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

BRIEF OF PETITIONER

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QUESTION PRESENTED

Does the Fourth Amendment allow the States to collect and analyze DNA from people arrested and charged with serious crimes?

PARTIES TO THE PROCEEDING

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STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland was filed on April 24, 2012. The order of that court denying the State of Maryland's motion for reconsideration was filed on May 18, 2012. The petition for a writ of certiorari was filed on August 14, 2012, within 90 days of the denial of the motion for reconsideration as required by Rule 13 of the Rules of the Supreme Court of the United States. The petition was granted on November 9, 2012. The jurisdiction of this Court lies under 28 U.S.C. § 1257(a) (2006).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The 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.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1994, the Maryland General Assembly created a statewide DNA database. 1994 Md. Laws 458. In 2002, the legislature expanded the reach of the database by mandating the collection of identifying DNA samples from anyone convicted of a felony after October 1, 2002, or otherwise already incarcerated for a felony on that date. 2002 Md. Laws 465. In 2008, the legislature amended the law to require the collection of an identifying DNA sample from people arrested for certain serious offenses: crimes of violence, burglary,

and attempts to commit those crimes. 2008 Md. Laws 337. For the collection of these samples, the Act does not require an initial warrant, nor does it require individualized suspicion separate and apart from that justifying the arrest on the qualifying charge. The statute is currently codified at Md. Code Ann., Pub. Safety § 2-501 *et seq*. (LexisNexis 2011 Repl. Vol.) ("the DNA Collection Act" or "the Act").

The collection of DNA samples is strictly regulated. The State may only gather "DNA records that directly relate to the identification of individuals[.]" *Id*. § 2-505(b). All samples and records are kept exclusively by the State crime laboratory. *Id*. § 2-506. The match of a known sample to a crime scene sample in a database is not itself used as evidence in any subsequent trial; rather, that match is used as probable cause to obtain a second sample from the suspect, which is again analyzed and compared to the crime scene sample. The second match is what is introduced at trial. *Id*. § 2-510.

Arrestee samples, in particular, are subject to a number of regulations. These samples may not be analyzed until after the suspect's first appearance in court. *Id*. § 2-504(d)(1). If at the suspect's first appearance a judicial officer determines that the qualifying charge is not supported by probable cause, the sample must be immediately destroyed without analysis. *Id*. § 2-504(d)(2). Similarly, the State must destroy a DNA sample and expunge all related DNA records if no conviction arises from the related charges, or the conviction is reversed, vacated, or pardoned. *Id*. § 2-511. Any records not expunged as directed are excluded from use "in any proceeding for any purpose." *Id*. § 2-511(f)(2). The misuse of DNA information–

including unauthorized disclosure, unauthorized use of the database, unauthorized testing of samples, or the "[w]illful failure to destroy" a qualified sample–is classified as a misdemeanor, punishable by imprisonment of up to five years, a $5,000 fine, or both. *Id*. § 2-512. The State began collecting DNA samples from qualifying arrestees on January 1, 2009.

In April of 2009, Alonzo Jay King was arrested and charged with multiple counts of first- and second-degree assault. First-degree assault is a qualifying crime of violence under the Act, and, therefore, King was required to submit to a buccal swab of his cheek for use in DNA testing within the guidelines of the Act. After King's first appearance, during which a judicial officer determined that probable cause existed to charge King with first-degree assault, a DNA test of the buccal swab yielded an identifying DNA profile, and the State submitted that profile to the national DNA database, known as the Combined DNA Index System (CODIS), for comparison to any unknown DNA profile on file. This comparison yielded a match between King's DNA and the previously unknown DNA recovered from the 2003 rape of Vonette W. in Wicomico County, Maryland. Based on the DNA match, King was charged with the 2003 rape and robbery.[1]

King moved to suppress the DNA evidence before his trial on the 2003 rape, arguing, among other

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[1] King eventually entered an *Alford* plea to one count of second-degree assault in the 2009 incident (JA 4), which did not independently qualify him for DNA testing under the separate convicted-felon provisions of the Act.

things, that the 2008 amendments to the DNA Collection Act violated the Fourth Amendment. The trial court denied his suppression motion. (JA 56). King was ultimately tried on an agreed statement of facts on a single count of first-degree rape, and on July 27, 2010, he was convicted of that charge. (JA 2).[2] He appealed his conviction to Maryland's intermediate appellate court, raising the same Fourth Amendment challenge. The appeal was removed to the Court of Appeals of Maryland on that court's own motion before judgment.

In its decision below, the Court of Appeals acknowledged that it had "previously [ ] upheld the constitutionality of the Act, as applied to convicted felons," but observed that it was now being called upon to consider an extension of the statute that concerned arrestees. (JA 85). Relying on *Samson v. California*, 547 U.S. 843 (2006) and *United States v. Knights*, 534 U.S. 112 (2001) for a "totality of the circumstances balancing test" (JA 85), the Court of Appeals concluded that King had a "sufficiently weighty and reasonable expectation of privacy against warrantless, suspicionless searches that [was] not outweighed by the State's purported interest in assuring proper identification of him as to the crimes for which he was charged at the time." (JA 85). The court found that because the State had already "identified King

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[2] An agreed statement of facts serves in Maryland the same purpose that a conditional guilty plea serves in the federal system, that is, to preserve the appealability of certain pretrial motions without the expense of conducting an actual trial. Fed. R. Crim. P. 11(a)(2) ("Conditional Plea"); *Bruno v. State*, 332 Md. 673, 689, 632 A.2d 1192, 1200 (1993).

accurately and confidently through photographs and fingerprints," it had "no legitimate need for a DNA sample in order to be confident who it arrested or to convict him on the first- or second-degree assault charges." (JA 85).

The court believed that "at the heart of this debate" is the "presumption of innocence cloaking arrestees and whether legitimate government interests outweigh the rights of a person who has not been adjudicated guilty of the charged crime." (JA 112). Operating from that premise, the court determined that an arrestee is "somewhere closer along the continuum to a person who is not charged with a crime than he or she is to someone convicted of a crime." (JA 112). The court imposed upon the State "the burden of overcoming the arrestee's presumption of innocence and his expectation to be free from biological searches before he is convicted of a qualifying crime." (JA 140).

The court also employed the presumption of innocence as a means of distinguishing its earlier decision in *State v. Raines*, 383 Md. 1, 857 A.2d 19 (2004), which upheld the DNA Collection Act as applied to convicted felons. According to the court, it was the presumption of innocence that tipped the scale in King's favor in this case: "If application of the balancing test result[ed] in a close call when considering convicted felons," the court observed, "then the balance must tip surely in favor of our closely-held belief in the presumption of innocence here." (JA 141).

Further, the court "d[id] not embrace wholly the analogy between fingerprints and DNA samples." (JA 142). While accepting that a buccal swab constituted a "minimal" physical intrusion, the court nevertheless

found the swab "distinct" from a fingerprint for Fourth Amendment purposes. (JA 143). The court explained that it did so because, although the statute has built-in safeguards against misuse of information, it could "not turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State." (JA 143).

The two-judge dissent argued that the majority "overinflat[ed] an arrestee's interest in privacy and underestimat[ed] the State's interest in collecting arrestee DNA." (JA 154). The dissenters noted that the expectation of privacy for lawfully arrested individuals is greatly diminished and that the law already permits significant intrusions on an arrestee's privacy, including a full head-to-toe search incident to arrest, and a strip search and body cavity inspection upon entering the local jail. (JA 157). The dissent further emphasized that the buccal swab is a de minimis intrusion, and the privacy interest at stake is limited to "identification information revealed by the 13 loci" (JA 161), not wholesale genetic information. That privacy interest, the dissent said, was quite limited, if it existed at all.

The dissent also rejected the majority's claim that the government could rely on traditional and less intrusive methods of identification, and thus had no need for DNA collection. It noted that the State had a strong interest in using the most reliable form of identification, and deemed the majority's position "'a Luddite approach' to Fourth Amendment interpretation." (JA 165). Given that the law restricts testing to identification only, and "categorically prohibits the plundering of 'the vast genetic treasure

map' that is incidentally made available by DNA collection" (JA 160), the dissenters further stated that they "could not disagree more" with the majority's rejection of the analogy to fingerprints.

The Chief Justice, in his capacity as the Fourth Circuit Justice, granted a stay of the Court of Appeals' decision. (JA 168). This Court granted the State of Maryland's subsequent petition for a writ of certiorari on November 9, 2012.

SUMMARY OF ARGUMENT

For centuries, public safety agencies have devised increasingly accurate techniques to identify individuals in their custody. These agencies have sought to collect and share identifying information in a standardized format to discover recidivists and solve crimes. Thus, in the late nineteenth century, the Bertillon system emerged; in the early twentieth century, forensic fingerprinting rose to preeminence. American courts have universally upheld these identification techniques against constitutional challenge. *See, e.g., United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932) (fingerprinting); *Downs v. Swan*, 111 Md. 53, 73 A. 653 (1909) (Bertillon system). DNA identification is simply the most recent of these techniques, the Fourth Amendment legitimacy of which has never been seriously doubted.

The Fourth Amendment protects people against unreasonable searches and seizures. The arrestee provisions of the DNA Collection Act authorize a constitutionally reasonable search under a totality of the circumstances analysis, in which this Court weighs

the degree of intrusion upon the privacy interest at stake against the degree to which the search furthers legitimate governmental interests. *Samson*, 547 U.S. at 848; *Knights*, 534 U.S. at 118-19.

On one side of the scale, the degree of intrusion is minimal. The DNA is taken by a buccal swab—a quick and painless rubbing of the cheek. The Act allows for the production of only a very limited amount of strictly identifying information from that swab. Arrestees have a reduced expectation of privacy generally, and when it comes to identity specifically, no legitimate expectation of privacy. The loss of liberty that flows from a finding of probable cause necessarily entails a loss of privacy in one's identity. Once lawfully in police custody, "the 'booking' of an arrestee, which for one thing confirms the person's identity, does not violate the Fourth Amendment." *Doe v. Sheriff of DuPage County*, 128 F.3d 586, 588 (7th Cir. 1997).

Additionally, from a Fourth Amendment perspective, the physical restrictions imposed upon an arrestee leave an arrestee situated similarly to a convicted offender in prison. And, contrary to the Court of Appeals' ruling, the presumption of innocence does not alter an arrestee's privacy interest. The presumption of innocence is a trial right that does nothing to change the restrictive conditions of pretrial custody that diminish an arrestee's expectation of privacy.

On the other side of the scale, the State's interests are significant. First, the State needs to accurately identify the people it has lawfully taken into custody, and DNA collection from arrestees serves the same

goals of unparalleled accuracy in identification as does DNA collection from convicted offenders. Second, by authorizing DNA collection at the time of arrest, the Act advances the State's interest in the supervision of pretrial detainees, which is not significantly different than its interest in the supervision of convicted offenders. Third, to the extent that DNA profiling leads to more efficient criminal investigations and prosecutions by accurately identifying a suspect, sampling arrestees advances the State's interest in acquiring this information when it can do the most good. Lastly, it is legitimate for the State to enact reasonable policies that enhance the efficacy of comparative DNA databases for solving crimes. By testing arrestees, the State expands the database in a reasonably targeted fashion, avoids squandering investigational resources, spares innocent persons from becoming mistaken suspects, and prevents additional crimes that might otherwise occur.

Further, the DNA Collection Act contains various safeguards that ensure the reasonableness of the search. It limits the discretion of individual police officers by mandating collection from those arrested for enumerated crimes. The Act criminalizes the misuse of samples, including improper testing. The Act does not allow for information to be retrieved from the samples until after the arrestee has been arraigned. And, finally, the Act contains an automatic expungement provision for an arrestee who is later cleared of all charges. For all these reasons the Court should conclude that the DNA Collection Act's arrestee provisions authorize a reasonable search under the Fourth Amendment.

ARGUMENT

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

The Fourth Amendment to the United States Constitution provides that "[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." U.S. Const. amend. IV. The touchstone of the Fourth Amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

Reasonableness must be appraised in light of the circumstances surrounding the search. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). The test for reasonableness involves balancing two interests: "the degree to which [the search] intrudes upon an individual's privacy" and "the degree to which [the search] is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999); *see also Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 536-37 (1967) ("there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails").

Reasonableness requires neither a warrant nor probable cause in all cases. *T.L.O.*, 469 U.S. at 340-41 (citing cases). Indeed, not even individualized suspicion is an irreducible minimum of constitutional reasonableness: "The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion. Thus, while this Court's jurisprudence has often recognized that 'to accommodate public and private interests[,] some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure,'. . . the 'Fourth Amendment imposes no irreducible requirement of such suspicion.'" *Samson*, 547 U.S. at 855 n.4 (citation omitted); *see also Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) (reaffirming "the longstanding principle" that no "measure of individualized suspicion[] is an indispensable component of reasonableness in every circumstance"); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989) ("[A] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable."). "Exceptions to the requirement of individualized suspicion are generally appropriate only where 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.'" *T.L.O.*, 469 U.S. at 342 n.8 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)).

This Court most recently applied this analysis in *Samson*, which involved the warrantless, suspicionless search of a parolee's person on a public street. Citing *Knights*, a similar case, the *Samson* Court balanced

the State's interests against the parolee's legitimate privacy expectations under the "totality of the circumstances." *Samson*, 547 U.S. at 848. 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 his reasonable expectations of privacy were lowered. *Id*. at 850. The Court found 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" under the Fourth Amendment.

The Court of Appeals of Maryland applied the *Knights*/*Samson* balancing test for reasonableness in this case, and indeed the same test has been applied in other cases on this topic. *United States v. Mitchell*, 652 F.3d 387, 403 (3d Cir. 2011); *see also Haskell v. Harris*, 669 F.3d 1049, 1053-1054, *vacated for en banc review*, 686 F.3d 1121 (9th Cir. 2012). Under that test, the DNA Collection Act's arrestee provisions authorize a reasonable search under the Fourth Amendment.

A. The search authorized by the DNA Collection Act involves only a minimal intrusion.

The search at issue in this case involves rubbing a small swab against the inside of an arrestee's cheek during booking. This is a de minimis invasion of personal integrity. *See Schmerber v. California*, 384 U.S. 757, 771 (1966) (invasiveness of blood draw not

significant).[3]

King's concern, of course, is not with the physical intrusiveness of the buccal swab, but with the nature of the information that is recovered from the swab. In this, he misperceives both the nature of that information and the legitimacy of his assumed right to anonymity.

1. By law, the only information at stake is an arrestee's identity.

This Court has long held that when assessing the constitutionality of a statute, it would consider the statute as written and not speculate about possible actions outside the purview of the law. *See*, *e.g.*, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (statute's presumptive correctness and deference by court requires that court not "go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases"). Thus, in *Whalen v. Roe*, 429 U.S. 589 (1977), this Court refused to find that a right to privacy was violated by a statute because a state agent might violate the restrictions on use and disclosure of

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[3] The constitutionality of the Act does not rise and fall on the minor intrusion of swabbing. While a buccal swab is the means of collection currently prescribed by the Director of the State Police Forensic Sciences Division, Md. Code Regs. 29.05.01.02 (2012), that method is not fixed by the Act. In the future, DNA samples may be taken by a piece of adhesive tape on the arm or outer ear. R.C. Li and H.A. Harris, *Using Hydrophilic Adhesive Tape for Collection of Evidence for Forensic DNA Analysis*, 48 J. Forensic Sci. 1318 (Nov. 2003).

information gathered pursuant to the law. *Id*. at 601; *see also NASA v. Nelson*, 131 S.Ct. 746, 761-62 (2011) (laws and regulations limiting public disclosure of private data sufficient to protect against fears of improper dissemination).

Similarly, in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), this Court dismissed concerns regarding the potentially private information gathered from a medical analysis. There, the test in question was urinalysis to look for evidence of illegal drug use in student athletes. This Court found that there was no Fourth Amendment violation where the school was only seeking evidence of drug use, and was not using the urine samples to gather other, unrelated information. *Id*. at 658-60.

When the Court of Appeals expressed concern about the disclosure of the "vast genetic treasure map" of the human genome (JA 143), it was ignoring the law as written. What is at issue in this case is not a search of King's "genes," but rather a search for his identity. The means by which his identity was ascertained was the forensic analysis of certain non-coding alleles on his DNA. Those alleles are not "genes"—they do not instruct cells to create proteins, and they do not translate to any phenotypical trait. *See* Sara H. Katsanis and Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, __ J. Forensic Sci. __ (Aug. 24, 2012) (concluding that loci used for forensic identification do not convey any sensitive or bio-medically relevant information) (advance online copy available at, http://onlinelibrary.wiley.com/doi/10.1111/j.1556-4029.2012.02253.x/abstract) (last visited Dec. 20, 2012). The privacy interest

at stake in this case is only in King's identity, as expressed by a short and essentially random sequence of numbers engraved upon every living cell.

Thus, any analysis of the information taken under the DNA Collection Act must be limited to what is actually taken under the statute, and not what other potential, illegal uses could be made of the swabs. Under the Act, the only information that may be collected and stored goes to identity, Md. Code Ann., Pub. Safety § 2-505(b), and any other use of the swabs is an incarcerable offense. *Id*. § 2-512. The State's crime laboratory, moreover, must comply with both the FBI's standards and the standards promulgated by the Maryland Secretary of the State Police. *Id*. § 2-503. These regulations similarly limit the information extracted from arrestee samples to a standard set of non-coding alleles, from which the State learns nothing aside from the gender of the individual and 13 pairs of numbers which, on their own, signify nothing. *See* FBI Laboratory Services, *CODIS and NDIS Fact Sheet*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last viewed Dec. 18, 2012) (listing accepted 13 loci). The string of numbers is useful for forensic purposes not because of any innate informational content, but solely because it is unique to that individual.

2. People arrested for violent crimes have reduced expectations of privacy generally, and no legitimate expectation of anonymity specifically.

In *Samson*, this Court discussed a "continuum" of privacy expectations, noting that parolees had a

greater expectation of privacy than those incarcerated, but a lesser expectation of privacy than probationers, with incarceration implicitly marking the nadir of privacy expectations. 547 U.S. at 850. At least initially, people arrested for violent crimes are incarcerated. It may be for a few hours until they make bond, or it may be until trial, but they are wholly in the custody of the State, far beyond the relatively remote level of supervision afforded to parolees and probationers.

Lawful arrest fundamentally changes the nature of the individual's physical relationship to the State, and correspondingly diminishes the individual's reasonable expectation of privacy. *See, e.g., United States v. Robinson*, 414 U.S. 218, 235 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."); *see also Illinois v. Lafayette*, 462 U.S. 640, 648 (1983) (routine search of items taken from arrestees reasonable without warrant); *United States v. Edwards*, 415 U.S. 800, 808 (1974) (no warrant required for search and laboratory analysis of suspect's clothes seized during booking).[4] The key limiting principle is that the arrest be lawful, and not simply a subterfuge for collecting the

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[4] In his concurrence in *Robinson*, Justice Powell was unequivocal: "[A] valid arrest justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee. The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest." 414 U.S. at 237-238 (Powell, J., concurring).

identifying information. *See Davis v. Mississippi*, 394 U.S. 721, 727 (1969).[5]

Not only does arrest mark a general reduction in an individual's expectation of privacy, but it eliminates entirely any expectation of anonymity. An arrestee might hope that his identity, and thus his participation in other crimes, goes undiscovered by the State. But "the mere expectation, however well justified, that certain facts will not come to the attention of the authorities" is not a privacy interest "that society is prepared to recognize as reasonable." *United States v. Jacobsen*, 466 U.S. 109, 122 (1984).

This Court has already ruled that there is no Fourth Amendment right to anonymity after being lawfully stopped by the police. In *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004), this Court upheld a Nevada law requiring people detained by the police to identify themselves. "[I]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *Id*. at 185 (quoting *INS v. Delgado*, 466 U.S. 210, 216 (1984)). Indeed, even absent a Fourth Amendment seizure, a person has no right to refuse to disclose identifying physical traits

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[5] The Maryland statute applies even greater limits. The buccal swab is not analyzed until after arraignment, the sample and test results are automatically expunged if no convictions arise from the arrest, and a statutory exclusionary rule bars the use of any samples after the expungement date. Md. Code Ann., Pub. Safety §§ 2-504(d), 2-511. These specific statutory restrictions are not necessarily determinative of the constitutionality of the statute, but they reflect the Maryland General Assembly's efforts at crafting a balanced, reasonable approach.

such as voice, *United States v. Dionisio*, 410 U.S. 1, 12-14 (1973); handwriting, *United States v. Mara*, 410 U.S. 19, 21 (1973); or hair samples, *In re Grand Jury Proceedings (Mills)*, 686 F.2d 135, 139 (3d Cir. 1982), *cert. denied*, 459 U.S. 1020 (1982). An arrestee certainly does not have a broader right to withhold proof of his identity than a grand jury witness. *Kelly*, 55 F.2d at 70 (no right to withhold fingerprints after arrest); *Downs*, 111 Md. at 64, 73 A. at 656 (no right to withhold Bertillon measurements after arrest).

If there is no right to anonymity for a citizen briefly detained on the street by an investigating officer or subpoenaed by a grand jury, certainly no right belongs to a person lawfully arrested for the type of violent or other serious crimes contemplated by the DNA Collection Act. In short, a person who is arrested for a violent crime has no right to withhold his identity from the police, and under the statute, the only information being analyzed by the State goes to the arrestee's identity. Whether that identifying information is a photograph, series of whorls and ridges on a fingerprint, or the string of numbers resulting from a DNA profile, the collection of that information as a part of routine booking procedures is reasonable. Because the Act limits the search at issue to identifying information only, it is of a kind with well-established booking procedures such as fingerprinting and photographing.[6]

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[6] In an observation that could just as easily apply to the transition from fingerprints to DNA profiles, one commentator noted that the change from Bertillonage to fingerprints was in part "because people often left their prints, but never their (continued...)

3. The presumption of innocence does not buoy an arrestee's privacy interest.

Virtually every State to have considered the question has upheld the collection of identifying DNA information from convicted offenders, including Maryland. *State v. Raines*, 383 Md. 1, 857 A.2d 19 (2004). From a Fourth Amendment standpoint, there is little distinction between someone incarcerated pending trial and someone incarcerated following a conviction. Both have a diminished expectation of privacy based on their physical and legal relationship to the State.

Indeed, the "continuum" discussed in *Knights* and *Samson* describes a range of physical relationships to the State, not an abstract continuum of pre- and post-trial legal rights. *Samson*, 547 U.S. at 850. The Court of Appeals of Maryland mistook this continuum for the latter, leading it to distinguish arrestees from convicted offenders on the basis of the presumption of innocence, the only differentiating legal right the court could divine. (JA 141).

This was error. The presumption of innocence is part of the trial right to due process. It is irrelevant to the Fourth Amendment right to be free from unreasonable searches and seizures prior to trial. In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court explicitly held that the presumption of innocence "has

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[6](...continued)
Bertillon measurements, at crime scenes." Michael J. Saks, *Merlin & Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science*, 49 Hastings L.J. 1069, 1084 (1998).

no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Id*. at 533; *see also United States v. Dillard*, 214 F.3d 88, 102 (2d Cir. 2000) (rejecting application of presumption of innocence to pretrial bail determinations), *cert. denied*, 532 U.S. 907 (2001); *United States v. Koskotas*, 888 F.2d 254, 257 (2d Cir. 1989) (noting that presumption of innocence "has no bearing on pre-trial issues"); *In re Forfeiture Hearing*, 837 F.2d 637, 643 (4th Cir. 1988) (en banc) (presumption of innocence "is not a grant of immunity from pre-trial inconvenience" and does not apply to pretrial "interfer[ence] with liberty or property," including property forfeiture). Absent the erroneous reliance on this doctrine, however, the primary distinction between this case and the convicted-offender cases disappears.

B. The search authorized by the DNA Collection Act greatly advances important governmental interests.

Turning to the other side of the scale, the minimal intrusion occasioned by the DNA Collection Act is justified by several important governmental interests.

1. DNA profiles of arrestees serve the same goals of unparalleled accuracy in identification as DNA profiles of convicted offenders.

The 2008 extension of the Act to arrestees advances the State's interest in accurately identifying people in its custody. King, like many people charged with

crimes of violence, remained in state custody pending trial. The State clearly has an interest in knowing the identities of the people in its custody. Because of its "unparalleled" accuracy, DNA analysis "has the potential to significantly improve both the criminal justice system and police investigative practices." *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 55 (2009). It is the gold standard of forensic identification, and thus the State has an interest in making DNA identification a part of its post-arrest identification process.

Not only is DNA analysis the best means of identification, it is immutable. King could give a false name; he could even change his appearance. But what King could not do is change the 26-number sequence derived from his DNA. *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992) ("Even a suspect with altered physical features cannot escape the match that his DNA might make with a sample contained in a DNA bank, or left at the scene of a crime within samples of blood, skin, semen or hair follicles."). For this reason, the "governmental justification for this form of identification . . . relies on no argument different in kind from that traditionally advanced for taking fingerprints and photographs, but with additional force because of the potentially greater precision of DNA sampling and matching methods." *Id*.

By authorizing DNA collection at the time of arrest, the DNA Collection Act also advances the State's interest in supervision of pretrial detainees, which is not significantly different than its interest in the supervision of convicted offenders. By accurately identifying arrestees, the State learns who may be suspects in other unrelated crimes, and who among

them should be charged under recidivist statutes. The State needs to reliably identify those in its custody in order to set bail, make decisions on institutional security for those not released, and set the terms and conditions of community supervision for those who are released. Accurate identification aids the State in the event that an arrestee escapes prior to trial, or if someone in its custody is wanted in another jurisdiction.

What is more, the State needs to acquire this information in a way that is most useful to its central missions of solving crimes and administering justice. Because the identifying information recovered from crime scenes is not always in the form of fingerprints, or photographs, or a suspect's name and date of birth, experience has shown that the State's interests are best served in gathering identifying information in a variety of formats—including DNA profiles.

2. The State has an interest in solving crimes as expeditiously as possible.

Additionally, of course, the State has an interest in solving crimes. Section 2-505 of the Act, enacted before the extension of the law to arrestees, includes "official investigation into a crime" as one of the enumerated purposes of creating the DNA database. By collecting DNA profiles at the time of arrest, law enforcement may narrow its field of suspects and save investigative resources. It can solve crimes faster, it can identify suspects with greater accuracy, and it can reduce the risk of setting a dangerous criminal free due to its failure to identify him as such.

To that end, the more profiles in the comparative DNA database, the more useful the database in identifying suspects. In 2002, the Maryland General Assembly made a reasoned choice to limit the collection of DNA to those convicted of felonies. Md. Code Ann., Pub. Safety § 2-504(a). In 2008, the General Assembly determined that the State's interests in a robust database would be better served by including the DNA profiles of people charged with crimes of violence, subject to certain safeguards and restrictions.

This, too, was a reasonable legislative choice. As Amicus Curiae DNA Saves said in its brief in support of the certiorari petition in this case, 70 percent of America's crime is committed by only six percent of its criminals. James E. Hooper, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 Mich. L. Rev. 1951, 1951 n.3 (1991). As a class, arrestees are far more likely than the general public to be recidivists. Approximately 77 percent of arrestees have prior arrests, 69 percent have multiple prior arrests and 61 percent have at least one prior felony conviction. U.S. Dep't of Justice, Bureau of Justice Statistics, *Violent Felons In Large Urban Counties* at 4, 5 (2006).

The General Assembly's decision to expand the Act to arrestees was balanced by the limits it imposed upon the State. The law restricts the State to accessing only identifying information and imposes clear limits on the collection, retention, and use of that information. At the same time it allows the State to gather identifying information in a forensically useful format from a group of people who have already, by

virtue of arrest, relinquished any right of privacy in their identities.

The facts of this case dramatically underscore the value of expanding the database to include arrestees charged with violent crimes. It is undisputed that in 2003, King broke into the home of Vonette W. and raped her at gunpoint. He did not leave behind his photograph, his fingerprints, or his name—but he did leave his identity nonetheless, in the form of a string of numbers engraved upon every cell. When he was arrested in 2009, it was for a different violent crime, first-degree assault. He was ultimately convicted of second-degree assault, which is not a felony, and therefore his DNA would never have been taken by the State under the original version of the DNA Collection Act. It was only due to the expansion of the Act to cover those charged with violent crimes that King was linked to the rape of Vonette W. and ultimately convicted. The DNA Collection Act reasonably advances a legitimate state interest and makes no intrusion on any cognizable privacy right of an arrestee. It does not violate the Fourth Amendment.

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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