectives are less important than a more fundamental divide over how much power may be ceded to government. The case illuminates the core question of whether and to what extent the Fourth Amendment retains any vitality and relevance in the 21<sup>st</sup> century and beyond. That concern permeates the Scalia dissent. Justice Scalia's primary focus is on what he perceives to be the majority's disingenuous justification for upholding the DNA collection program. More importantly, he correctly recognizes that the Court's flawed rationale sets a dangerous precedent that may pave the way for an extraordinary degradation of the Fourth Amendment, with

far reaching consequences for Americans' individual liberty and privacy rights.

### I. THE CORE DISAGREEMENT: WAS DNA COLLECTED FOR IDENTIFICATION PURPOSES?

"The Court's assertion that DNA is being taken, not to solve crimes, but to *identify* those in the State's custody, taxes the credulity of the credulous."<sup>3</sup> Thus does Justice Scalia take dead aim at the heart of the majority opinion. In order to justify the blanket extraction of DNA from arrestees, without probable cause or any individualized suspicion, the Court had to shoehorn this case into something akin to the narrow category of "special needs cases" in which such searches are permitted.<sup>4</sup> The Court had to overcome both the core concern with general searches that led to the adoption of the Fourth Amendment and the Court's own jurisprudence that the Fourth Amendment "generally bars officials from undertaking a search or seizure absent individualized suspicion."<sup>5</sup> So what is the government necessity that the Court relied upon? Identification of the accused. "The legitimate government interest served by the Maryland DNA Collection Act is one that is well established: the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody."<sup>6</sup>

The Court seeks to justify the DNA collection as a necessary identification tool attendant to the arrest and ensuing court process. It went to great lengths to explain that the process of collecting, analyzing, and comparing a suspect's DNA is essential to ensure that the person is who he says he is. The process is analogized to taking an arrest photo, recording body measurements, or fingerprinting the accused. Additionally, it is suggested that the procedure is necessary to inform bail decisions and to ensure that the person remains available for trial. Finally, although the Court avoids expressly justifying its opinion by reference to the obvious benefit of using the DNA sample to solve a crime, as indeed was the case with Mr. King, the Court does contend that the procedure can potentially free an innocent accused person.<sup>7</sup>

The Scalia dissent eviscerates this analysis. He sees the Court's characterization of the DNA search as an identification tool rather than as a crime solving technique as essential to its application of a "free-form 'reasonableness' inquiry."<sup>8</sup> Faced with well-established jurisprudence that generalized, suspicionless searches to detect evidence of criminal wrongdoing are strictly prohibited, Justice Scalia suggests that the Court has contorted the term "identification" to avoid the obvious truth that the true purpose of the DNA search is to solve unsolved crime.<sup>9</sup> His attack on the identification rationale is meticulous, and has ample support in the record, the briefing, and the oral argument of the case.

### II. SCALIA IS RIGHT THAT THE DNA WAS NOT TAKEN FOR IDENTIFICATION PURPOSES—BUT FOR HOW LONG?

As presented to the Court, the facts belie the suggestion that Alonzo King's DNA was taken to verify his identity or to inform any decision with respect to bail. The authorizing statute expressly identifies five purposes for the collection of DNA samples, one of which is "as part of an official investigation

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into a crime,” and none of which is to establish the identity or history of the arrestee.<sup>10</sup> Second, Maryland’s Governor and Attorney General both hailed the decision of the Supreme Court to hear the state’s appeal of the Maryland high court’s finding of unconstitutionality as opening the door to their continued use of the program to resolve open investigations and to fight crime.<sup>11</sup> Third, Maryland law prohibited testing of the specimens or putting them in the database, without consent, until after the arrestee’s arraignment date—hence it clearly was not necessary to identify King in the same way as an arrest photograph or fingerprints.<sup>12</sup>

Fourth, the sequence of events clearly undercuts the identification rationale. King was arrested on April 10, 2009, the same day on which the specimens were taken from him, but they were not sent to the Maryland State Police Forensic Sciences Division for two weeks, and then they were not sent to the lab for testing for another two months. The lab data was not entered in the Maryland DNA database until July 13, 2009, and the match to the unsolved crime did not occur until August 4, 2009—nearly four months after King’s arrest—when King’s profile was matched with a sample from the scene of an unrelated crime that was in the Federal Bureau of Investigation’s national database. Clearly, this process had nothing to do with King’s identity, and everything to do with solving an unsolved crime.

There is another major factor which persuasively demonstrates the true purpose of the DNA seizure. As Justice Scalia explains, the FBI’s DNA database includes two separate collections: one is from known convicts and arrestees and one is from samples taken from crime scenes. If the purpose of the Maryland procedure was to identify King, the specimen would have only been submitted for comparison to the database with known individuals, as opposed to the one with samples from unsolved crimes.<sup>13</sup> But, in fact it was compared with the unsolved crime database.

Furthermore, although the State tried to emphasize identification as the valid governmental interest in its main brief, it acknowledged that a stated purpose of the enabling Act was “official investigation into a crime[.]” and underscored its value as a tool to “narrow its field of suspects and save investigative resources[.]” and that “[i]t can solve crimes faster. . . .”<sup>14</sup> In its reply brief, the State went even further, boasting of the number of arrestee matches to unsolved crimes that had been achieved since the Supreme Court granted the stay allowing the State to resume the collection of DNA samples from arrestees, and generally asserted that expansion of DNA databases “has been shown to reduce crimes rates overall.”<sup>15</sup> Finally, any remaining doubt that the true purpose of the program is to solve crimes was put to rest the moment the State’s attorney opened her mouth at the oral argument. In the very first sentence of her argument, she recited the number of arrestee matches, prosecutions and convictions that had resulted from the arrestee DNA seizures since the program started in 2009 as proof of the fact that the Act is working.<sup>16</sup>

Ironically, however, while there is no doubt that identification was clearly not the purpose of the DNA seizure in the *King* case, Justice Scalia’s focus on that flawed justification

may in the near future prove to be a moot analysis. And that is why his underlying concern with the mass collection of DNA samples without any particularized suspicion and solely on the basis of an amorphous reasonableness analysis is so very right.

During the oral argument, the notion that taking DNA specimens from arrestees is somehow pertinent to bail determinations was probed by the Justices. The State’s attorney responded that in Maryland the lab is now getting results in 11 to 17 days. And in arguing for the United States, as an amicus in support of the State, the Deputy Solicitor General noted that the day will soon be at hand when DNA analysis can be completed within 90 minutes—and devices will be present in booking stations for immediate use upon arrest.<sup>17</sup> Justice Kennedy noted the apparent advances that reduce the time to procure results in his opinion for the Court.<sup>18</sup> Justice Scalia dismissed the Court’s authority for that conclusion, as well as its uncritical acceptance of the government’s representation at oral argument that DNA may soon be accomplished in mere minutes.<sup>19</sup> But then Justice Scalia offers an observation that illustrates why the amorphous balancing test relied upon by the majority is so problematic, and of far greater moment than the currently bogus identification justification:

At most, this [alleged improving capacity to rapidly test DNA] demonstrates that it may one day be possible to design a program that uses DNA for a purpose other than crime-solving—not that Maryland has in fact designed such a program today. . . . The issue before us is not whether DNA can *some day* be used for identification; nor even whether it can *today* be used for identification; but whether it *was used for identification* here.<sup>20</sup> (emphasis in original)

It is appropriate to cabin a court’s decision to the facts of the case before it. But, as elegantly and meticulously as the Scalia dissent dissects and rebuts the identification rationale for the DNA searches of King, the fact is that technology will progress. There will come a day when rapid identification will not only be facilitated by the extraction of DNA specimens, but also by other emerging technologies, such as mass recording of phone calls, email analysis, license plate readers, GPS tracking, cellular tracking technologies, facial recognition imaging, and limitless other devices. And the government will claim a substantial interest in verifying identification in a wide range of activities besides the processing of arrestee. It is for this reason that the dissent’s fundamental concern with warrantless, suspicionless searches is so right, and why the Court’s “reasonableness” test is so problematic and, frankly, dangerous.

### III. THIS COURT’S BALANCING TEST EVISCERATES FOURTH AMENDMENT PROTECTIONS

The overarching rationale of the Scalia dissent is that the Fourth Amendment does not permit a search to be upheld by resort to a reasonableness inquiry unless there is a lawful government purpose other than crime-solving. And since under the majority’s contorted analysis virtually all the law enforcement techniques that seek to solve crimes can be packaged as furthering identification, the kind of balancing used by the

Court will seriously erode the Fourth Amendment. Whether it is NSA surveillance and recording of telephone calls, government review of email accounts, GPS tracking data, license plate readers, or the video surveillance that is now routinely deployed throughout the nation, all of this can be used to determine if a person has committed—or is planning a crime.<sup>21</sup> Under the Court’s rubric, the search of all of this data is justified because it can serve as a means of verifying identification. There will always be an assertion that the government has an overriding interest in establishing a person’s identity through the very same tools that will establish whether a person has committed a crime or is contemplating doing so. And, of course, a claim that an investigative tool may solve a violent crime or prevent one inevitably tips the scale against the individual—even though there is no reason whatsoever to suspect the individual of wrongdoing unrelated to the purpose for which identification is being verified.<sup>22</sup>

The Court both trivializes the privacy rights of arrestees, and the potential frequency with which these intrusions will occur. The Court dismisses the compulsory extraction of cells from the mouth of an arrestee as a procedure that is “quick and painless.” On the other hand, Justice Scalia, and one might suspect a substantial majority of the population, sees the procedure as an atrocious affront to liberty and human dignity.<sup>23</sup>

To appreciate the magnitude of the threat, one must appreciate the frequency with which these intrusions are already occurring, the disparate impact on certain populations, and the hardships imposed upon those whose DNA profile is innocently linked to that recovered from an unsolved crime scene.

Consider the size of the class of people who will be subject to these DNA searches. While the Maryland statute limited the taking of specimens from those arrested for serious felonies that are supported by probable cause, there was no such limitation in the Court’s decision. According to the FBI’s Uniform Crime Reporting Data, in 2011, for example, there were approximately 12,408,899 arrests in the United States, which was down over 700,000 from 2010,<sup>24</sup> and, as the Scalia dissent noted, nearly one-third of Americans are arrested for some offense by age 23.<sup>25</sup> Even prior to the decision at least 28 states permitted collection of DNA specimens from arrestees, several including those charged only with misdemeanors.<sup>26</sup> And, while the Maryland statute required that the DNA results should be purged from the database if the underlying charge is dismissed or resulted in exoneration, many other statutes do not have such a requirement, nor did the Court impose one.<sup>27</sup> Hence, countless thousands who are arrested, irrespective of whether or not they actually did anything wrong or eventually get convicted, have their DNA permanently entered in DNA databases.<sup>28</sup>

It is also important to note that DNA databases are proliferating in this nation. Numerous counties and cities have developed their own DNA databases. Many operate without clear cut criteria for the collection and use of the information, or engage in practices that are entirely ad hoc, including taking DNA from mere suspects and retaining it even if the person is never charged with a crime.<sup>29</sup> One especially egregious program that recently came to light operates in Orange County, Cali-

fornia. Law enforcement maintains a database with 100,000 profiles, including samples from persons charged with minor offenses, and frequently obtains samples as part of an agreement to drop charges or offer a plea deal.<sup>30</sup>

Since the Court’s rationale provides no doctrinal basis to limit the DNA seizures to serious felonies, there is every reason to believe that widespread collection of DNA samples will proliferate without limitation. Indeed, several Justices recognized this at the oral argument, and not just those who joined the dissent. Chief Justice Roberts noted that under the State’s theory “there’s no reason you couldn’t undertake this procedure with respect to anybody pulled over for a traffic violation[,]” suggesting that just like police officers give Breathalyzer tests, they could take a DNA sample.<sup>31</sup> Among the dissenters, Justice Ginsburg wondered why samples could not be taken at a *Terry* stop,<sup>32</sup> and Justice Kagan speculated that the State’s theory could apply to “any arrestee, no matter how minor the offense,” or even to “any old person in the street” or “for everybody who comes in for a driver’s license.”<sup>33</sup> Justice Sotomayor expressed concern that the identification rationale could apply “each time [the State] has some form of custody over you, in schools, in workplaces, wherever else the State has control over the person[.]”<sup>34</sup>

Lest these concerns be dismissed as merely the speculative probing that occurs at oral argument, it is noteworthy that in analogizing the collection of DNA to fingerprinting as a standard means of identification, Justice Kennedy in the Court’s opinion referenced how the perpetrator of the Oklahoma City bombing, one of the terrorists involved in the September 11 attacks, and a noted serial killer had all been stopped for minor driving offenses just before or after the commission of those heinous crimes. Clearly, the Court was not signaling any intent to limit DNA extraction programs to the relatively confined contours of the Maryland program. One can easily envision the identification rationale applied to myriad governmental contacts, such as obtaining a driver’s license, registering a motor vehicle, gaining admission to a school, proving one’s immigration status, or even entering a government building.

Furthermore, in terms of the adverse societal impact of such programs, the burden will fall disproportionately on racial and ethnic minorities.<sup>35</sup> For example, the nation’s largest city has long maintained one of the most massive stop-and-frisk programs in the nation, with a proven disparate impact on minorities.<sup>36</sup> Is society prepared to further perpetuate disparity by disproportionately maintaining the profiles of minorities in massive databases? Whether or not purposefully designed stop-and-frisk programs are ultimately held to be unconstitutional, there will always be the potential for abuse of discretion in individual cases. Should an unwarranted stop enable the collection and entry of person’s DNA into a database?

Finally, there is an aspect to these DNA extraction programs that the Court completely ignored, even though the State’s Attorney red-flagged the issue for the Court. The very same statistics that were cited to show what an effective tool the program had been for solving crimes, also show that it can result in untold misery for innocent people whose DNA has been routinely seized. The attorney noted that the 225 matches resulted in 75 prosecutions and 42 convictions. But what about



those 150 cases that did *not* result in prosecutions?<sup>37</sup> What were those people, whose DNA was either erroneously or innocently linked to the scene of a serious crime, put through? The DNA of some these individuals may have been at a crime scene for entirely innocent purposes. Alternatively, it is highly likely that the match may have been erroneous. While DNA is unquestionably a valuable law enforcement tool, and can provide the exclusion necessary to exonerate the wrongfully convicted, it is neither foolproof nor exempt from myriad flaws that result in false database hits.<sup>38</sup> When viewed through this lens, it is clear that massive DNA collection poses a significant threat to liberty for countless thousands who will have engaged in no wrongdoing.

### Conclusion

During the oral argument, Justice Alito, who joined the majority, observed that this is one of the most important criminal procedure cases the Court has heard in decades.<sup>39</sup> That is no understatement. Technological advance has driven society to a critical juncture. Will the Founder's articulation of the Fourth Amendment as a bulwark against generalized searches endure in this new age? *Maryland v. King* does not bode well. But the Scalia dissent underscores this core American principle that hopefully, in the fullness of time, will emerge transcendent:

Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives that the protection of our people from suspicionless law-enforcement searches. The Fourth Amendment must prevail.<sup>40</sup>

### Endnotes

- 1 *Maryland v. King*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013).
- 2 In 2012, Justice Scalia wrote the majority opinion in *United States v. Jones*, in which the Court held that the attachment of a GPS tracking device to a suspect's car, and its subsequent use to monitor that vehicle's movements constitutes a search under the Fourth Amendment. *United States v. Jones*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). Justice Sotomayor, who also filed a separate concurrence, joined in the Court's opinion. And Justices Breyer, Ginsburg and Kagan concurred in the judgment, joining Justice Alito's concurrence.
- 3 *Maryland v. King*, 133 S.Ct. at 1980 (Scalia, J., dissenting) (emphasis in original).
- 4 Somewhat curiously, the Court considers the DNA seizure with the so-called special needs cases as "background." *Maryland v. King*, 133 S.Ct. at 1969-70. These cases generally uphold warrantless searches or seizures on that ground that some governmental interest constitutes a special need other than a general law purpose, such as searches of parolees (*Samson v. California*, 547 U.S. 843 (2006)), or blood and urine testing of railroad employees implicated in accidents or safety violations (*Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989)). But later in the opinion, the Court specifically eschews the applicability of the special needs category of cases to the DNA extraction program. *Maryland v. King*, 133 S.Ct. at 1978. Justice Scalia cites this paradox as evidence that the Court's opinion lacks any coherent rationale other than that the DNA search is useful to solve crime. *Id.* at 1982-83 (Scalia, J., dissenting).
- 5 *Chandler v. Miller*, 520 U.S. 305, 308 & 313-14 (1997) (striking down a Georgia law that required candidates for public office to pass a drug test without any particularized suspicion) ("When such 'special needs' -- concerns other than crime detection -- are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties," *Id.* at 314). See also *Indianapolis v. Edmond*, 531 U.S. 32, 38 (2000) (invalidating Indianapolis narcotics checkpoint program designed to uncover evidence of

ordinary criminal wrongdoing) ("[i]n none of these cases...did we indicate approval of a [search] whose primary purpose was to detect evidence of ordinary criminal wrongdoing.")

- 6 133 S.Ct. at 1970.
- 7 "Finally, in the interests of justice, the identification of an arrestee as the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned for the same offense." *Maryland v. King*, 133 S.Ct. at 1974. In fact, though, as Justice Scalia points out in a footnote, "this procedure has nothing to do with exonerating the wrongfully convicted" -- inasmuch as the arrestee's sample is only compared to unsolved crimes and not to solved crimes where a potentially innocent person was convicted. See 133 S.Ct. at 1982, n.2 (Scalia, J., dissenting).
- 8 133 S.Ct. at 1982 (Scalia, J., dissenting).
- 9 See *supra* note 5.
- 10 MD Code, Public Safety, § 2-505(a); 133 S.Ct. at 1982 (Scalia, J., dissenting).
- 11 133 S.Ct. at 1985 (Scalia, J., dissenting). Indeed, in a reference that may not foster feelings of great collegiality, Justice Scalia also noted that when Chief Justice Roberts in his capacity as the Justice assigned to the Fourth Circuit granted a stay of the Maryland Court of Appeals decision finding the statute unconstitutional, the Chief Justice noted that the statute "provides a valuable tool for investigating unsolved crimes and thereby helping to remove violent offender from the general population." 567 U.S. \_\_\_, \_\_\_, 133 S.Ct. 1, 3, 183 L.Ed.2d 667 (2012) (Roberts, C.J., in chambers).
- 12 MD Code, Public Safety, §2-504(d)(1).
- 13 See 133 S.Ct. at 1984-85 (Scalia, J., dissenting).
- 14 Brief of Petitioner at 23, *Maryland v. King*, 133 S.Ct. 1958 (2013).
- 15 Reply Brief of Petitioner at 11-12, *Id.*
- 16 "Mr. Chief Justice, and may it please the court: Since 2009, when Maryland began to collect DNA samples from arrestees charged with violent crimes and burglary, there have been 225 matches, 75 prosecutions and 42 convictions, including that of Respondent King." Justice Scalia immediately retorted, "Well, that's really good. I'll bet you, if you conducted a lot of unreasonable searches and seizures, you'd get more convictions, too. That proves absolutely nothing." To which the State's attorney responded, "Well, I think, Justice Scalia, it does, in fact, point out the fact that -- that the statute is working[.]" Transcript of Oral Argument at 3, *Maryland v. King*, 133 S.Ct. 1958, available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-207.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-207.pdf).
- 17 Transcript of Oral Argument, *Id.* at 17. Justice Breyer also noted a reference to the fact that in some places the delay has been reduced to two days. *Id.* at 18.
- 18 133 S.Ct. at 1977.
- 19 *Id.* at 1988 (Scalia, J., dissenting).
- 20 *Id.* at 1988-89.
- 21 See, e.g., Chris Francescani, *U.S. surveillance leaks threaten police use of new technologies: official*, REUTERS, Oct. 21, 2013 ("New technology including advanced facial recognition software, mobile license plate readers and unmanned aircraft are reshaping U.S. law enforcement, officials said."); Somini Sengupta, *Privacy Fears Grow as Cities Increase Surveillance*, N.Y. TIMES, Oct. 14, 2013, at A1 ("For law enforcement, data mining is a big step toward more complete intelligence gathering. The police have traditionally made arrests based on small bits of data -- witness testimony, logs of license plate readers, footage from a surveillance camera perched above a bank machine. The new capacity to collect and sift through all that information gives the authorities a much broader view of the people they are investigating.")
- 22 Justice Scalia underscores this point when he observed that "[i]f identifying someone means finding out what unsolved crimes he has committed, then identification is indistinguishable from the ordinary law enforcement aims that have never been thought to justify a suspicionless search." 133 S.Ct. at 1983 (Scalia, J., dissenting).
- 23 "But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths to royal inspection." 133 S.Ct. at 1989 (Scalia, J., dissenting).

- 24 According to the Federal Bureau of Investigation, Criminal Justice Information Services Division, “[n]ationwide, law enforcement made an estimated 12,408,899 arrests in 2011.” See Federal Bureau of Investigation, Uniform Crime Reports, Crime in the U.S., Persons Arrested, *available at* <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/persons-arrested>. The figure for 2010 was 13,120,947 arrests. *Id.*, *available at* <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/persons-arrested>.
- 25 133 S.Ct. at 1988 (Scalia, J., dissenting), and source cited *thereat*.
- 26 Julie Samuels, Elizabeth Davies, Dwight Pope and Ashleigh Holand, *Collecting DNA From Arrestees: Implementation Lessons*, 270 NAT’L. INSTIT. JUST. J. 18, 20-21 (June 2012) (“Our review of laws in the 28 states that passed legislation authorizing the collection of DNA samples prior to conviction reveals that about half of states (13) collect from all persons arrested for any felony crime, while the other half of states limit collection to a subset of felonies that typically involve violence or sexual assault. Seven states also collect from individuals arrested or charged with select misdemeanor crimes. Oklahoma, Connecticut and Utah have additional criteria for collection based on the arrestee’s status, criminal history and health (respectively).”) (citations omitted).
- 27 Brief of Amici Curiae American Civil Liberties Union, ACLU of Maryland, and ACLU of Northern California Supporting Respondent at 31-32, *Maryland v. King*, 133 S.Ct. 1958. (“It is also essential to understand that other state laws are broader in scope than Maryland’s law and therefore raise critical constitutional issues in their own right. Specifically, the laws of the federal government and states like California allow collection from persons who have not been charged with anything; who may have been merely arrested for much less serious crimes than are covered by Maryland’s law; and whose samples will be analyzed, uploaded to CODIS, and retained indefinitely even if they are never charged with any crime, or are charged and acquitted. Those laws, of course, are not before the Court.”)
- 28 For an insightful analysis of why arrestees should not be subjected to these dragnet searches, see Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent at 29-30, *Id.*
- 29 Joseph Goldstein, *Police Agencies Are Assembling Records of DNA*, N.Y. TIMES, June 13, 2013, at A1.
- 30 Erica E. Phillips, *More DNA Samples, More Debate*, WALL ST. J., Sept. 23, 2013.
- 31 Transcript of Oral Argument at 6-7, *Maryland v. King*, 133 S.Ct. 1958.
- 32 Transcript of Oral Argument at 7-8, *Id.* A so-called “Terry stop” occurs in a street encounter, usually involving a request for identification and a protective pat-down of the person, when a police officer believes he/she has reasonable suspicion that the person may have committed a crime. See *Terry v. Ohio*, 392 U.S. 1 (1968).
- 33 Transcript of Oral Argument at 10-11, *Maryland v. King*, 133 S.Ct. 1958.
- 34 Transcript of Oral Argument at 12-13, *Id.*
- 35 TANYA E. COKE, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, CRIMINAL JUSTICE IN THE 21ST CENTURY: ELIMINATING RACIAL AND ETHNIC DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM (2013), at 8, n.4 (“According to the latest available figures, [African Americans and Hispanics] comprise 58 percent of all inmates, even though they make up only one quarter of the U.S. population.”), *available at* <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=28550&libID=28519>, *citing* NAACP Criminal Justice Fact Sheet, *available at* <http://www.naacp.org/pages/criminal-justice-fact-sheet>.
- 36 As the City “adopted a policy of indirect racial profiling by targeting racially defined groups for stops based on local crime suspect data[,]” the Court found the resulting “disproportionate and discriminatory stopping of blacks and Hispanics in violation of the Equal Protection Clause.” *Floyd v. City of New York*, \_\_\_ F.Supp.2d \_\_\_, 2013 WL 4046209 at \*7 (S.D.N.Y. Aug. 12, 2013).
- 37 See Transcript of Oral Argument, *supra* note 16, at 3.
- 38 For an excellent analysis demonstrating how DNA analysis can and has resulted in false matches and wrongful convictions, see Brief of 14 Scholars of Forensic Evidence As Amici Curiae Supporting Respondent, by Professors Brandon L. Garrett and Erin Murphy, *Maryland v. King*, 133 S.Ct. 1958, at 25-36, and the multiple sources cited therein (cataloging errors). See also Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 HARVARD L. REV. 1, 33 & n.202 (2013), *citing Id.*; William C. Thompson, *Forensic DNA Evidence: The Myth of Infallibility*, in GENETIC EXPLANATIONS: SENSE AND NONSENSE 227 (Sheldon Krimsky & Jeremy Gruber eds., 2013); 4 David Faigman et al., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 31:15 (2012) (listing fifteen laboratories involved in DNA-related scandals).
- 39 Transcript of Oral Argument at 35, *Maryland v. King*, 133 S.Ct. 1958.
- 40 133 S.Ct. at 1989 (Scalia, J., dissenting).

