No. 12-207

IN THE
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,
v.
ALONZO JAY KING, JR.,
Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

REPLY BRIEF OF PETITIONER

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REPLY ARGUMENT

THE COLLECTION OF IDENTIFYING DNA INFORMATION AFTER A LAWFUL ARREST IS REASONABLE.

A. King concedes that the test for Fourth Amendment reasonableness requires neither a warrant nor individualized suspicion when the privacy interest implicated by a search is minimal — which is the case here.

King argues that "a search ordinarily requires a warrant and probable cause," a principle, he says, that "disposes of this case." (Respondent's Br. at 20). But not even King subscribes to this oversimplified disposition of the issues. Quite the contrary, he expressly concedes in his brief that a warrant and "individualized suspicion" are but "presumptive requirements," with which this Court will dispense when, "for instance," the "individual challenging the conduct is entitled only to a diminished expectation of privacy[.]" (Respondent's Br. at 39) (citing *Samson v. California*, 547 U.S. 843, 852 (2006)).

The concession is well-founded. The Court has, in its own words, "made clear" that "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989). Individualized suspicion is not required when "the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."'" *New Jersey v. T.L.O.*, 469

U.S. 325, 342 n.8 (1985) (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)). In this context, "other safeguards" include statutes, regulations, and governmental policies that fulfill the spirit, if not the form, of a warrant to "protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents." *Skinner*, 489 U.S. at 621-22. When "the circumstances justifying [the search] and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them," " a warrant would do little to further" this essential purpose. *Id*. at 622.[1] "[I]n light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate." *Id*. When these are the circumstances under which a search has occurred, this Court has not allowed an "important governmental interest furthered by the intrusion [to] be placed in jeopardy by a requirement of individualized suspicion[.]" *Id*. at 624.

Although both *T.L.O.* and *Skinner* also happened to involve governmental interests deemed to stand apart from criminal law enforcement, and are, for that

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[1] *See also Brown v. Texas*, 443 U.S. 47, 51 (1979) ("the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, *or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limits on the conduct of individual officers*") (emphasis added).

reason, sometimes referred to as "special-needs" cases, *Samson* makes clear that the reasonableness test that those cases espouse is not limited to a special-needs case. The test, if satisfied, may apply in the context of criminal law enforcement.

Samson involved the warrantless, suspicionless search of a parolee's person on a public street. To determine the Fourth Amendment reasonableness of this search, the Court invoked what it called the "'general Fourth Amendment approach,'" which looks to the "'totality of the circumstances.'" 547 U.S. at 848 (citing *United States v. Knights*, 534 U.S. 112, 120 (2001)). "Whether a search is reasonable 'is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id*. (citing *Knights*, 534 U.S. at 118-19). To the question whether a warrant based on probable cause was presumptively required absent "special needs," came the clear answer that

> although this Court has only sanctioned suspicionless searches in limited circumstances, namely, programmatic and special needs searches, we have never held that these are the only limited circumstances in which searches absent individualized suspicion could be "reasonable" under the Fourth Amendment.

Samson, 547 U.S. at 855 n.4.[2]

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[2]In light of this explanation, King's extensive reliance on three cases preceding *Samson* — namely, *Chandler v. Miller*, 520

True to these words, the *Samson* Court in fact applied the test espoused by *T.L.O.* and *Skinner*. Beginning with an assessment of the minimal privacy interests implicated by the search, the Court noted that as a parolee, Samson occupied a position on a "continuum" of state supervision that was somewhere between probation (as in *Knights*) and actual imprisonment. This level of supervision meant that Samson's reasonable expectations of privacy, while not entirely extinguished, were lowered. *Id*. at 850. The Court then turned to the government's interest in policing parolees, which the Court called "substantial," because of the greater likelihood that parolees would re-offend in the future, an obvious impediment to reintegration with society. *Id*. at 853.

Finally, the Court looked to the presence of "safeguards" that might fulfill the role of a warrant by limiting the discretion of the official in the field. *Id*. at 856. In this regard, the statute authorizing the warrantless search of Samson prohibited "arbitrary, capricious or harassing" searches, which the Court deemed sufficient to ameliorate the "concern that [the] suspicionless search system gives officers unbridled discretion[.]" *Id*. In the end, the Court concluded that the government's "substantial" interest in reducing recidivism, *id*. at 853, when weighed against a parolee's "severely diminished expectations of privacy," *id*. at 852, meant that the search was "reasonable"

U.S. 305 (1997); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) — as exemplary of some implicit limit on the application of the reasonableness balancing test to cases involving "special needs" is not correct.

under the Fourth Amendment.

Although more explicit in its doctrinal approach, *Samson* did not really break new ground by applying a balancing test in the field of criminal law enforcement. Take for example the decision in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), which "involve[d] criminal prosecutions for offenses relating to the transportation of illegal Mexican aliens." *Id.* at 545; *see also id*. at 552 ("Interdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems."). The Court approved of the warrantless stop and interrogation at fixed checkpoints of the occupants of automobiles traveling on roadways near the border. The Court noted that it would be "impractical" for the government to attempt to develop "reasonable suspicion" of smuggling or transportation of illegal aliens with regard to individual vehicles, due to the heavy traffic flow on the roads where checkpoints were located. *Id*. at 557.

Further, a "reasonable suspicion" requirement "would largely eliminate any deterrence to the conduct of well-disguised smuggling operations." *Id*. Since the checkpoint procedure significantly limited the discretion of the officers conducting the questioning and provided travelers with visible evidence of the questioner's legal authority, the Court also noted that the intrusion into an individual's legitimate expectation of privacy was fairly limited. *Id*. at 557-59; *see also Prouse*, 440 U.S. at 656-57 (search conducted according to neutral criteria far less intrusive than search apparently conducted at the whim of the searcher). While allowing that "some quantum of individualized suspicion is usually a prerequisite to a

constitutional search or seizure," the Court held that "the Fourth Amendment imposes no irreducible requirement of such suspicion." 428 U.S. at 560-61; *see also Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (no requirement to show "special need" search before engaging in balancing test); *Ferguson v. City of Charleston*, 532 U.S. 67, 81 n.15 (2001) (acknowledging that warrantless searches for law enforcement purposes may be acceptable even without probable cause when the individuals to be searched "have a lesser expectation of privacy than the public at large").

By parity of reasoning with *Samson,* and even a case like *Martinez-Fuerte*, the test for Fourth Amendment reasonableness in this case requires neither a warrant nor individualized suspicion. The test urged by Maryland is nothing new, and is, in fact, endorsed by King where, as here, the subject of the search has a reduced expectation of privacy, the governmental interests are important, and other safeguards fulfill the function of a warrant. (Respondent's Br. at 39) (citing *Samson*, 547 U.S. at 852).

B. Balancing the interests confirms the Fourth Amendment reasonableness of a search under the DNA Collection Act.

King argues that even if the Court were to dispense with the probable cause and warrant requirements, the collection of his DNA was not reasonable. His argument heavily depends on an insistence that people who have been arrested and charged with serious

crimes are identical, under the Fourth Amendment, to people who have not been arrested and charged with anything. This is not now and never has been the law.

1. King concedes that the collection of DNA from convicted offenders is constitutional, but mistakenly purports to draw a Fourth Amendment distinction between convicted offenders and arrestees based on the presumption of innocence.

In *State v. Raines*, 383 Md. 1 (2004), the Court of Appeals of Maryland considered the same statute when its application to convicted felons was challenged. Applying the balancing test used by this Court in *Knights* and *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999), the court found that "the primary purpose of the Act [is] to identify individuals involved in crime (including the vindication of those falsely convicted)[.]" 383 Md. at 24. Moreover, "the limited intrusion applies, not to members of the general public . . . but only to a certain class of convicted criminals." *Id*. at 25. Noting the provisions of the statute which prohibit unauthorized use of DNA samples, the court observed that "the only information obtained from the DNA linked to the individual pursuant to the Act is the DNA identity of the person being tested. The DNA profile thus serves the purpose of increasing the efficiency and accuracy in identifying individuals within a certain class of convicted criminals." *Id*. The court called such identifying profiles "akin to . . . a fingerprint[,]" and held that offenders "have little, if any, expectation of privacy in their identity" and that the collection of DNA "whose primary purpose is to

identify individuals with lessened expectations of privacy[] is totally distinguishable from [a] search of ordinary individuals for the purpose of gathering evidence against them in order to prosecute them for the very crimes that the search reveals." *Id*. (footnote omitted).

The *Raines* court held that the "minimal" intrusion of a buccal swab was less invasive than the search of a home in *Knights* and upheld the collection under the Fourth Amendment. *Id*. at 21. King and his amici would appear to agree with this analysis when they concede that the warrantless search of a person after conviction is allowed under the Fourth Amendment. (Respondent's Br. at 48).

With this concession, King's argument collapses. The operation of the statute is the same with regard to arrestees and convicted offenders. The only way to reach a different conclusion in this case is through a finding that people arrested and charged with a qualifying crime of violence do not have a "lessened expectation of privacy" in their identities. *Raines*, 383 Md. at 25. King would have this Court so find based on the same mistaken reasoning of the Court of Appeals below, that the presumption of innocence buoys an arrestee's expectation of privacy in his identity, so that it remains equivalent to any member of the public at large. He thus argues, "[w]hen it comes to the government's authority to conduct searches for investigative purposes, . . . an arrestee is presumed to be innocent, and stands in the same position as an ordinary citizen[.]" (Respondent's Br. at 26). Of course, this argument cannot be reconciled with this Court's precedents, particularly *Bell v. Wolfish*, 441

U.S. 520 (1979). (Petitioner's Br. at 18-21). In fact, King does not even try.

2. King overstates his privacy interest in his non-coding loci.

King further argues that a DNA profile is not simply identifying information because "our DNA is a blueprint[.]" (Respondent's Br. at 45). This is an incorrect analogy, because a blueprint defines exact physical specifications, while the human genome conveys only generalities. It also ignores the distinction between the entire human genome and the tiny, non-coding fraction of it contained in a standard CODIS profile, which reveals nothing about the person who contributed the profile save his or her sex. Sara H. Katsanis & Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 58 J. Forensic Sci. s169 (Jan. 2013). The State can and does analyze only that limited identifying information presented from FBI-approved reagents and software. Md. Code Regs. 29.05.01.01, *et seq*. (2012). Thus, the fact that the entire human genome – including non-coding loci – contains more detailed information which could, conceivably, be used to discern information about a person's general physical characteristics, simply is not relevant to the issue before this Court, because the State does not, and legally cannot, gather this sort of information. Md. Code Ann., Pub. Safety Art. § 2-505(b), § 2-512 (LexisNexis 2011 Repl. Vol.) When King's amicus refers to "[t]he broad discretion to rummage through an arrestee's genome" under the Act (Amicus Br. of Public Defender Service for the District of Columbia at 11), it is engaging in fantasy. No such

"rummaging" exists.

With respect to the 13 loci that the State does examine, King does not contend that they reveal any medically sensitive information, and they do not. (*See* Amicus Br. of Genetics, Genomics and Forensic Science Researchers at 36). Instead, he predicts that "scientific advances *may* allow additional personal information to be gleaned from" a CODIS profile. (Respondent's Br. at 46) (emphasis added). If and when science advances as King can only speculate, there will be time enough for courts to address it. But, a reviewing court is bound by the statute as it exists and as it is actually applied in the here and now. A court "must deal with the case in hand and not with imaginary ones[.]" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 455 (2008) (citation and quotation omitted); *see also Whalen v. Roe*, 429 U.S. 589, 605-06 (1977) (assuming law's privacy restrictions will be followed absent evidence to the contrary). There is no evidence that officials in Maryland, or anywhere else, are improperly analyzing, storing, or disseminating "genetic" information about arrestees or convicted offenders.

3. *The State has a significant interest in collecting DNA profiles from arrestees.*

As discussed in its opening brief, the State has a significant interest in collecting identifying DNA profiles from arrestees. The statute expressly spells out a number of legitimate state goals advanced by the legislation. The Court of Appeals, in *Raines*, identified others. At the end of the day, King himself presents

the best evidence of one of the legitimate state interests being advanced by the limited, systematic collection of identifying DNA profiles from arrestees: the name of the violent rapist who left behind his identifying DNA profile in 2003 was discovered when crime scene evidence was compared to King's DNA profile collected six years later. Before this case, King had never been convicted of a felony, and so absent the amendments to the DNA Collection Act, the DNA evidence he left at the scene of the 2003 rape might never have been linked to a specific individual.

King complains in his brief that there is insufficient evidence of "the efficacy of the expansion of the Maryland Act to arrestees." (Respondent's Br. at 49). But he does not venture a specific number as to how many rapists, murderers, and other criminals must be identified before a court may find that the State has advanced a legitimate interest. Since this Court's July, 2012 stay of the Court of Appeals' opinion and mandate in this case, allowing the State to resume collecting DNA profiles from qualified arrestees, the State has had 28 matches to unsolved crimes from new arrestee samples, including rapes, burglaries, assaults, and homicides. The matches have been to crimes committed in Maryland, Pennsylvania, Delaware, Florida, and New York. The State of California found that prior to the advent of arrestee profiling, its DNA database was helpful in about 35 percent of cases where unknown DNA samples were recovered. After arrestee profiling was instituted, that figure increased to nearly 68 percent. (Amici Br. of California, *et al.*, at 8-9).

The expansion of DNA databases to include more

known samples, moreover, has been shown to reduce crime rates overall, and at a lower cost than simply increasing incarceration rates or sentences.[3] The addition of samples from those charged with serious felonies has been projected to decrease murders by more than three percent and rapes by over six percent. Jennifer L. Doleac, *The Effects of DNA Databases on Crime*, University of Virginia 2012 (working paper, publication forthcoming) (available at http://www.batten.virginia.edu/content/2013-001-effects-dna-databases-crime-jennifer-doleac-860) (last visited Feb. 15, 2013). Thus, the various legislatures that have adopted DNA collection statutes have done so to further significant governmental interests in, for example, identifying people in custody, making proper decisions regarding bail and supervision, identifying the donors of previously recovered crime scene evidence, and properly sentencing recidivists.[4] If the

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[3]Thus on January 10, 2013, the President signed into law the Katie Sepich Enhanced DNA Collection Act of 2012, which provides grants to states to establish or broaden arrestee DNA collection programs. 112 P.L. 252, 126 Stat. 2407 (2013).

[4]The amici brief submitted by California on behalf of the States — joined by every other state in the union, the District of Columbia, and Puerto Rico — provides striking examples of pretrial supervision determinations affected by arrestee DNA testing. In one California case, Octavio Castillo was arrested on a stolen credit card charge and released on his own recognizance. When testing of Castillo's DNA sample taken on arrest revealed a match to the profile from an unsolved kidnapping and sodomy case, authorities revoked Castillo's bond, he was detained pending trial, and subsequently convicted. (Amici Br. of California *et al.*, at 11-12). In another case, Shelby Glenn Shamblin was arrested for drug offenses in 2010. Viewed by authorities as a low-level

interests themselves are significant, it is not the proper role of a reviewing court to second-guess the efficacy of a particular policy. But indeed the success that these programs have enjoyed nationwide indicates that not only are the interests advanced by the laws important, but that the laws are successfully achieving those policy goals.

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drug offender, Shamblin was granted a diversion in lieu of prosecution. Two months later, Shamblin's arrestee DNA sample revealed a match to an unsolved rape and murder case dating back to 1980. Based on that match, Shamblin was arrested, his diversion was terminated, and he is now scheduled to stand trial on both the drug charges and the rape and murder charges. (*Id*. at 12).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals of Maryland should be reversed and the constitutionality of the Act affirmed.

Respectfully submitted,

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