Constitutional Law—Supreme Court Allows Warrantless Search and Seizure of Arrestee's DNA—*Maryland v. King*, 133 S. Ct. 1958 (2013)

The Fourth Amendment to the U.S. Constitution was enacted to protect citizens from unreasonable searches and seizures.[1] In *Maryland v. King*,[2] a case of first impression, the Supreme Court addressed the question of whether a warrantless search and seizure of an arrestee's DNA would be afforded Fourth Amendment protection.[3] The Court, utilizing a reasonableness balancing test, held that the government's compelling interest of identifying criminals outweighed the arrestee's right to privacy and found the search and seizure constitutional.[4]

King involves the constitutionality of the Maryland DNA Collection Act as applied to arrestees.[5] The Act permits law enforcement to obtain DNA samples from arrestees charged with committing or attempting to commit a violent crime or burglary.[6] Once taken, the arrestee's DNA sample is not processed or placed in a database until the arraignment, unless the arrestee grants the state permission to process the sample.[7]

In 2009, Alonzo King was arrested in Maryland for committing violent crimes, and his DNA was collected pursuant to the Act via a buccal swab.[8]

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1. *See* U.S. CONST. amend. IV. The Fourth Amendment provides:

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

2. 133 S. Ct. 1958 (2013).

3. *See id.* at 1966, 1968 (noting Court never addressed issue at bar).

4. *See id.* at 1980 (holding warrantless search and seizure of DNA pursuant to state statute permissible under Fourth Amendment).

5. *See id.* at 1966 (identifying issue at bar).

6. *See* King v. State, 42 A.3d 549, 552 (Md. 2012), *rev'd*, 133 S. Ct. 1958 (2013) (defining statutory requirements).

> The stated purpose of the statute is to "analyze and type the genetic markers contained in or derived from the DNA samples"; to assist an official investigation of a crime; to identify human remains; to identify missing persons; and for "research and administrative purposes," including the development of a population database and to aid in quality assurance.

Id. at 558.

7. *See* King v. State, 42 A.3d 549, 559 (Md. 2012), *rev'd*, 133 S. Ct. 1958 (2013) (explaining timeline of DNA processing).

8. *See* 133 S. Ct. at 1966, 1967 (outlining facts of case). Collecting a DNA sample via a buccal swab

Subsequently, King's DNA was uploaded to the Combined DNA Index System (CODIS) database, and his sample matched DNA taken from an unsolved 2003 rape.[9] King was indicted and convicted of the 2003 rape, despite his effort to suppress the DNA evidence.[10] King appealed his conviction to the Court of Appeals of Maryland, which utilized the totality of the circumstances balancing test and held that the Act impermissibly violated King's Fourth Amendment right to be free from unreasonable searches.[11] The appeals court reasoned that King's expectation of privacy outweighed the government's interest in using the DNA to identify King.[12]

On appeal, the Supreme Court reversed the Court of Appeals of Maryland's decision and held that the warrantless search and seizure of King's DNA was constitutional.[13] The Court reasoned that as an arrestee, King had a diminished expectation of privacy and that the intrusion of the buccal swab was minimal.[14] Similarly, the Court held that the processing of King's DNA through the CODIS database did not intrude on his privacy.[15] When balancing King's rights against the compelling government interest of facilitating a station-house search and using DNA to identify arrestees, the Court held that the scale tipped in the government's favor.[16]

"The touchstone of the Fourth Amendment is reasonableness."[17] The Framers drafted the Fourth Amendment to protect the colonists from general warrants that were used by the English crown.[18] Thus, it follows that the

entails collecting skin cells inside the mouth by swiping a device similar to a Q-tip against the cheek. *See id.* at 1967-68.

9. *See id.* at 1966. The CODIS database is a national indexing system aimed at standardizing the collection and storage of DNA profiles from all fifty states. *Id.* at 1968. The CODIS database processes the thirteen loci that are nonprotein coding regions of DNA. *Id.* at 1968. The noncoding regions used for processing are considered to be junk DNA. *Id.* "The term [Junk DNA] apparently is intended to indicate that this particular noncoding region, while useful and even dispositive for purposes like identity, does not show more far-reaching and complex characteristics like genetic traits." *Id.* at 1967.

10. *See id.* at 1966 (describing case's procedural history). King argued that the search and seizure of his DNA were unconstitutional under the Fourth Amendment. *Id.* The circuit court held that the Act did not violate the Fourth Amendment. *Id.*

11. *See* King v. State, 42 A.3d 549, 552-53 (Md. 2012), *rev'd*, 133 S. Ct. 1958 (2013) (reversing conviction).

12. *See* King v. State, 42 A.3d 549, 552-53 (Md. 2012), *rev'd*, 133 S. Ct. 1958 (2013) (reasoning arrestee's "sufficiently weighty" expectation of privacy not outweighed by state identification rational).

13. *See* 133 S. Ct. at 1980.

14. *See id.* at 1977-80 (arguing Act has sufficient safeguards).

15. *See id.* at 1979-80 (finding processing of King's DNA through CODIS constitutional).

16. *See id.* at 1980 (balancing state's interests against King's rights).

17. Florida v. Jimeno, 500 U.S. 248, 250 (1991); *see also* Katz v. United States, 389 U.S. 347, 360 (1967). The Fourth Amendment only protects against searches and seizures that are unreasonable. *See* Florida v. Jimeno, 500 U.S. 248, 250 (1991); *see also* Ohio v. Robinette, 519 U.S. 33, 39 (1996) ("Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances.").

18. *See* United States v. Chadwick, 433 U.S. 1, 7-8 (1977) (outlining history of Fourth Amendment), *abrogated on different grounds by* California v. Acevedo, 500 U.S. 565 (1991); *see also* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1(a) (5th ed. 2012) (describing history

Fourth Amendment is based on the premise that searches and seizures conducted absent a warrant are per se unreasonable.[19] The Court has made several exceptions to the warrant requirement and has allowed warrantless searches and seizures under certain conditions.[20] In circumstances where a warrant is not required, the Fourth Amendment calls courts to assess the reasonableness of the search by weighing the government's legitimate interests in performing the search against the intrusion upon the individual's privacy.[21]

The Fourth Amendment provides protection from physical intrusions into one's person and intrusions into an one's personal privacy and security.[22] Physical intrusions into the human body are akin to searches of a dwelling, and absent emergency situations, a warrant is normally required.[23] When dealing

surrounding creation of Fourth Amendment); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925, 939-41 (1997) (explaining colonial history of warrantless intrusions).

19. *See* United States v. Streifel, 665 F.2d 414, 419-20 (2d Cir. 1981) ("It is fundamental that governmental searches and seizures without warrant . . . are per se unreasonable"); *see also* Chimel v. California, 395 U.S. 752 , 766-68 (1969) (holding warrantless search of home unconstitutional), *abrogated on other grounds by* Davis v. United States, 395 U.S. 752 (2011); Katz v. United States, 389 U.S. 347, 357 (1967) (finding warrantless eavesdropping unreasonable).

20. *See* Illinois v. McArthur, 531 U.S. 326, 330-31 (2001) (citing various exceptions, including searches of cars, luggage, and stops based upon certain justifications). "We nonetheless have made it clear that there are exceptions to the warrant requirement. When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *Id. See generally Warrantless Searches and Seizures*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 37 (2005) (identifying and explaining exceptions to warrant requirement).

21. *See* Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999) (outlining balancing test).

22. *See* Winston v. Lee, 470 U.S. 753, 761-62 (1985) (indicating personal or physical intrusion subject to Fourth Amendment scrutiny); *see also* Payton v. New York, 445 U.S. 573, 589-90 (1980) (providing intrusion into home falls under Fourth Amendment); Dunaway v. New York, 442 U.S. 200, 216 (1979) (noting personal intrusion occurs when person forced to accompany police officers); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (indicating eavesdropping amounts to personal intrusion); Schmerber v. California, 384 U.S. 757, 767-68 (1966) (identifying blood test as physical intrusion into body).

23. *See* Schmerber v. California, 384 U.S. 757, 770 (1966) (comparing search of dwelling to search of human body). "Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned." *Id.* In *Schmerber*, the defendant was in a car accident and taken to the hospital where he received a blood alcohol test against his will. *See id.* at 758. The defendant moved to suppress the blood alcohol test at his trial, arguing that it violated his Fourth Amendment rights. *See id.* at 759. The Court held that the blood test was admissible because it was reasonable to believe that exigent circumstances existed to secure evidence, and a delay in obtaining a warrant could have led to destruction of the evidence. *See id.* at 770-72. Further, the Court held that the minimal risk of physical harm to the defendant added to the reasonableness of the intrusion. *Id.* at 771; *cf.* Winston v. Lee, 470 U.S. 753, 766-67 (1985) (holding surgery to remove bullet substantial intrusion and thus unreasonable under the Fourth Amendment); People v. More, 764 N.E.2d 967, 969-70 (N.Y. 2002) *(*declaring body cavity search without warrant unconstitutional due to lack of exigent circumstances); Angelique Romero, Comment, *Implications of* United States v. Jones *on DNA Collection from Arrestees: A Trespass Prohibited by the Fourth Amendment?*, 25 ST. THOMAS L. REV. 244, 260 (2013) (analogizing extraction of DNA to search of dwelling).

> If the entrance into the home is unconstitutional under the original interpretation of the Fourth Amendment, which applied a trespass test to determine an unreasonable search, the DNA collection would also be an unconstitutional search because it involves a trespass to an area protected by the

with physical intrusions into the body, the health and safety of the individual is a crucial factor in determining reasonableness.[24] When analyzing the reasonableness of the intrusion, the context of the search and the person's relationship to the state plays a significant role in determining their expectation of privacy.[25] For example, arrestees are held to have a diminished expectation of privacy, but they have a greater expectation than parolees, probationers, and felons.[26]

Although the Court has recognized exceptions to the warrant requirement, it has gone to great lengths to protect individuals' private information from being seized absent a warrant.[27] In general, DNA samples contain a wealth of private information.[28] When a sample is taken for law enforcement identification purposes, the noncoding regions also known as junk DNA are processed through a DNA database.[29] The term junk DNA has proved to be misleading as this region contains vital and personal information.[30]

Fourth Amendment: the person.

Romero, *supra*, at 261; *see also* Michael J. Crook, Comment, *Sacrificing Liberty for Security: North Carolina's Unconstitutional Search and Seizure of Arrestee DNA*, 34 CAMPBELL L. REV. 473, 497 (2012). "The Fourth Amendment prohibits law enforcement from intruding into the body of an arrestee in order to seize a biological sample unless they have either a warrant . . . or . . . probable cause . . . and exigent circumstances exist that make obtaining a warrant impracticable." Crook, *supra*, at 494.

24. *See* Winston v. Lee, 470 U.S. 753, 766-67 (1985) (holding surgery to remove bullet unreasonable under Fourth Amendment).

25. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995) (noting privacy depends on relationship with state).

26. *See* King v. State, 42 A.3d 549, 578 (Md. 2012), *rev'd*, 133 S. Ct. 1958 (2013) (indicating arrestees have higher expectations of privacy); *see also* Riley v. California, 134 S. Ct. 2473, 2488 (2014) (stating arrestees entitled to Fourth Amendment protection).

27. *See* Riley v. California, 134 S. Ct. 2473, 2494-95 (2014) (holding warrantless search of cellphone unreasonable because of private information stored on device). In *Riley*, the Court consolidated two cases on appeal where the defendants' phones were seized incident to their arrests and searched without warrants. *See id.* at 2480-82. In ruling for the defendants, the Court found that cell phones contain an immense amount of information that, as a whole, can reconstruct an individual's private life. *See id.* at 2489-91, 2495; *see also* Katz v. United States, 389 U.S. 347, 359 (1967) (holding warrantless eavesdropping unconstitutional). *But see* Lewis v. United States, 385 U.S. 206, 210 (1966) (holding information disclosed to undercover agent not private).

28. *See* Jacqueline K. S. Lew, Note, *The Next Step in DNA Databank Expansion? The Constitutionality of DNA Sampling of Former Arrestees*, 57 HASTINGS L.J. 199, 205 (2005) (indicating sample contains person's entire genetic makeup).

29. *See* 133 S. Ct. at 1966-67 (describing use of junk DNA).

30. *See* Lew, *supra* note 28, at 204-05 (noting "junk DNA" not really junk). Junk DNA actually contains essential instructions for human development and survival. *See id.* at 205. Also, it has been found that junk DNA has the possibility of revealing private information about its carrier such as race, sex, and relationship to other people. *See id.*; *see also* Theodore Y. Blumoff, *Foreword: The Brain Sciences and Criminal Law Norms*, 62 MERCER L. REV. 705, 729 (2011) ("It turns out that some of that 97%+ we have previously labeled 'junk DNA' is not junk at all."); Cynthia D. Lopez-Beverage, *Should Congress Do Something About Upstream Clogging Caused by the Deficient Utility of Expressed Sequence Tag Patents?*, 10 J. TECH. L. & POL'Y 35, 82 (2005) (remarking junk DNA patent owner "claims to have a 'strong intellectual property portfolio,'" illustrating hardly junk).

In *King*, the Supreme Court began its analysis by noting that the Fourth Amendment applied to the extraction of King's DNA.[31] Next, the Court noted that the taking of King's DNA fell under a warrant exception because he had a diminished expectation of privacy and the intrusion was minimal.[32] Accordingly, the Court concluded that the search was still subject to Fourth Amendment scrutiny and the proper test would be to weigh the government's legitimate interest against the intrusion upon King's privacy.[33]

The Court found that the government had a legitimate interest in using DNA samples for identification; safeguarding police, staff, and other detainees; ensuring arrestee's availability for trial; preventing crime by arrestees; and conducting station-house searches.[34] Next, the Court held that King had a diminished expectation of privacy because he was an arrestee.[35] In utilizing *Winston*, the Court primarily focused on the physical aspect of the buccal swab and concluded that the intrusion was minimal.[36] At the same time, the Court—heavily relying on the junk DNA standard—held that the processing of King's DNA through the CODIS database did not invade his privacy.[37] Ultimately, the Court held that King's diminished expectation of privacy combined with the minimal intrusions into his privacy were not enough to outweigh the government's interests.[38]

The *King* Court incorrectly ruled that the seizure of an arrestee's DNA, absent a warrant, did not violate the Fourth Amendment.[39] The Court based its decision on the premise that warrantless searches and seizures could be reasonable in circumstances where there are minimal intrusions, but it left its holding vulnerable to attack on the very same grounds.[40] The Court primarily relied on *Schmerber* and *Winston* in deciding that the intrusion was minimal, but it did not properly apply the precedent to King's case.[41]

31. *See* 133 S. Ct. at 1969 (noting applicability of Fourth Amendment).

32. *See id.* at 1969-70.

33. *See id.* at 1970 (identifying balancing test).

34. *See id.* at 1970-75 (outlining government's interests). The Court noted that the government's interest in identity went beyond having the accurate name and encompassed knowing an arrestee's criminal history. *See id.* at 1971. The Court went on to state that using DNA was analogous to using fingerprints for identification purposes. *See id.* at 1972.

35. *See* 133 S. Ct. at 1978 (indicating person's expectation of privacy depends on relationship with state). The Court held that people in custody have a diminished expectation of privacy and a search of their person may be extensive. *Id.*

36. *See id.* at 1979 (indicating buccal swab involves gentle rub and does not break skin). The Court also noted that the buccal swab was a minimal intrusion because it did not pose any danger to King. *See id.*

37. *See id.* at 1979-80 (stating use of junk DNA did not invade privacy as noncoding regions). The Court heavily relied on the presumption that junk DNA does not reveal genetic traits and its sole use is for identification. *See id.* at 1979.

38. *See id.* at 1980 (outlining Court's holding).

39. *See* 133 S. Ct. at 1980 (Scalia, J., dissenting).

40. *See id.* at 1969 (majority opinion) (noting whether "intrusion is negligible is of central relevance to determining reasonableness").

41. *Compare id.* at 1979 (utilizing *Schmerber* and *Winston* in determining intrusion minimal), *with*

The Supreme Court should have viewed the physical intrusion into King's body as akin to a physical intrusion into a dwelling.[42] If the Court had viewed the physical intrusion in this light, it would have found that the physical search was not minimal.[43] Similarly, when analyzing the processing of King's DNA through CODIS, the Court should have acknowledged the information contained in DNA is extremely personal, and thus, it should be afforded Fourth Amendment protection.[44] Assuming *arguendo* it was proper for the Court to view the sample solely as the thirteen loci that were being processed, the result would have been the same because junk DNA contains personal information.[45]

By arguing the intrusion into King's body and personal privacy were minimal, the Supreme Court improperly tipped the reasonableness balancing test in favor of the government.[46] Consequently, the Court's holding drastically contradicts the purpose behind the Fourth Amendment.[47] As a result, all future arrestees who have their DNA extracted without a warrant will impermissibly have their Fourth Amendment rights violated.[48]

In *Maryland v. King*, the Supreme Court considered whether the warrantless extraction of an arrestee's DNA violated the Fourth Amendment. The Court improperly ruled that the extraction of DNA was constitutional. Consequently, the Court has now given the states free rein to impinge on an arrestee's constitutional right to be free from unreasonable searches and seizures.

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Winston v. Lee, 470 U.S. 753, 761 (1985) (recognizing "extent of intrusion upon . . . dignitary interests in personal privacy" as factor to consider), *and* Schmerber v. California, 384 U.S. 757, 769-70 (1966) (indicating absent exigent circumstances search warrant required for search into human body). The Court in *King* improperly applied *Schmerber* because no exigent circumstances were present as King was already in custody when his DNA was taken. *See* 133 S. Ct. at 1966. Similarly, the Court disregarded the personal privacy factor in its intrusion analysis as prescribed by *Winston* because the Court viewed the DNA sample solely as the noncoding regions. *See id.* at 1979.

42. *See* Schmerber v. California, 384 U.S. 757, 769-70 (1966) (suggesting physical intrusion into body treated like intrusion into dwelling); Romero, *supra* note 23, at 261 (asserting warrantless extraction of DNA akin to warrantless search of dwelling).

43. *See* Romero, *supra* note 23, at 260-61 (arguing DNA extraction absent warrant impermissible under Fourth Amendment).

44. *See supra* note 28 and accompanying text (explaining DNA samples contain private information).

45. *See supra* note 30 and accompanying text (demonstrating junk DNA not junk).

46. *See* Crook, *supra* note 23, at 494 (stating warrant or emergency circumstances needed for DNA extraction).

47. *See* 133 S. Ct. at 1981 (Scalia, J., dissenting) (indicating purpose of Fourth Amendment to protect against general suspicionless searches); *see also* Riley v. California, 134 S. Ct. 2473, 2494-95 (2014) (holding warrantless search of cell phone impermissible under Fourth Amendment); Maclin, *supra* note 18, at 939-41 (discussing reasoning behind Fourth Amendment).

48. *See* U.S. CONST. amend. IV (defining search and seizure standard); United States v. Streifel, 665 F.2d 414, 419-20 (2d Cir. 1981) (indicating searches and seizures absent warrant unreasonable).