Twenty-First Century Fingerprinting: Supreme Court in *King* to Determine Privacy Interest in Arrestee DNA

Described by Justice Alito as "perhaps the most important criminal procedure case that this Court has heard in decades," the Supreme Court's decision in *Maryland v. King* will have far-reaching Fourth Amendment implications.[1] In 2008, the Maryland General Assembly passed the Maryland DNA Collection Act, amending a 2002 statute that expanded police authority to collect DNA samples from those arrested for certain offenses.[2] Under the statute, samples are collected at the time of arrest, but can only be analyzed once the arrestee has been charged and arraigned.[3] Once collected, the DNA sample is immediately processed, submitted to the FBI's Combined DNA Index System database (CODIS), and compared against other samples.[4]

THE ARREST, THE SWAB, AND THE RAPE CONVICTION[5]

On April 10, 2009, police arrested Alonzo Jay King, Jr. in Wicomico County, Maryland on first- and second-degree assault charges. King's arrest for a violent crime authorized police to collect a buccal swab DNA sample from him by rubbing a cotton swab on the inside portion of King's mouth. The Maryland State Police Forensic Sciences Division uploaded the sample to the Maryland DNA database in July, and recorded a "hit" in August, matching King's DNA to an unsolved rape case from 2003. In that case, a disguised man broke into the home of a fifty-three-year-old woman and raped her while holding a gun to her head. The woman could not identify her attacker, but

1. Transcript of Oral Argument at 35, Maryland v. King, No. 12-207 (U.S. argued Feb. 26, 2013), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-207.pdf; *see also* King v. State, 42 A.3d 549, 553 n.6 (Md.), *cert. granted*, 133 S. Ct. 594 (2012).

2. *See* MD. CODE ANN., PUB. SAFETY § 2-504 (LexisNexis 2013), *invalidated by* King v. State, 42 A.3d 549 (Md.), *cert. granted*, 133 S. Ct. 594 (2012). The Act authorizes DNA collection from arrestees for crimes of violence, attempted crimes of violence, burglary, or attempted burglary. *See id.* The 2002 statute authorized police to collect DNA samples from anyone convicted of a felony. *See* Act of May 16, 2002, ch. 465, 2002 Md. Laws 3714; *see also* Act of May 26, 1994, ch. 458, 1994 Md. Laws 2185 (establishing statewide DNA database).

3. *See* § 2-504(d)(1).

4. *See King*, 42 A.3d at 553 n.6. In accordance with federal regulations, after processing, the DNA profile generates a short sequence of numbers that do not reveal private information except that the number sequence is unique to each individual. *See id.* at 559-60. Furthermore, if the arrestee is not convicted of the crime or the database registers no hit, the sample is destroyed. *Id.* at 560.

5. All factual information provided in this section, unless otherwise noted, comes from King v. State, 42 A.3d 549, 553-55 (Md.), *cert. granted,* 133 S. Ct. 594 (2012).

police were able to collect a sample of the attacker's semen.

Based solely on the DNA evidence, the Wicomico County grand jury returned an indictment against King for first-degree rape in October. At trial, King filed a motion to suppress the DNA evidence, arguing the Act authorized an illegal search and seizure, which could not survive scrutiny under the Fourth Amendment. After the hearing judge denied the motion to suppress, King was subsequently convicted of first-degree rape and sentenced to life in prison without the possibility of parole. King appealed, but Maryland's highest court—the Court of Appeals of Maryland—granted certiorari before the intermediate appellate court rendered a judgment.[6] The Court of Appeals then reversed, holding that the Act violated the Fourth Amendment. The State appealed to the United States Supreme Court and filed a request for a stay pending the disposition of the writ.[7] Chief Justice Roberts granted the stay because the State had established a reasonable possibility that the Court would grant certiorari and a fair prospect that the Court would reverse the decision below.[8] On November 9, 2012, the Court granted certiorari and heard oral arguments on February 26, 2013.[9]

A BRIEF LOOK AT BALANCING THE FOURTH AMENDMENT AND AN ARRESTEE'S EXPECTATION OF PRIVACY

The Fourth Amendment protects people from "unreasonable searches and seizures" without a warrant supported by probable cause that describes with particularity "the place to be searched, and the persons or things to be seized."[10] The Supreme Court incorporated the Fourth Amendment to the states in 1961 by holding that evidence obtained by searches and seizures in violation of the Constitution is inadmissible in state courts.[11] There is "no fixed formula" for determining a Fourth Amendment violation; instead, the ultimate question is whether the actions by police were reasonable enough under the circumstances to satisfy the Fourth Amendment's requirements.[12] The basic rule is that warrantless searches are per se unreasonable "subject only to a few specifically established and well-delineated exceptions."[13] In *Pennsylvania v. Mimms*, the

6. *See id*.; *see also* King v. State, 30 A.3d 193 (Md. 2011) (granting certiorari to Maryland Court of Appeals).

7. Maryland v. King, 133 S. Ct. 1, 2 (2012).

8. *See id*. (granting stay of judgment pending disposition of State's petition for writ of certiorari).

9. *See* Maryland v. King, 133 S. Ct. 594, 594 (2012) (granting certiorari); Transcript of Oral Argument, *supra* note 1, at 1 (listing date of oral arguments before Supreme Court).

10. US CONST. amend. IV.

11. *See* Mapp v. Ohio, 367 U.S. 643, 653 (1961).

12. *See id*.

13. *See* Katz v. United States, 389 U.S. 347, 357 (1967), *superseded by statute,* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 212, *as recognized in* United States v. Koyomejian, 946 F.2d 1450 (9th Cir. 1992); *see also* Missouri v. McNeely, No. 11-1425, 2013 WL 1628934, at *5 (U.S. Apr. 17, 2013) ("Our cases have held that a warrantless search of the person is reasonable only if it falls within

Court stated that lower courts should consider "'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'"[14]

Reasonableness may mean that neither a warrant nor probable cause is required in all cases. Individualized suspicion is often required, but the "'Fourth Amendment imposes no irreducible requirement of such suspicion.'"[15] Indeed, the Court has cautioned that individualized suspicion is "not a constitutional floor, below which a search must be presumed unreasonable."[16]

In *Samson v. California*, the Court analyzed the search under a "totality of the circumstances" test by balancing the State's interest against the parolee's legitimate privacy expectation.[17] Although the defendant in *Samson* was a parolee, the "totality of the circumstances" analysis would be the same with any suspect in police custody because of a diminished expectation of privacy.[18] In the particular case of arrestees, the Court recognized that they have a diminished expectation of privacy, placing them further across the continuum from law-abiding citizens to convicts, probationers, and parolees. Recently, the Court upheld the strip search of an arrestee for a traffic offense as reasonable under this analysis because the government's interest in safety outweighed the arrestee's diminished expectation of privacy.[19]

Although the Court has not discussed buccal swabs in the past, it has recognized other extractions of DNA material—such as drawn blood—as a search.[20] In conducting that analysis, however, the Court has also held that if performed appropriately, blood draws are not so invasive as to violate the Fourth Amendment.[21] Additionally, courts have allowed law enforcement to collect DNA samples from arrestees when they have "abandoned" or not demonstrated a subjective expectation of privacy as to items that contain their DNA, such as left-behind water bottles or cigarette butts, because this type of

a recognized exception.").

14. Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)).

15. Samson v. California, 547 U.S. 843, 855 n.4 (2006) (quoting United States v. Martinez–Fuerte, 428 U.S. 543, 560 (1976)).

16. Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 624 (1989).

17. *See Samson*, 547 U.S. at 848 (quoting United States v. Knights, 534 U.S. 112, 118 (2001)). Even if a situation fits into a recognized exception to the warrant requirement, the Court employs the totality of the circumstances analysis to determine reasonableness. *See* Missouri v. McNeely, No. 11-1425, 2013 WL 1628934, at *5-7 (U.S. Apr. 17, 2013) (determining reasonableness of situation under exigent circumstances exception based on totality of circumstances).

18. *See* United States v. Mitchell, 652 F.3d 387, 411 (3d Cir. 2011) (describing diminished expectation of privacy because arrestees give up some, if not all, privacy rights).

19. *See* Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1518-20 (2012) (holding interests of correction officers outweigh arrestee's privacy interest).

20. *See Skinner*, 489 U.S. at 616.

21. *See* Schmerber v. California, 384 U.S. 757, 771 (1966) (holding blood draw not constitutionally significant because public recognizes this as common practice).

DNA collection is not a search in the constitutional sense.[22] Neither party to the suit questions that DNA collection is a search in the constitutional sense, but they do diverge on how to characterize this search.[23] The lower courts in *Mitchell* and *King* held the processing of the DNA sample and creation of the DNA profile in CODIS to be a second search, but disagreed on its constitutionality because of the extensiveness of information that "junk DNA" can provide to the government.[24]

Two federal appeals courts and one state supreme court previously upheld statutes similar to the Maryland act as permissible under the Fourth Amendment.[25] In *United States v. Mitchell*, the Court of Appeals for the Third Circuit conducted a balancing analysis of the Federal DNA Act and held that collecting a DNA sample was minimally intrusive and did not weigh significantly in the defendant's favor.[26] The court held that the method used to process the DNA, so called "junk DNA," contained very little information beyond identification, and other safeguards were sufficient to render the search reasonable for Fourth Amendment purposes.[27] The Ninth Circuit and the Virginia Supreme Court, like the Third Circuit, have upheld the everyday practice of collecting DNA from arrestees, common to federal law enforcement and twenty-eight states.[28]

22. *See* Commonwealth v. Bly, 862 N.E.2d 341, 356-57 (Mass. 2007) (holding no privacy interest in discarded cigarette butt and water bottle used during interrogation); Laura A. Matejik, *DNA Sampling: Privacy and Police Investigation in a Suspect Society*, 61 ARK. L. REV. 53, 63 (2008) (describing several cases where courts have allowed law enforcement to test DNA left behind by suspects); *see also* Jaclyn G. Ambriscoe, Note, *Massachusetts Genetic Bill of Rights: Chipping Away at Genetic Privacy*, 45 SUFFOLK U. L. REV. 1177, 1183 (2012) (describing expectation of privacy analysis in Massachusetts). Chief Justice Roberts discussed a scenario similar to *Bly* during oral arguments. *See* Transcript of Oral Argument, *supra* note 1, at 31 ("[I]f you're in the interview room or something, you take a drink of water, you leave, you're done. I mean, they can examine the DNA from that drink of water.").

23. *Compare* Brief of Petitioner at 13-14, Maryland v. King, No. 12-207 (U.S. argued Feb. 26, 2013), 2012 WL 6755127, at *13-14 (arguing DNA collection as search but de minimis for constitutional considerations), *with* Brief for the Respondent at 18-19, Maryland v. King, No. 12-207 (U.S. argued Feb. 26, 2013), 2013 WL 315233, at *18-19 (arguing DNA collection as search that triggers Fourth Amendment analysis).

24. *Compare* King v. State, 42 A.3d 549, 577 (Md. 2012) ("[W]e can not turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State."), *with* United States v. Mitchell, 652 F.3d 387, 407-08 (3d Cir. 2011) (finding safeguards with handling of DNA reasonable under Fourth Amendment).

25. *See* Haskell v. Harris, 669 F.3d 1049, 1080 (9th Cir.) (reviewing similar California law), *reh'g granted en banc*, 686 F.3d 1121 (9th Cir. 2012); *Mitchell*, 652 F.3d at 431 (reviewing similar federal law); Anderson v. Commonwealth, 650 S.E.2d 702, 708 (Va. 2007) (reviewing similar Virginia law), *cert. denied*, 553 U.S. 1054 (2008).

26. *See Mitchell*, 652 F.3d at 407.

27. *See id.* at 408.

28. *See Haskell*, 669 F.3d at 1080; *Anderson*, 650 S.E.2d at 708; Brief for the States of California et al. as Amici Curiae Supporting Petitioner at 1, Maryland v. King, No. 12-207 (U.S. argued Feb. 26, 2013), 2013 WL 98697, at *1.

MARYLAND CREATES A SPLIT AND DRAWS THE COURT'S ATTENTION

In *King*, the Court of Appeals of Maryland split with these courts and held that the DNA search was unreasonable under the Fourth Amendment.[29] The court applied the "totality of the circumstances" test and found for the defendant because King, as an arrestee, was entitled to a presumption of innocence that convicted felons, probationers, and parolees did not receive. Reasoning that the respondent's expectation of privacy outweighed the State's interest in using DNA for identification purposes, the court rejected the State's need for the DNA to identify the defendant because fingerprints and photographs had already adequately identified King. The court rejected the State's argument that DNA samples are a modern, more accurate form of ink fingerprinting because the vast amount of genetic data that an arrestee's DNA may contain distinguishes it from a simple fingerprint. Simply put, the court held that a lawful arrest for a crime of violence cannot serve as probable cause for a DNA search of an arrestee.

At oral argument on February 26, 2013, the Supreme Court focused predominantly on the primary purpose of the legislation and the comparison between "DNA fingerprinting" and ink fingerprinting.[30] The State and the Solicitor General compared the evolution of speed and accuracy of ink fingerprinting with where "DNA fingerprinting" will likely be, in as few as two years.[31] Chief Justice Roberts expressed hesitation to decide a case based on the future possibilities of the technology, but Maryland countered that the technology is already more accurate than ink fingerprinting and can be used to revoke bail if a "hit" comes back from the database.[32] Despite heavy reliance by the Maryland Court of Appeals on the presumption of innocence, the justices seemed more interested in the possession of DNA by the government and the speed of processing the samples.

WHAT IS THE INITIAL INQUIRY: PER SE UNREASONABLE OR BALANCING?

Both Justice Kagan and the respondent indicated that the initial analysis is

29. *See* King v. State, 42 A.3d 549, 576-77 (Md.), *cert. granted*, 133 S. Ct. 594 (2012). The court reasoned that the presumption of innocence protects arrestees in a manner that convicted felons do not enjoy. *See id.* at 576. The court explained that it was a close call upholding the previous Maryland statute, which only dealt with the collection of DNA of convicted felons, and thus the court should err on the side of the Constitution when considering arrestees. *See id.* ("If application of the balancing tests results in a close call when considering convicted felons . . . then the balance must tip surely in favor of our closely-held belief in the presumption of innocence here."); *see also* State v. Raines, 857 A.2d 19, 27 (Md. 2004) (upholding MD. CODE ANN., PUB. SAFETY § 2-501 (LexisNexis 2013)).

30. *See* Transcript of Oral Argument, *supra* note 1, at 35, 60 (statements by bench and advocates describing DNA sampling as "fingerprinting of the 21st century").

31. *See id.* at 59 (claiming DNA fingerprinting will have capability to rapidly progress in eighteen to twenty-four months).

32. *See id.* at 23.

usually not a balancing of the interests at play, but a requirement that the state meet one of the established Fourth Amendment warrant exceptions because warrantless searches are per se unreasonable.[33] In this case, none of the traditional exceptions, such as search incident to arrest or exigent circumstances, would apply. The Court could create a new exception to the warrant requirement for biometric data generally.[34] The Court could also attempt to fit this situation into a recognized exception such as a search incident to arrest; however, this is unlikely because the search would not fit into the twin rationales of officer safety or preservation of evidence.[35] These outcomes are unlikely, but the Court could find for the State through a straightforward balancing analysis. Warrantless searches are per se unreasonable, but that does not end the inquiry. A balancing of interests determines ultimately whether the government's actions were reasonable.

DNA identification is in the same place technologically that ink fingerprinting was twenty to thirty years ago, before powerful computer databases or even the Internet existed.[36] Both ink fingerprinting and DNA sampling are used for identification, but both also match arrestees to crimes. The test of reasonableness by balancing interests has resulted in the Court holding that warrantless searches without individualized suspicion can still be reasonable in certain circumstances, such as when the privacy interest is minimal, the government's purpose will be frustrated by requiring a warrant, and safeguards are in place to limit discretion.[37] The warrantless "search" of fingerprinting arrestees has never been squarely addressed by the Court, but King conceded that given the widespread use of fingerprinting, the practice is most likely constitutional.[38] "DNA fingerprinting" more accurately addresses the governmental interest in properly identifying arrestees, determining whether to detain or release them, and devising methods to best supervise them.[39] Finally, the amici curiae brief of the fifty states persuasively argued that collecting DNA samples from arrestees serves the compelling

33. *See id*. at 25 ("You went right into free-form balancing. That's typically not the way we do it."); Brief for the Respondent, *supra* note 23 (describing initial analysis as Fourth Amendment exceptions instead of balancing). The Court most recently reaffirmed this approach in 2009. *See* Arizona v. Gant, 556 U.S. 332, 338 (2009).

34. *See* David H. Kaye, *On the "Considered Analysis" of Collecting DNA Before Conviction*, 60 UCLA L. REV. DISC. 104, 117 (2013), http://www.uclalawreview.org/?p=4172 (describing possible exception Supreme Court could craft).

35. *See* Chimel v. California, 395 U.S. 752, 762-63 (1969).

36. *Cf*. Jennifer L. Mnookin, *Fingerprint Evidence in an Age of DNA Profiling*, 67 BROOK. L. REV. 13 (2001) (discussing history of fingerprint evidence).

37. *See* Illinois v. McArthur, 531 U.S. 326, 330-31 (2001). The Court held that special law-enforcement needs, diminished expectations of privacy, or minimal intrusions "may render a warrantless search or seizure reasonable." *Id*. at 330-31.

38. *See* Brief for the Respondent, *supra* note 23, at 35.

39. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 9-10, 29, Maryland v. King, No. 12-207 (U.S. argued Feb. 26, 2013), 2013 WL 50686, at *9-10, *29.

governmental interest in solving crimes because of the number of previously unsolvable cold cases that have been solved by collecting DNA samples from arrestees.[40]

The State does have a significant interest in accurately identifying arrestees, and DNA collection assists the State in adequately supervising pretrial detainees. The use of DNA also leads to more efficient criminal investigations by eliminating suspects and conserving resources.[41] Nevertheless, processing DNA continues long after the arrestee has been identified, so the purpose must also be identification of arrestee involvement in previously unsolved crimes. Although not explored fully in oral arguments, the length of time DNA identification currently takes could be compared with the length of time ink-fingerprinting identification took prior to the incorporation of computer databases.[42] The safeguards surrounding the processing and use of the DNA sample constitute a reasonable search under a "totality of the circumstances" analysis because the search is minimal and the DNA processing can only reveal the identity of the arrestee as random numbers. Thus, the only loss of privacy is in being accurately identified, and there is no established, reasonable expectation of privacy in anonymity, especially after an arrest.[43]

CONCLUSION

If the Supreme Court decides to uphold the Maryland Court of Appeals and rules "DNA fingerprinting" of arrestees unconstitutional, it would have far-reaching implications because many states and the federal government have enacted similar legislation. The fact that every state—including those without similar legislation—has filed in support of petitioner should not be overlooked. It is unusual for the Court to take up a case that has not been fully vetted in the lower courts. However, the shockwaves that this decision could make by overruling other appellate courts and striking down a widely used practice demonstrate the need to resolve this dispute.

Ultimately, the *Samson* "totality of the circumstances" balancing test to determine reasonableness is appropriate. The governmental interests in identifying suspects and solving unrelated offenses should be sufficient to outweigh the privacy interest in preventing access to an individual's genetic code, especially when combined with the safeguards already in place to protect

40. *See* Brief for the States of California et al. as Amici Curiae Supporting Petitioner, *supra* note 28, at 8-9. Even though not all fifty states have comparable DNA collection requirements for arrestees, every state has filed in support of petitioner. *See id*. at 1 (noting twenty-eight states and federal government have legislation similar to Maryland's).

41. *See* Brief of Petitioner, *supra* note 23, at 9-10.

42. *See* Transcript of Oral Argument, *supra* note 1, at 18-19 (questioning whether speed of fingerprinting analysis would have rendered ink fingerprints taken in 1950s unconstitutional).

43. *See id*. at 9; *see also* Doe v. Sheriff of DuPage Cnty., 128 F.3d 586, 588 (7th Cir. 1997) (holding defendants have no expectation of privacy in positive identification).

the arrestee's genetic information. A decision in favor of Maryland could establish that the *Samson* "totality of the circumstances" analysis to determine reasonableness is the initial inquiry for Fourth Amendment purposes. This outcome could signal that provided a state acts reasonably, a number of activities previously barred by the Fourth Amendment now could be legitimate.

A decision in favor of King, on the other hand, would not only result in massive upheaval of routine law-enforcement practices, but would lead to fewer solved crimes. Such an outcome may also stunt the evolution of DNA identification, the speed of which could eventually match that of ink fingerprinting today. Should the court rule in favor of King, it would also necessarily draw a distinction for the first time between the privacy rights of arrestees and parolees.

Should the Court reverse the Maryland Court of Appeals, the bench will likely carefully narrow the opinion to limit future expansive uses of this information. The Court could require the state to bear the heavy burden of demonstrating that the DNA samples are appropriately handled and only used for identification purposes.

Ultimately, the Court should reverse the Maryland Court of Appeals because on balance the statute is reasonable. The minimal intrusion to the arrestee is offset by the improvement of suspect identification for bail supervision, the important governmental interest in solving crimes, and statutory safeguards. Had a similar case found ink fingerprinting (which does not require individualized suspicion) unconstitutional, many law-enforcement practices that we currently consider normal and routine would not exist, compromising law enforcement's effectiveness. Striking down statutory DNA identification would cut short future technological advances that could make the use of DNA fingerprinting equivalent to current ink-fingerprinting practice, yet much more effective and accurate.

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