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Arrestee Number Two, Who Are You? Suspicionless DNA Testing of Pre-Trial Arrestees and the Fourth Amendment Implications

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NOTE

Arrestee Number Two, Who Are You? Suspicionless DNA Testing of Pre-Trial Arrestees and the Fourth Amendment Implications

Maryland v. King, 133 S. Ct. 1958 (2013)

LESLEY A. HALL*

I. INTRODUCTION

On September 21, 2003, a man broke into the home of Vonette W., a fifty-three-year-old Salisbury, Maryland, resident, and raped her at gunpoint.[1] The crime was not solved for another six years, when a DNA test revealed the identity of her attacker.[2] That attack propelled a Fourth Amendment fight in the Maryland state court system over whether suspicionless DNA[3] testing of pre-trial arrestees was unreasonable under the Fourth Amendment, an issue ultimately resolved in the Supreme Court of the United States.[4]

This Note discusses the resolution of that constitutional battle, *Maryland v. King*, where the U.S. Supreme Court held that DNA testing of pre-trial arrestees was reasonable under the Fourth Amendment as a routine booking procedure.[5] The Court also held that DNA testing's use for arrestee identification permitted its use as a tool to investigate suspicionless crimes.[6] Part II analyzes the facts and holding of *Maryland v. King*. Part III discusses Fourth Amendment jurisprudence, including court-established tests used to ascertain whether a particular search is reasonable. Part IV examines the United States Supreme Court's rationale in *King*, including Justice Scalia's dissent, joined by Justices Ginsburg, Sotomayor, and Kagan. Lastly, Part V analyzes why the majority erred in determining that suspicionless DNA tests were reasona-

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1. Maryland v. King, 133 S. Ct. 1958, 1965 (2013).

2. *Id.*

3. "DNA" means deoxyribonucleic acid. MD. CODE ANN., PUB. SAFETY § 2-501(g) (West 2014).

4. *See* King v. State, 42 A.3d 549 (Md. 2011), *cert. granted* Maryland v. King, 133 S. Ct. 594 (2012), *rev'd* 133 S. Ct. 594 (2013).

5. 133 S. Ct. 1958, 1980 (2013).

6. *Id.*

ble under the Fourth Amendment, how the holding further blurs Fourth Amendment exceptions, and how the holding diminishes the Fourth Amendment's power to protect an arrestee's expectation of privacy. This Note ends by discussing certain issues on which the Court remained silent in its opinion, issues that could prove dispositive in future cases.

II. FACTS AND HOLDING

On September 21, 2003, a man broke into Vonette W.'s Salisbury, Maryland, home.[7] The man wore a scarf to conceal his identity and ordered Vonette W. not to look at him.[8] The attacker raped Vonette W. at gunpoint and fled with her purse.[9] An ambulance took Vonette W. to Peninsula Regional Medical Center, where she underwent a forensic examination for sexual assault.[10] Semen was collected on a vaginal swab, the swab was subsequently processed, and the DNA was uploaded to the Maryland DNA database.[11] No matches resulted from sample comparisons in the DNA database, and Vonette W. was unable to positively identify her attacker.[12]

On April 10, 2009, approximately six years after Vonette W.'s attack, Alonzo Jay King, Jr. ("King") was arrested in Wicomico County, Maryland, after being accused of scaring a group of people with a shotgun. He was charged with first- and second-degree assault.[13] As part of their booking procedure, the Wicomico County police used a cheek swab to take a DNA sample from King, which was authorized by the Maryland DNA Collection Act ("Maryland Act").[14]

Prior to his April 2009 assault arrest, King was not a suspect in the Vonette W. rape. However, on August 4, 2009, the Combined DNA Index System ("CODIS")[15] provided the Salisbury police with a "hit" on King's DNA profile.[16] CODIS also informed the Wicomico County, Maryland, police that a DNA sample matched their sample.[17] Wicomico County police then identified the arrestee to whom that DNA sample belonged.[18]

On October 13, 2009, Detective Barry Tucker of the Salisbury Police Department presented the DNA findings to a grand jury, which returned with

7. King v. State, 42 A.3d 549, 553-54 (Md. 2011), *cert. granted* Maryland v. King, 133 S. Ct. 594 (2012), *rev'd* 133 S. Ct. 1958 (2013).

8. *Id.*

9. *Id.* at 554.

10. *Id.*

11. *Id.*

12. *Id.*

13. Maryland v. King, 133 S. Ct. 1958, 1965 (2013).

14. *See id.* at 1966; *see also* MD. CODE. ANN., PUB. SAFETY § 2-504 (West 2014).

15. *See infra* Part III.F.

16. King v. State, 42 A.3d at 553.

17. *Id.*

18. *Id*.

an indictment against King for ten charges in the Vonette W. rape.[19] The DNA hit provided Detective Tucker with probable cause for the indictment and with probable cause for Detective Tucker to acquire a search warrant to obtain another buccal swab[20] from King.[21] King filed a motion to suppress in the Circuit Court for Wicomico County, claiming that the Maryland Act that authorized the initial post-arrest buccal swab violated King's Fourth Amendment right against unreasonable searches and seizures.[22] The Circuit Court denied King's motion to suppress.[23] King pled not guilty to the rape charges, and after a trial was convicted and sentenced to life in prison without the possibility of parole for the rape.[24] The Maryland Court of Appeals reversed, holding that the section of the Maryland DNA Collection Act, which allowed DNA collection from pre-trial arrestees, violated the Fourth Amendment of the United States Constitution.[25]

Maryland appealed, and on June 3, 2013, the U.S. Supreme Court granted certiorari.[26] In a 5-4 decision, the Court held that "DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure."[27] Specifically, the Court held that when officers made an arrest supported by probable cause to hold for a serious crime, taking and analyzing a buccal swab of the arrestee's cheek was a legitimate booking procedure that assisted officers in identifying the arrestee.[28] Justice Scalia wrote the dissenting opinion, joined by Justices Ginsberg, Sotomayor, and Kagan.[29] The dissent stated that DNA testing of pre-trial arrestees did not identify arrestees as part of the booking procedure and instead was an unconstitutional suspicionless search for criminal investigatory purposes.[30]

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19. *Id.* at 554.

20. A buccal swab is a cotton swab or filter paper that is applied to the inside cheek of a suspect's mouth. Maryland v. King, 133 S. Ct. at 1965.

21. *See* King v. State, 42 A.3d at 553. While King's original DNA sample hit was inadmissible as evidence at trial, it was lawfully used as probable cause for a warrant to obtain a second sample. *Id.* at 560 (citing MD. CODE ANN., PUB. SAFETY § 2-510 (West 2012)).

22. *Id.* at 558-59.

23. *Id.* at 554-55. After a hearing, the trial court judge issued a memorandum upholding the constitutionality of the Maryland DNA Collection Act's authorization to collect DNA from arrestees because King's arrest was lawful. *Id.*

24. *Id.* at 555.

25. *Id.* at 555-56. The court held that, using the totality of the circumstances balancing test, King's expectation of privacy as an arrestee was greater than the State's purported interest in using King's DNA to identify him for purposes of his arrest on the assault charges. *Id.*

26. Maryland v. King, 133 S. Ct. 1958, 1966 (2013).

27. *Id.* at 1980.

28. *See id.* The Court also held that the swab on the arrestee's cheek is a painless and minimal intrusion. *Id.*

29. *Id.* (Scalia, J., dissenting).

30. *See infra* Part IV.B.

III. LEGAL BACKGROUND

The Fourth Amendment is an essential source of individual protection against illegal state intrusion, especially protecting those individuals accused of committing criminal acts.[31] The Fourth Amendment to the U.S. Constitution states as follows:

> 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.[32]

The touchstone of Fourth Amendment analysis has been the question of reasonableness.[33] Whether the government is investigating a crime or performing a noncriminal investigation determines what must be demonstrated to "search" and "seize" without violating the Fourth Amendment.[34] Section A discusses the standard for determining whether a governmental action constitutes a Fourth Amendment search. Section B considers the standard required of law enforcement officers investigating a crime. Section C analyzes the government's burden in noncriminal administrative searches. Section D examines the totality of the circumstances test that courts often use to determine Fourth Amendment reasonableness. Section E discusses DNA testing of arrestees and what federal courts have held. Finally, Section F discusses the Maryland DNA Act.

A. The Fourth Amendment and the Reasonable Expectation of Privacy Standard

To determine whether a search was reasonable, the initial question must be whether a governmental act was actually a Fourth Amendment search. DNA testing, according to the Court in *King*, was a search governed by the Fourth Amendment.[35] In *Katz v. U.S.*,[36] Charles Katz was convicted of transmitting wagering information by telephone from California to Florida and Massachusetts.[37] The federal government recorded Katz's telephone conversation while in a public telephone booth using an electronic listening

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31. Mapp v. Ohio, 367 U.S. 643, 654-55 (1961).

32. U.S. CONST. amend. IV.

33. Michigan v. Fisher, 558 U.S. 45, 47 (2009) ("[T]he ultimate touchstone of the Fourth Amendment, we have often said, is reasonableness.").

34. *Id.*

35. Maryland v. King, 133 S. Ct. 1958, 1968-69 (2013).

36. 389 U.S. 347, 352-53 (1961) ("[T]he premise that property interests control the right of the Government to search and seize has been discredited.").

37. *Id.* at 348. This was a violation of federal law. *Id.*

and recording device placed on the outside of the telephone booth.[38] The Court held that the government's eavesdropping into the public telephone booth violated the Fourth Amendment, explaining that the Fourth Amendment "protects people – and not simply 'areas' – against unreasonable searches and seizures."[39]

In *Katz*, Justice Harlan's concurrence established a two-part test: first, that a person exhibited an actual, subjective expectation of privacy, and second, that the expectation of privacy was one that society recognized as reasonable.[40] Jurisprudence extending from *Katz* further defined the test and provided instructions for courts and governmental actors on whether a person or her actions are protected from governmental intrusion under the Fourth Amendment.[41]

B. The Fourth Amendment Probable Cause Standard

Fourth Amendment case law has interpreted the "reasonableness" requirement of the Fourth Amendment to mean that, while pursuing a criminal investigation, law enforcement officials must have probable cause to execute a warrantless arrest and search.[42] In *King*, the Court analyzed whether the Fourth Amendment required probable cause of a particular crime before law enforcement swabbed King's cheek.[43] The Fourth Amendment speaks only to warrants requiring probable cause, stating that "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."[44] The Court in *Henry v. United States* interpreted the Fourth Amendment to require that a police officer have probable cause to arrest a suspect and perform a search incident to that arrest.[45]

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38. *Id.*

39. *Id.* at 353.

40. *Id.* at 361 (Harlan, J., concurring).

41. *See* California v. Greenwood, 486 U.S. 35 (1988) (holding that society has no reasonable expectation of privacy concerning garbage left on the curb for pickup); *see also* Kyllo v. United States, 533 U.S. 27 (2001) (holding that police use of a thermal imager to look into a home was a search under the Fourth Amendment because the technology obtained information that could not have been obtained without a "physical intrusion into a constitutionally protected area"); Oliver v. United States, 466 U.S. 170 (1984) (creating the "open fields" doctrine by holding that police entry and examination of open fields does not implicate Fourth Amendment protections).

42. Camara v. Mun. Court of S.F., 387 U.S. 523, 534-35 (1967).

43. Maryland v. King, 133 S. Ct. 1958, 1969 (2013).

44. U.S. CONST. amend. IV.

45. Henry v. United States, 361 U.S. 98, 103 (1959). In *Henry*, John Patrick Henry was convicted of unlawfully possessing cartons of stolen radios. *Id.* at 98. Police stopped him after they watched him get into an automobile and make several stops in an alley, leaving their sight and returning with cartons, which he placed in a car and drove off. *Id.* at 99-100. The U.S. Supreme Court held that the police lacked

The Fourth Amendment has been interpreted to require a finding of probable cause to arrest a suspect and perform a search incident to that arrest because the Amendment's text included a prohibition on the unreasonable "search and seizure" of persons.[46] In *Tennesee v. Garner*, the Court held that when a police officer restrained the freedom of a person to walk away, he has seized that person.[47]

The Court has interpreted the Fourth Amendment to require a finding of probable cause to arrest a suspect.[48] In *Wong Sun v. United States*, the Court held that probable cause created a reasonable person standard and that the police officer must have "evidence which would warrant a man of reasonable caution and belief that a [crime] has been committed."[49] The Court also held that probable cause is fact-specific and established the minimum standard applicable to warrantless arrests.[50] The objective of the probable cause standard was to prevent unfounded arrests, or arrests on insufficient evidence of

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sufficient probable cause to arrest Henry because his actions did not provide police with reasonable grounds to believe that a particular package contained stolen radios. *Id.* at 104. The Court stated, "And while a search without a warrant is, without limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause." *Id.* at 102 (citing Carroll v. United States, 267 U.S. 132, 155-56 (1925)).

46. Tennessee v. Garner, 471 U.S. 1, 7 (1985); *see* Payton v. New York, 445 U.S. 573, 585 (1980) ("[I]t is sufficient to note that the warrantless arrest of a person is a species of seizure required by the Amendment to be reasonable."); Beck v. Ohio, 379 U.S. 89, 92 (1964).

47. *Garner,* 471 U.S. at 7 (1985). Edward Garner ran from police and attempted to climb over a fence to elude police, who chased him after suspecting he had burglarized a home. *Id.* at 3-4. The police shot him as he fled, killing him, and his father filed a lawsuit against the police, alleging that the statute that permitted police to use deadly force against an unarmed fleeing suspect was unconstitutional under the Fourth Amendment. *Id.* at 4-5. The Court reasoned that because restraining a person's freedom is a seizure for Fourth Amendment purposes, killing a "fleeing suspect" is also a seizure. *Id.* at 11. The Court held that because Garner's son was unarmed and running away, the officer's act of pulling his pistol and shooting Garner's son in the head was not reasonable, and thus not justified under the Fourth Amendment. *Id.*

48. Wong Sun v. United States, 371 U.S. 471, 479 (1963) ("It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion."); *see* Henry v. United States, 361 U.S. 98, 101-02 (1959).

49. *Wong Sun*, 371 U.S. at 479. Defendants James Wah Toy and Wong Sun were arrested separately under suspicion of selling heroine after police chased Toy through his home and arrested him after an informant revealed that he had purchased heroine from Toy. *Id.* at 472-75. Toy claimed that Wong Sun sold heroine and police subsequently arrested Wong Sun at his home. *Id.* at 474-75. The Court held that Toy's arrest lacked probable cause because the informant's statements to police did not provide enough evidence that Toy possessed heroine. *Id.* at 479.

50. *Id.*

wrongdoing.[51] In lieu of taking time to obtain a warrant, a police officer may legally arrest an individual once the combination of facts at hand provide him with a reasonable belief that a felony has been committed or that a misdemeanor has been committed in his presence.[52]

C. The Fourth Amendment Jurisprudence and the Administrative Search

The requirement of probable cause to "seize and search" the person is limited to instances where the primary objective is criminal investigation.[53] Fourth Amendment jurisprudence has carved out exceptions to the probable cause requirement,[54] including administrative searches.[55] Administrative searches are noncriminal governmental searches that are also governed by the Fourth Amendment.[56] The Court held in *King* that DNA testing of pre-trial arrestees constituted an administrative search because law enforcement's primary goal was not criminal investigation but arrestee identification.[57] In *Camara v. Municipal Court of City and County of San Francisco*, the U.S. Supreme Court identified a housing code inspection as an administrative

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51. Maryland v. Pringle, 540 U.S. 366, 370 (2003) ("The long-prevailing standard of probable cause protects citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime . . . ."); *see also* Brinegar v. United States, 338 U.S. 160, 176 (1949).

52. *Pringle*, 540 U.S. at 369-70 ("A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause."); *see also* United States v. Watson, 423 U.S. 411, 414-15 (1976).

53. Camara v. Mun. Court of S.F., 387 U.S. 523, 535-38 (1967).

54. *See* Robert Molko, *The Perils of Suspicionless DNA Extraction of Arrestees Under California Proposition 69: Liability of the California Prosecutor for Fourth Amendment Violation? The Uncertainty Continues in 2010,* 37 W. ST. U. L. REV. 183, 192 (2010) ("Over the past half century, the United States Supreme Court has carved out many exceptions to the Fourth Amendment's search warrant requirement; e.g., search incident to arrest; the automobile exception; the plain view exception; the plain feel exception; the airport and borders exception; the exigent circumstances exception; searches pursuant to consent; booking searches; inventory searches; pat down searches; protective sweeps; hot pursuit; and administrative searches.").

55. *Id.*

56. *See* New Jersey v. T.L.O., 469 U.S. 325, 336 (1985) ("But this court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon 'governmental action' – that is, 'upon the activities of the sovereign authority.'" (quoting Burdeau v. McDowell, 256 U.S. 465, 475 (1921))).

57. Maryland v. King, 133 S. Ct. 1958, 1980 (2013) (finding that DNA testing of pre-trial arrestees constitutes a "routine booking procedure").

search and held that the city's need for the inspection outweighed a lessee's privacy expectation.[58]

The Court analyzed administrative searches in *Colorado v. Bertine*.[59] The United States Supreme Court held that a container search pursuant to a post-arrest inventory search was constitutional, stating that "[t]he standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures . . . . The probable cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations."[60] According to the Court, inventory searches provided an exception to the Fourth Amendment probable cause requirement because of the need to maintain an arrestee's possessions for safekeeping.[61]

New Jersey v. T.L.O. further discussed noncriminal administrative searches. The Court held that the legality of a search of a public school student should be determined by the reasonableness of the search, specifically weighing the student's reasonable expectation of privacy against the school's need for control over its students.[62] *T.L.O.* illustrated that administrative searches required a standard less than probable cause.[63]

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58. 387 U.S. at 538. In *Camara*, Roland Camara, a lessee, refused to allow an inspector of the Division of Housing Inspection of the San Francisco Department of Public Health inside his apartment without a search warrant to conduct a "routine annual inspection for possible violations of the city's Housing Code." *Id.* at 526. Under the applicable statute, Camara was arrested and later convicted of violating the San Francisco Housing Code by refusing to permit the warrantless inspection. *Id.* The Court held that while these inspections were subject to Fourth Amendment constraints, they were reasonable searches under the Fourth Amendment. *Id.* at 538. Specifically, the Court balanced the city's need for the inspections against Camara's privacy invasion and determined that the inspections involved a limited invasion of his privacy. *Id.* at 538.

59. 479 U.S. 367 (1987). In *Bertine*, police arrested Steven Lee Bertine for driving under the influence, took him into custody, and performed an inventory search on his van. *Id.* at 368. In the van, police found a closed backpack with various containers housing controlled substances, including cocaine paraphernalia. *Id.*

60. *Id.* at 371 (quoting S. Dakota v. Opperman, 428 U.S. 364 (1976)).

61. *Id.* at 372.

62. 469 U.S. 325, 341 (1985). Here, a warrantless search of a high school student's purse was reasonable because the student had a lower expectation of privacy in the high school setting, and the need for teacher safety and control of students superseded what expectation of privacy the student possessed. *Id.*

63. *Id.* at 342 n.8 ("We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches . . . we have held that although '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.' 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 offi-

D. Fourth Amendment Totality of the Circumstances Test

Whether a Fourth Amendment search was reasonable has often been measured in objective terms by examining "the totality of the circumstances."[64] In implementing this test, a court analyzes "endless variations in the facts and circumstances" that implicate the Fourth Amendment[65] and considers "all the circumstances surrounding the encounter."[66] When a court analyzes facts surrounding a particular search, it must "assess . . . on the one hand, the degree to which [the search] intruded upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests."[67] The *King* Court used the totality of the circumstances test to analyze the Maryland DNA Act.[68]

Using the totality of the circumstances test, the Court first questioned who the person was because the degree of protection against governmental search is diminished depending on the person's status in relation to the criminal justice system.[69] Whether the individual has any involvement with the criminal justice system or is an "ordinary citizen" greatly influences his reasonable expectation of privacy against government searches.[70] In *Samson v. California*, the Court determined that an ordinary citizen should be afforded the greatest expectation of privacy,[71] followed by a probationer,[72] and then a parolee,[73] who should be afforded the least expectation of privacy.[74]

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cial in the field.'" (quoting Delaware v. Prouse, 440 U.S. 648, 654-55 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976)).

64. Ohio v. Robinette, 519 U.S. 33, 39 (1996).

65. *Id.*

66. *Id.*

67. United States v. Knights, 534 U.S. 112, 118-19 (2001) (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

68. Maryland v. King, 133 S. Ct. 1958, 1978 (2013).

69. *See, e.g.*, *Knights*, 534 U.S. at 120-22. The Court held that a probationer had a lower expectation of privacy than ordinary citizens, so a search of probationer's house required no more than reasonable suspicion. *Id.* The government's need to ensure that the probationer does not commit any more criminal acts outweighs the probationer's reasonable expectation of privacy in his home. *Id.*

70. Samson v. California, 547 U.S. 843, 850 (2006).

71. *Id.* at 849.

72. The Court created an assumption that probationers are more likely than ordinary citizens to violate the law. *Id.* at 849; *see also Knights*, 534 U.S. at 114-22 (holding that reasonable suspicion was enough justification for a search of a probationer's home because he had a diminished expectation of privacy due to his status as a probationer).

73. Parolees have an even lower expectation of privacy than probationers because they are serving the remainder of their prison sentence while among the general populace, making them more "akin to imprisonment than probation is to imprisonment." *Samson*, 547 U.S. at 850.

74. In *Samson*, a suspicionless search of a parolee was reasonable under the Fourth Amendment because, as a parolee, he served the remainder of his sentence

E. Fourth Amendment and DNA Search of Arrestees

Prior to *Maryland v. King*, the U.S. Supreme Court confronted the issue of what expectation of privacy standard the Fourth Amendment provided pre-trial detainees in *Bell v. Wolfish*.[75] The Court held, *inter alia*, that while visual cavity searches of detainees infringed upon their reasonable expectation of privacy, the searches were not unreasonable considering the circumstances because of prison officials' need to confiscate contraband and protect themselves.[76]

The Court also articulated a special needs test, which is considered an exception to Fourth Amendment reasonableness jurisprudence. The test allows searches based on individualized suspicion of wrongdoing.[77] The Court defined the exception as "special needs, beyond the normal need for law enforcement"[78] that mandated a context-specific inquiry and permitted suspicionless searches when the individual's privacy interests were minimal and the government's interest in the search was great.[79]

Prior to *Maryland v. King*, only the Third and Ninth Circuits dealt with constitutional challenges to suspicionless DNA testing of arrestees. In *U.S. v. Mitchell*, Ruben Mitchell was indicted on one count of attempted possession with intent to distribute cocaine.[80] At his arraignment, the Government sought a DNA sample, to which Mitchell objected, arguing that the federal statute[81] ordering the DNA sample violated his Fourth Amendment rights.[82] The Third Circuit, applying the totality of the circumstances test, held that Mitchell, as a pre-trial detainee, had a diminished expectation of privacy in his identity that was outweighed by the government's legitimate interest in collecting his DNA.[83]

In *United States v. Pool*, Jerry Arbert Pool was charged with possessing and receiving child pornography in violation of federal law.[84] The magistrate judge ordered Pool to provide a DNA sample as part of his release on bond, to which Pool objected, claiming a Fourth Amendment violation.[85] The

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among the general populace and his parole was conditioned upon his willingness to consent to governmental searches. *Id.*

75. 441 U.S. 520 (1979).

76. *Id.* at 558.

77. Chandler v. Miller, 520 U.S. 305, 314 (1997).

78. *Id.* at 313.

79. *Id.* at 314.

80. U.S. v. Mitchell, 652 F.3d 387, 389 (3d Cir. 2011).

81. 42 U.S.C. § 14135a (2006).

82. *Mitchell*, 652 F.3d at 389.

83. *Id.* at 415-16.

84. United States v. Pool, 621 F.3d 1213, 1215 (9th Cir. 2010), *vacated*, 659 F.3d 761 (9th Cir. 2011).

85. *Id.* at 1215-16.

Court, using the totality of the circumstances test,[86] held that Pool, as a pre-trial detainee, had a lesser expectation of privacy that was outweighed by the government's interest in his DNA.[87]

Finally, in *Haskell v. Harris*, the Ninth Circuit once again examined suspicionless DNA testing from pre-trial detainees.[88] The California legislature had enacted the DNA Act, which required DNA testing of individuals convicted of certain offenses.[89] A 2004 amendment provided law enforcement officials with authority to obtain DNA from arrestees, which was loaded into a databank.[90] The plaintiffs were arrestees who provided DNA samples but were never convicted of the felonies with which they were charged.[91] The plaintiffs filed suit, alleging that the 2004 amendment violated their Fourth Amendment rights.[92] Applying the totality of the circumstances balancing test, the court held that the government's key interests[93] outweighed the plaintiffs' expectation of privacy, which was diminished due to their felony arrest.[94]

F. The Maryland Act

The Maryland Act authorizes law enforcement to collect DNA samples from people who were arrested and charged[95] with a crime of violence,[96] a

86. *Pool*, 621 F.3d at 1218 ("The use of the special needs test would be problematic. The test was developed in cases outside of the law enforcement context and the Supreme Court has been leery of applying it to criminal cases."); *see* Ferguson v. City of Charleston, 532 U.S. 67, 84 (2001).

87. *Pool*, 621 F.3d at 1228.

88. 669 F.3d 1049 (9th. Cir. 2012), *reh'g en banc granted*, 686 F.3d 1121 (9th Cir. 2012) and *on reh'g en banc*, 10-15152, 2014 WL 1063399 (9th Cir. Mar. 20, 2014).

89. *Id.* at 1050.

90. *Id.*

91. *Id.* at 1052.

92. *Id.*

93. The court listed them as follows: "identifying arrestees, solving past crimes, preventing future crimes, and exonerating the innocent." *Id.* at 1062.

94. *Id.* at 1065. The court emphasized that its reasoning was based on DNA extraction, processing, and analysis as it existed at the time, and acknowledged that future developments in the DNA technology could alter the constitutionality of California's DNA Act. *Id.* at 1065.

95. "[E]ach DNA sample required to be collected under this section shall be collected: (1) at the time the individual is charged, at a facility specified by the Secretary . . . ." MD. CODE ANN. PUB. SAFETY § 2-504(b) (West 2014). The DNA sample, which may be collected, cannot be tested or placed in a DNA database until after the first scheduled arraignment date unless the suspect consents or requests an earlier time. § 2-504(d).

96. Crimes of violence include abduction, first-degree arson, kidnapping, manslaughter (except involuntary), maiming, murder, rape, robbery, carjacking, armed carjacking, first-degree sexual offenses, second-degree sexual offenses, use of a

burglary, or an attempted crime of violence or burglary.[97] Under the Act, law enforcement may use a buccal swab to gently swab the inside cheek of the suspect's mouth.[98] If an arrestee is not convicted of the charges for which he was arrested, the DNA samples and records are required to be destroyed or expunged by authorities.[99] According to Maryland, taking an arrestee's DNA and submitting it to an online filing system helps law enforcement accurately identify arrestees and helps law enforcement to be confident in the arrestee's identity.[100]

Law enforcement submits an arrestee's DNA to a filing system, CODIS, which is authorized by Congress and monitored by the Federal Bureau of Investigation ("FBI") to collect and maintain DNA profiles submitted by law enforcement across the United States.[101] CODIS connects DNA laboratories at the local, state, and national level and includes all fifty states and numerous federal agencies.[102] CODIS collects DNA profiles provided by local laboratories[103] from arrestees, convicted offenders, and forensic evidence found at crime scenes and lumps them into a single database.[104] CODIS standardizes the points of comparison in the DNA samples, which are based on thirteen loci at which STR alleles are noted and compared.[105] Comparing these loci

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handgun in the commission of a felony, first-degree child abuse, sexual abuse of a minor, an attempt to commit any of the aforementioned crimes, continuing course of conduct with a child, first-degree assault, assault with intent to murder, assault with intent to rape, assault with intent to rob, and assault with intent to commit a first- or second-degree sexual offense. MD. CODE ANN. CRIM. LAW § 14-101(a)(1)-(24) (West 2014).

97. § 2-504(a)(3)(i)-(iii).

98. Maryland v. King, 133 S. Ct. 1958, 1970 (2013).

99. MD. CODE ANN. PUB. SAFETY § 2-511(a)(1) (West 2014). However, the DNA samples are not expunged if the charges are placed on a stet docket or the arrestee received probation prior to the judgment. § 2-511(a)(2) (West 2014).

100. *King*, 133 S. Ct. at 1970.

101. *Id.* at 1968.

102. *Id.*

103. These laboratories are required to adhere to quality standards and are audited. *Id.*

104. *Id.*

105. *Id.* "DNA profiles use short tandem repeat technology (STR), to analyze the presence of alleles, which are codal sequences of genetic variants responsible for producing particular traits and characteristics. These STRs are found at thirteen precise regions on an individual's DNA sample." Stephanie Beaugh, *How the DNA Act Violates the Fourth Amendment Right to Privacy of Mere Arrestees and Pre-Trial Detainees*, 59 LOY. L. REV. 157, 166-67 (2013). DNA includes coding regions, called "genes," which contain proteins, while the non-coding regions, known as intergenic sequences, lie between the genes. Brief for Genetic Scientists Robert Nussbaum et al. as Amici Curiae in Support of Respondent at 4, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207). The markers used to create DNA profiles come from non-coding regions. *Id.* Within the nucleus of most cells, DNA is organized into twenty-three pairs of chromosomes, and one chromosome in each pair is inherited from the

enables CODIS to match individual samples with extreme accuracy.[106] CODIS sets the uniform national standards by which DNA is matched and facilitates connections between local law enforcement agencies who can then share more specific information about the profiles.[107] Among the profile information are the identities of those arrestees who have submitted the DNA samples, as CODIS only identifies these samples by the DNA profile itself, the name of the agency that submitted it, the laboratory personnel who analyzed it, and a numerical identification number for the specimen.[108]

IV. INSTANT DECISION

A. The Majority Opinion

In *Maryland v. King*, the U.S. Supreme Court explained DNA mechanics, specifically that the portions of the DNA that law enforcement officials used to identify criminals were called "junk" DNA.[109] Junk DNA consists of a "noncoding region" of DNA that identifies the owner of the DNA without showing more "far-reaching and complex characteristics like genetic traits."[110] The Court noted that the Maryland Act[111] required that law enforcement officers swab the inside cheek of the individual's mouth to collect skin cells with the intent to use this information to identify the individual.[112] This, the Court held, was a search under the Fourth Amendment.[113] Howev-

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person's mother and the other from the person's father. *Id.* The location of a gene or DNA marker on a chromosome is known as a "locus" or "loci" (plural). *Id.* at 5. Alleles are "variants of a gene or DNA sequence that occur at the same locus." *Id.* A person inherits two alleles from each locus, one from each parent. *Id.* DNA profiling "involves identifying the alleles found at multiple loci in an individual's DNA." *Id.* CODIS relies on short tandem repeats (STRs), which are repeating sequences of a few base pairs of DNA. *Id.* Every person has two copies of the STR at a particular locus. *Id.* Examining enough loci will produce a profile that is statistically likely to be unique to that person "given the frequency with which the relevant alleles occur at those loci in the population." *Id.* at 6.

106. *King*, 133 S. Ct. at 1968. The Court cites a statistic of one in one-hundred trillion. *Id.*

107. *Id.*

108. *Id.* at 1984 (Scalia, J., dissenting).

109. *Id.* at 1967 (majority opinion).

110. *Id.* Forensic analysis, according to the Court, "focuses on repeated DNA sequences scattered throughout the human genome, known as short tandem repeats." *Id.* "The alternative possibilities for size and frequency of these STRs at any given point along a given strand of DNA are known as alleles." *Id.* "Multiple alleles are analyzed in order to ensure that the DNA profile matches only one person, and with near certainty." *Id.*

111. *See supra* Part III.F.

112. *King*, 133 S. Ct. at 1967-68.

113. *Id.* at 1968-69.

er, the buccal swab was not considered intrusive, which the Court deemed was central to the search's reasonableness.[114]

The Court then determined which reasonableness test to employ.[115] The Court considered the special needs test,[116] but ultimately rejected it in favor of the totality of the circumstances test.[117] The special needs test has historically been used to search law-abiding citizens who have a greater expectation of privacy than King.[118] King, who was arrested, was in police custody and had a reduced expectation of privacy.[119] Once an individual is arrested on probable cause for a dangerous offense, his expectation of privacy is reduced, and, therefore, DNA identification under these circumstances does not require consideration of any special needs that would justify searching an entire category of people.[120]

The Court recognized law enforcement's need to process and identify pre-trial arrestees as a legitimate government interest.[121] First, the Court stated that an individual's identity is comprised of more than the arrestee's name.[122] A perpetrator could take deliberate steps to hide his true identity by changing his appearance and falsifying his driver's license.[123] Perpetrators could also falsify their criminal records, which requires police to obtain identification to determine an arrestee's true criminal record.[124] DNA provides "irrefutable identification" of the person from whom it was taken, leaving no doubt as to the perpetrator's identity.[125] DNA completes the arrestee's profile and connects the arrestee's prior criminal history to his name, Social Security number, aliases, and photograph.[126]

Second, police officers must be concerned with facility safety with every arrestee they book.[127] DNA identification provides information about the

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114. *Id.* at 1969.

115. *See id.*

116. *See supra* Part III.E.

117. *King*, 133 S. Ct. at 1978. The Court stated that, while certain searches do not warrant individualized suspicion, the special needs test has historically been applied in "programmatic" searches of otherwise law-abiding citizens who are not suspected of wrongdoing. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1970. Because a lawful arrest by itself justified a search of the arrestee, the Court noted that the process of taking an arrestee into "[the police officers'] physical dominion" supplanted individual suspicion. *Id.* at 1971.

122. *Id.*

123. *Id.*

124. *See id.* at 1971-72.

125. *Id.* at 1972.

126. *Id.*

127. *Id.* Courts in the past have approved visual inspections for gang tattoos to ensure rival gang members were not locked up together. *Id.*

person whom police are detaining, including whether the arrestee has a history of mental illness or violence.[128]

Third, the government has an interest in ensuring that those who are arrested are available for trials.[129] The Court stated that, without DNA, an arrestee will be more prone to flee the instant charges out of fear that his continued contact with the criminal justice system will reveal to police his prior unclaimed offenses.[130]

Fourth, an arrestee's criminal history is important when determining whether a judge should release the arrestee on bail.[131] Beyond whether or not a judge releases an arrestee on bail, the Court claimed that a DNA profile can assist the judge in determining when to allow bail, what conditions the arrestee must meet while out on bail, whether the court should revisit the initial release determination at a future date (upon receiving DNA information), and whether the arrestee's conditional release should be revoked.[132]

Governmental interests in station-house searches of the arrestee's person and possessions are so important to the overall criminal justice system that, at times, they are more important than the governmental interests that supported a search immediately after arrest.[133] Booking procedures, such as photographs and fingerprints, have long been standard police techniques that have assisted police in identifying criminal offenders.[134] The Court determined that fingerprinting, which has been an acceptable booking procedure for decades, is the functional predecessor to DNA.[135] DNA identification was determined to vastly superior to fingerprinting; however, the Court claimed that DNA testing's additional intrusion upon the arrestee's person was insignificant because fingerprinting should not be used as the baseline.[136]

King's primary argument for differentiating DNA identification and fingerprint identification was that, while fingerprint identification can provide near instantaneous results, DNA identification took more time.[137] He claimed

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128. *Id.*

129. *Id.* at 1972-73 (citing Bell v. Wolfish, 441 U.S. 520, 534 (1979)).

130. *Id.* at 1973. The Court provided an example of a defendant arrested for burglary: he will be more likely to run on the burglary charge out of fear that the DNA taken as a result of his conviction of the burglary charge will link him to a more serious rape charge, for which he likely left DNA evidence at the crime scene. *Id.* If police have his DNA profile pursuant to his post-arrest booking procedure, he will have to face both charges. *See id.* If not, his departure from custody could pose a safety risk to "society at large." *Id.*

131. *Id.* Most judges must take into account what risk the arrestee poses to the community to which he is released, and DNA helps determine a complete criminal history and will assist the judge in making bail determinations. *Id.*

132. *Id.* at 1974.

133. *Id.* (citing Illinois v. Lafayette, 462 U.S. 640, 645 (1983)).

134. *Id.* at 1975-76.

135. *Id.* at 1976.

136. *Id.*

137. *Id.*

that DNA identification took so long that the testing could not be used for identification purposes and was only used to collect evidence for use against the arrestee.[138] The Court responded that the creation of the FBI's Integrated Automated Fingerprint Identification System ("IAFIS"), which synthesized fingerprints into a national database, did not make fingerprinting constitutionally sound, just more effective.[139] According to the Court, DNA identification is undergoing rapid technological advances, and, just as fingerprinting was constitutional for decades prior to IAFIS, DNA identification is permissible as a law enforcement tool today, despite its time delays.[140]

Next, the Court analyzed an arrestee's legitimate expectation of privacy in the custodial setting.[141] The Court analyzed the intrusion upon an arrestee's legitimate expectation of privacy from a cheek swab and found it to be minimal at most.[142] Furthermore, the parts of the DNA used to identify arrestees were not susceptible to constitutional attack because the "junk DNA" provided no insight into an arrestee's genetic traits and limited the information accessible to police.[143] Finally, the Maryland Act precluded persons from using the DNA collected for purposes other than identification.[144]

Because DNA identification of arrestees is an integral part of the booking procedure and DNA extraction via a buccal swab is minimally invasive, the Court determined that DNA identification of arrestees is a reasonable search under the Fourth Amendment.[145]

B. The Dissent

Justice Scalia wrote the dissenting opinion, joined by Justices Sotomayor, Ginsberg, and Kagan.[146] According to the dissent, the heart of the Fourth Amendment was the proscription against suspicionless searches of a person when the motive was criminal investigation.[147] The dissent believed

138. *Id.*

139. The Court provides a website for additional information on IAFIS: http://www.fbi.gov/about-us/cjis/fingerprints_biometics/iafis/iafis. *Id.* IAFIS was launched in 1999, despite the fact that collecting fingerprints had been part of standard booking procedures for decades prior to that time. *Id.*

140. The Court provides websites for additional information about DNA technological advances that show DNA processing time has been reduced from one year in 2008 to twenty days in 2012. *Id.* at 1976-77.

141. *Id.* at 1978.

142. *Id.* at 1977-78. According to the Court, "The fact that an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines that term." *Id.* at 1969; *see supra* Part III.

143. *King*, 133 S. Ct. at 1979.

144. *Id.* at 1979-80.

145. *Id.*

146. *Id.* at 1980 (Scalia, J., dissenting).

147. *Id.*

DNA testing of pre-trial arrestees was a suspicionless search.[148] Indeed, previous decisions deeming suspicionless searches reasonable did not involve searches relating to criminal law enforcement.[149]

Justice Scalia was unpersuaded by the majority's primary justification for the DNA swab: the identification of the arrestee.[150] He first attacked the majority's use of the term "identification" as meaning something other than its common definition, suggesting the real reason to be "searching for evidence that he has committed crimes unrelated to the crime of his arrest."[151]

Next, the dissent focused on timing.[152] Maryland law precluded DNA testing or placement in a statewide database until a defendant had been arraigned,[153] and King was arrested on April 10, 2009.[154] King's DNA was not processed until after his initial appearance, which was three days after his arrest.[155] The dissent found it doubtful that, during those three days, the Wicomico County police failed to identify King, ask for his name, or take his fingerprints.[156]

The dissent next examined the pertinent dates.[157] Maryland State Police's Forensic Sciences Division received King's DNA sample on April 23,

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148. *Id.* The dissent called attention to a time when the United States' founding fathers declared general warrants, and their authority to grant officers the right to search a person who has not been accused of a crime, "grievous and oppressive." The remedy was the Fourth Amendment, specifically the Warrant Clause, which requires a warrant to be particular (individualized); the Court previously held that the Fourth Amendment's proscription of unreasonable searches "imports the same requirement of individualized suspicion." *Id.* at 1980-81 (citing Va. Declaration of Rights §10 (1776), in 1 B. Schwartz, *Bill of Rights: A Documentary History* 234, 235 (1971)).

149. "There is a closely guarded category of constitutionally permissible suspicionless searches," none of which deal with criminal law enforcement. *Id.* (citing Chandler v. Miller, 520 U.S. 305, 313-14 (1997); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 609 (1989)).

150. *Id.* at 1982-83.

151. If this were the case, then "identification is indistinguishable from the ordinary law enforcement aims that have never been thought to justify a suspicionless search." *Id.* at 1983. The dissent analogized the DNA testing with the police searching every lawfully stopped car because something might turn up relating to some unsolved crime. *Id.* But no one would claim that such a search would "identify" the driver, nor would any court claim the search was lawful. *Id.*

152. *Id.*

153. The dissent claims that the Maryland legislature did not intend the statute to authorize DNA swabs of arrestees to assist in identification or else they would not have statutorily mandated that DNA be tested after the arrestee's arraignment. *Id.* (citing MD. CODE. ANN., PUB SAFETY § 2-504(d)(1) (West 2014)).

154. *Id.*

155. *Id.*

156. "Does the Court really believe that Maryland does not know whom it was arraigning?" *Id.*

157. *Id.* at 1984.

2009 – two weeks after his arrest.[158] It was nearly three months before King's lab tests were available, and four months before the DNA "hit" on a sample taken from an unrelated FBI database.[159] King's DNA sample was in an FBI database that is comprised of DNA samples taken from known convicts and arrestees.[160] However, once the DNA sample was in the FBI database, that database kept only the DNA profile itself, the name of the agency that submitted it, the laboratory person who analyzed it, and a numerical identification number.[161] If law enforcement officers want to identify a person in custody using DNA, they can compare an arrestee's DNA sample to the FBI's DNA database that keeps known convicts and arrestees' DNA profiles.[162]

However, this is not what law enforcement did.[163] Instead of identifying the criminal with the DNA sample, the DNA sample was identified by the criminal.[164] Once the DNA database that keeps known convicts and arrestees' DNA profiles "hits" with the FBI's DNA database that keeps unsolved crime DNA, Maryland must backtrack to the officer who first submitted the DNA to find out the identity of the known convict or arrestee from whom the sample was taken.[165] The dissent noted that "identification" was not among the purposes of the Maryland statute.[166] Maryland's purpose in obtaining DNA samples from arrestees, according to the dissent, was "part of an official investigation into a crime."[167]

Next, the dissent stated that the majority's claim that DNA profiles are a continuation of standard booking procedures, specifically photographs and fingerprints, was misguided.[168] Photographs are different, namely because they are not considered searches at all for Fourth Amendment purposes.[169]

158. *Id.*

159. The DNA sample was mailed from there to a testing lab on June 25, 2009, two months after it was received and nearly three months after King's arrest. *Id.* The data from the lab tests was not available until July 13, 2009, when it was entered into Maryland's DNA database, together with King's identifying information, informing Maryland to whom the DNA sample belonged. *Id.* On August 4, 2009 – four months after King's arrest – the DNA "hit" a sample taken from an unrelated FBI database while in the FBI's national database, and at this point, the FBI did not know to whom the DNA belonged. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 1984-85.

163. *Id.*

164. *Id.* at 1985.

165. *Id.* at 1985-86.

166. *Id.*

167. *Id.* at 1985 (citing MD. CODE. ANN., PUB. SAFETY § 2-505(a)(2) (West 2014)).

168. *Id.*

169. *Id.* at 1986 (citing Florida v. Jardines, 133 S. Ct. 1409, 1413-14 (2013)) ("[W]e have never held that merely taking a person's photograph invades any recognized 'expectation of privacy.'" (citing Katz v. United States 389 U.S. 347 (1967))).

Furthermore, the U.S. Supreme Court has never been asked to decide whether fingerprinting constitutes a search for Fourth Amendment purposes.[170]

To make matters worse, according to the dissent, fingerprinting and DNA are not used for the same purposes, even in the booking process.[171] An arrestee's fingerprints are normally taken to identify arrestees, and only sometimes to solve crimes; DNA of arrestees is taken to solve crimes, and nothing else.[172] Fingerprints are uploaded into a database in a matter of minutes, whereas DNA takes months to analyze.[173] While IAFIS, the national database that maintains fingerprints of criminals, includes detailed information such as mug shots, tattoos, and criminal histories, CODIS contains no personal identifiers.[174] And while DNA is taken to check crime-scene evidence against arrestees' profiles, fingerprints recovered from crime scenes are not usually compared against a database of known fingerprints because that requires further police work.[175]

According to the dissent, King's legitimate expectation of privacy as a pre-trial arrestee outweighed the government's interest in using his DNA for crime solving purposes.[176] Under the dissent's reasoning, DNA testing is not used to identify offenders and instead has the sole purpose of aiding law enforcement in criminal investigations.[177] The dissent feared that this purported "identification" justification will erode the Fourth Amendment.[178]

V. COMMENT

"No matter the degree of invasiveness, suspicionless searches are *never* allowed if their principal end is ordinary crime solving. A search incident to arrest either serves other ends . . . or is not suspicionless."[179] In *Maryland v. King*, the Court blurred the lines between criminal investigatory searches that require probable cause and searches that achieve the same outcome but are considered a category of suspicionless invasions. *King*'s holding eroded

170. *Id.* at 1988 ("This bold statement [that the taking of fingerprints was constitutional for generations prior to the introduction of DNA] is bereft of citation to authority because there is none for it. The 'great expansion in fingerprinting came before the modern era of Fourth Amendment jurisprudence,' and so we were never asked to decide the legitimacy of the practice." (quoting United States v. Kincade, 379 F.3d 813, 874 (9th Cir. 2004) (Kozinski, J., dissenting))).

171. *Id.* at 1987.

172. *Id.*

173. Justice Scalia pointed out that Maryland's eighteen-day period from processing to "hit" seems to be a "paragon of efficiency" in relation to most other states. *Id.* at 1988.

174. *Id.* at 1987.

175. *Id.*

176. *Id.* at 1989.

177. *Id.*

178. *Id.*

179. *Id.* at 1982.

Fourth Amendment protections because it permitted law enforcement to search King for evidence of a crime for which law enforcement had no suspicion, a theory that has proved to be violative of the Fourth Amendment.[180] *King* also left unanswered an important Fourth Amendment question: at what point will suspicionless DNA searches violate the Fourth Amendment? This Part discusses *King's* destructive impact on the Fourth Amendment and suggests how the Court could have kept DNA searches in criminal investigations while sparing the Fourth Amendment.

A. A Square Peg in a Round Hole

The Court's holding in *King* permits law enforcement to perform suspicionless DNA searches.[181] Individualized suspicion of wrongdoing is an important component of the warrant process.[182] The Supreme Court's exceptions to individualized suspicion, described as a "closely guarded category of permissible suspicionless searches,"[183] were meant to be narrow exceptions to the probable cause rule that permits suspicionless searches only when the search is intended to satisfy objectives other than criminal investigation.[184] Post-arrest booking procedures that include searches are justified to protect law enforcement safety and to obtain evidence relevant to the alleged crime.[185] Searches that result in evidence relevant to the alleged crime are sound Fourth Amendment searches because they are based on the probable cause that justified the arrest.[186] These administrative searches also prove fruitful for "ascertaining or verifying [the arrestee's] identity."[187]

The Court's assertion that DNA testing is an acceptable law enforcement identification method is unfounded.[188] Assuming *arguendo* that DNA testing arrestees is for identification purposes, it should be noted that DNA does not identify arrestees in every case. Because CODIS only compares a known arrestee's DNA to a database housing DNA collected from crime scenes, an arrestee will only be identified if his DNA was present at a prior crime scene.[189] If the crime for which an arrestee was arrested is his first

180. *See supra* Part III.B.

181. *King*, 133 S. Ct. at 1981-82 (Scalia, J., dissenting).

182. Chandler v. Miller, 520 U.S. 305, 313 (1997).

183. *King*, 133 S. Ct. 1958, 1981 (2013) (Scalia, J., dissenting) (citing *Chandler*, 520 U.S. 305 (1997)).

184. *Miller*, 520 U.S. at 314 ("When such 'special needs' – concerns other than crime detection – are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.").

185. United States v. Robinson, 414 U.S. 218, 234 (1973).

186. *Id.*

187. Illinois v. Lafayette, 462 U.S. 640, 646-47 (1983).

188. *King*, 133 S. Ct. at 1985 (Scalia, J., dissenting).

189. *See* Brief of 14 Scholars of Forensic Evidence as Amici Curiae Supporting Respondent, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207); *see also Labor-*

offense or an offense trailing a long line of offenses for which there was no DNA at the crime scenes, law enforcement will be unable to identify an arrestee using his DNA even if it were possible to use it as an identification tool.[190]

Furthermore, Maryland law provides that fingerprinting – not DNA testing – is law enforcement's primary means of identifying an arrestee.[191] Once a suspect is arrested and his fingerprints are taken, those fingerprints provide near instantaneous identification.[192] Within minutes of providing the fingerprints to the FBI through IAFIS, the FBI responds with the identity of the arrestee or a report that the person's fingerprints are not on file with the IAFIS.[193] These results are over 99% accurate.[194] Indeed, many jurisdictions – including Maryland and the federal government – decline to DNA test arrestees whose DNA is already in the system, however, law enforcement will still fingerprint arrestees.[195] The fingerprints are also used to "track" the DNA sample after submission into CODIS, enabling law enforcement to "verify the identity of the individual from whom the [DNA] sample is taken."[196] The implication is clear: DNA testing on arrestees fails to identify arrestees.

Comparing fingerprints and photographs to DNA testing fails to provide any legitimate justification for using DNA testing as an identification procedure. Photographs are not considered searches for Fourth Amendment purposes.[197] Humans expose their faces, including their identifying characteristics (e.g. tattoos, birthmarks, scars, and hairstyles), to the public every time they interact with the world. Photographing a face as a post-booking procedure also provides near instantaneous identification of the arrestee because a cursory glance at a photograph can reveal a person's identity faster than a DNA analysis, which requires submission into CODIS and then backtracking from the arrestee's DNA that "hit" to the police station that submitted the

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atory Services, Frequently Asked Questions (FAQS) on the CODIS Program and the National DNA Index System, FBI, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Aug. 3, 2014).

190. *Laboratory Services, Frequently Asked Questions (FAQS) on the CODIS Program and the National DNA Index System*, *supra* note 189.

191. Brief of Amici Curiae American Civil Liberties Union, et al., Supporting Respondent at 6-8, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207).

192. *Id.*

193. *Id.*

194. *Id.* at 7.

195. *Id.* at 8 (citing MD. CODE REGS. 29.05.01.04.B(4) (2013)).

196. *Id.* at 5-6.

197. Maryland v. King, 133 S. Ct. 1958, 1986 (2013) (Scalia, J., dissenting) ("Is not taking DNA samples the same, asks the Court, as taking a person's photograph? No – because that is not a Fourth Amendment search at all. It does not involve a physical intrusion onto the person."); *see also* Dow Chemical Co. v. United States, 476 U.S. 227 (1986) (holding that aerial photography of chemical company's industrial complex was not a "search" for Fourth Amendment purposes).

DNA.[198] Not only must police use other identifying characteristics – like the fingerprint or the photograph – to identify whose DNA the "hit" sample belongs to, but DNA submission requires complex scientific analysis to ascertain whether the DNA sample matches the DNA evidence found at a crime scene.[199] In contrast, anyone with functioning eyes can quickly compare a photograph to a person.

The U.S. Supreme Court has never addressed the constitutionality of fingerprinting.[200] Assuming that fingerprinting does constitute a search for Fourth Amendment purposes, fingerprinting reveals much less about a person – and is thus less intrusive – than DNA testing.[201] Fingerprints are nothing more than raised ridges on the skin, specific to each human being but nonetheless exposed to the world. We use our hands, and expose our fingerprints, every day of our lives. Fingerprinting is an ideal identification tool because within seconds police know an inimitable trait about that person.

Furthermore, fingerprinting does not require any physical intrusion.[202] Fingerprinting reveals nothing more than the contours of an arrestee's print on an exposed part of his or her skin.[203] A DNA sample requires intrusion into a person's oral cavity and an extraction of cells from which police test the DNA.[204] While the *King* majority held that King's buccal swab testing was painless and lacked any surgical invasiveness, buccal swab testing is still intrusive.[205] Exposing an arrestee's oral cavity to a search is intrusive because it probes a "portal into the body" that society deems an intimate and private area.[206]

DNA is also more revealing than fingerprinting. A buccal swab provides a wealth of information about a person, from his genetic traits to the statistical likelihood of his contracting a particular disease to a predisposition

198. *See supra* Part IV.B.

199. Brief of Amici Curiae American Civil Liberties Union et al., Supporting Respondent, *supra* note 191.

200. As Justice Scalia noted in the dissent, "This bold statement [from the majority, stating that fingerprinting has been constitutional for generations prior to the FBI's IAFIS computer-matching system] is bereft of citation to authority because there is none for it . . . fingerprinting came before the modern era of Fourth Amendment jurisprudence and so we were never asked to decide the legitimacy of it." *King*, 133 S. Ct 1958, 1988 (2013) (Scalia, J., dissenting).

201. Brief of Public Defender Service for the District of Columbia Amicus Curiae Support Respondent, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207).

202. *Id.*

203. *Id.*

204. *Id.*

205. *See* Katz v. United States, 389 U.S. 347 (1967) (holding that warrantless search and seizure of defendant's words spoken into a public telephone booth violated the Fourth Amendment).

206. Brief of Public Defender Service for the District of Columbia Amicus Curiae Supporting Respondent, *supra* note 201.

to a sexual orientation.[207] DNA can tell the police whether an arrestee's child or parent was involved in a crime or it can establish paternity.[208] While Maryland law precludes the use of pre-trial arrestee's DNA for these purposes, the DNA still remains in the database throughout the trial procedure, and if an arrestee is convicted, it remains in the database permanently.[209] Furthermore, Maryland law specifically permits the DNA to be used for research purposes wholly unrelated to criminal investigations.[210] Regardless of why a person is arrested, his propensity for prostate cancer and the prevalence of schizophrenia in his family are irrelevant for law enforcement purposes and extend beyond Fourth Amendment reasonableness.[211]

A more persuasive argument is that fingerprinting – like photographing – is not a search under the Fourth Amendment.[212] Fingerprinting's utility in arrestee identification is instantaneous and reveals no more than what is collected.[213] Moreover, fingerprinting is often not used to solve crimes, leaving it to the police officer's discretion whether to submit an arrestee's fingerprint into IAFIS.[214] While IAFIS does house a smaller index of "latent" fingerprints,[215] law enforcement agencies do not search that index after fingerprinting an arrestee because that particular aspect of fingerprinting takes longer, is more complex, and costs more.[216] Police do not submit fingerprints to this database because the fingerprints' primary purpose is to identify arrestees.[217]

In order to justify DNA testing for criminal investigation purposes without individualized suspicion, the Court had to create a hybrid exception that permits an otherwise unconstitutional search to be conducted because DNA is too proficient at linking a known arrestee's DNA to the DNA left at a crime scene.[218] The Court praised DNA's ability to match arrestees to crime scenes and held that DNA testing was constitutional because of rapid technological advances currently taking place.[219] The Court also held that DNA testing was

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207. *Id.*

208. *Id.*; *see also* Brief for Genetic Scientists Robert Nussbaum, et al., *supra* note 105.

209. MD. CODE. ANN., PUB. SAFETY § 2-511(a)(1)-(2) (West 2014).

210. Brief for the Respondent, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207).

211. Brief of Public Defender Service for the District of Columbia Amicus Curiae Supporting Respondent, *supra* note 201.

212. *King*, 133 S. Ct. 1958, 1987-88 (2013) (Scalia, J., dissenting).

213. *Id.* at 1987.

214. Brief for Respondent, *supra* note 210.

215. "Latent fingerprints" are defined as fingerprints taken from a crime scene. *Id.*

216. Maryland v. King, 133 S. Ct. 1958, 1987-88 (2013) (Scalia, J., dissenting); Brief for Respondent, *supra* note 210.

217. *King*, 133 S. Ct. at 1987.

218. *Id.* at 1985.

219. *Id.* at 1977 (majority opinion).

constitutional because DNA testing will *someday* be as fast as fingerprint analysis, and currently is much more accurate.[220]

The *King* exception erodes the Fourth Amendment because it diminishes the importance of an independent magistrate's finding of probable cause, which is an important component of Fourth Amendment constitutionality.[221] To force DNA testing into this sort of exception can be likened to forcing a square peg in a round hole. DNA testing's accuracy should not be relevant to the issue of constitutionality because, "[w]here….public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search . . . ."[222]

B. No End in Sight

Maryland v. King failed to address at what point pre-arrest DNA testing would be violative of the Fourth Amendment. The answer could be dispositive in future Fourth Amendment cases.

First, the Court held that suspicionless DNA testing of arrestees was reasonable when the arrest was supported by probable cause for a *serious offense*.[223] The Court was silent as to whether the seriousness of the offense was dispositive for the post-arrest DNA test's constitutionality. If the fact that King was arrested for a serious crime was integral to the Court's conclusion that the DNA test was reasonable, then other states and the federal government could be violating the Fourth Amendment with their statutes.[224] Under federal law, law enforcement may obtain DNA from pre-trial arrestees who are arrested, facing charges, or convicted.[225] Furthermore, various state laws have statutes that are more expansive than Maryland's. North Carolina, for example, requires a DNA sample to be taken from arrestees who are accused of committing a number of violent offenses.[226] Included in North Carolina's definition of "violent offenses" are cyberstalking and stalking.[227] In Ohio and Vermont, an arrestee must submit his DNA upon probable cause

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220. *Id.*

221. *See* Brief for Respondent, *supra* note 210.

222. Chandler v. Miller, 520 U.S. 305, 323 (1997).

223. *King*, 133 S. Ct. at 1980; *see also supra* Part III.F.

> [T]he Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate booking procedure that is reasonable under the Fourth Amendment.

King, 133 S. Ct. at 1980.

224. *See infra* notes 228-230 and accompanying discussion.

225. 42 U.S.C. § 14135a (2012); Beaugh, *supra* note 105, at 165-66 (2013).

226. N.C. GEN. STAT. ANN. § 15A-266.3A(f)(10)-(11) (West 2014).

227. *Id.*

of any felony committed in the state on or after July 1, 2011.[228] Likewise, Louisiana requires a DNA sample from all arrestees who are arrested for felonies.[229] The answer to whether it is constitutional for a DNA sample to be taken from a suspect who is arrested for failure to pay child support,[230] for example, is unknown. However, testing the DNA of a person arrested for a nonviolent misdemeanor or nonviolent felony should be considered unreasonable.

Second, although current technology permits law enforcement to use an arrestee's "junk" DNA only for identification purposes,[231] law enforcement can use junk DNA to perform "partial match searches."[232] The FBI currently uses these thirteen loci to perform partial match searches of its DNA databases, which are called "familial searches."[233] These searches permit partial matches. When there is a partial match, law enforcement is informed that the arrestee from whom the match was taken is a relative of the offender.[234] At this point in time, the thirteen loci used in CODIS contain information on familial relationships and can match siblings with siblings and parents with children.[235] Currently, California, Colorado, Nebraska, Texas, and Virginia all permit investigators to search for these partial matches, turning family members into "genetic informants" for the police against their own families.[236]

Partial familial matching creates a blurred constitutional line because it creates a partial DNA make-up without the probable cause required for an arrest.[237] Partial "familial matching" may also be used to uncover familial ties that the donor did not want revealed.[238] For example, partial familiar matching could uncover a child's paternity or could reveal biological parents after a closed adoption.[239]

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228. OHIO REV. CODE ANN. § 2901.07 (West 2012); VT. STAT. ANN. TIT. 20, § 1933 (West 2014).

229. LA. REV. STAT. ANN. § 609 (2014).

230. It is a class D felony in Missouri if the defendant fails to pay more than twelve monthly payments. MO. REV. STAT. § 568.040.5 (2012).

231. Maryland v. King, 133 S. Ct. 1958, 1967 (2013).

232. Brief of 14 Scholars of Forensic Evidence as Amicus Curiae Supporting Respondent, *supra* note 189.

233. *Id.*

234. *Id.* (citing Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 292-93 (2010)).

235. Brief for Genetic Scientists Robert Nussbaum et al. as Amici Curiae in Support of Respondent, *supra* note 105.

236. *Id.*

237. Natalie Ram, *The Mismatch Between Probable Cause and Partial Matching*, 118 YALE L.J., POCKET PART 182, 184 n.17 (2009).

238. Brief for Genetic Scientists Robert Nussbaum et al. as Amici Curiae in Support of Respondent, *supra* note 105 at 20-21.

239. *Id.*

Third, while junk DNA currently identifies a particular human being, technological advances may permit more biological characteristics to be gleaned from the junk DNA. Advances in biology and medicine may soon provide information about a person's physical or mental traits and whether specific STR chains can be associated with particular traits or disorders.[240] Today, genetic disorders such as Down Syndrome are visible on these non-coding regions.[241]

While the Court in *King* considered how future technological advances in DNA testing could make DNA testing better at identifying arrestees, the Court did not consider what information the government may be able to obtain when, in the future, advances will likely provide more personal information with the same thirteen loci.[242] The future potential of obtaining more information from one buccal swab should weigh more heavily against government interest and in favor of an arrestee's reasonable expectation of privacy.[243]

The parameters of DNA testing's constitutionality in *King* were established with the understanding that junk DNA revealed nothing more than a profile specific to that arrestee.[244] If junk DNA someday reveals more, it could provide the government with more evidence obtained without individualized suspicion or other Fourth Amendment requirements.[245] For example, if police knew that a man suspected of a violent crime was diabetic but knew nothing else about him, police could analyze DNA samples in their possession to identify suspects with genes that cause diabetes.[246] While using the diabetes gene could "identify" the perpetrator,[247] this practice circumvents the Fourth Amendment to search a person and seize incriminating information about him without individualized suspicion.[248]

If, in the future, law enforcement is able to use the same buccal swab to see more of an arrestee's characteristics, then the totality of the circumstances analysis in King may render pre-trial arrestee junk DNA testing unconstitutional. New scientific advances may mean that an arrestee's reasonable expectation of privacy is outweighed by the governmental search. While the

240. *Id.* at 23.

241. *Id.*

242. *See King*, 133 S. Ct. 1958 at 1976-77.

243. Brief for Genetic Scientists Robert Nussbaum et al. as Amici Curiae in Support of Respondent, *supra* note 105 at 10-11 (citing Kyllo v. United States, 533 U.S. 27, 34 (2001)).

244. *King*, 133 S. Ct. at 1966-67.

245. Brief for Genetic Scientists Robert Nussbaum et al. as Amici Curiae in Support of Respondent, *supra* note 105 at 14-15.

246. *Id.* at 33.

247. The diabetes gene would only identify the perpetrator if the perpetrator had been DNA tested before. *See supra* Part V.A.

248. *See supra* Part V.A.

buccal swab does not change, information gleaned from the person does, which will have major privacy implications.[249]

C. Give Him His Day in Court

Defendant King did not dispute the validity of suspicionless DNA testing of convicts and parolees.[250] A convicted felon has a lowered expectation of privacy because of his past crimes, and thus is subject to searches that would be considered unreasonable if he were not a convicted felon.[251] The difference between an arrestee and a convicted felon is the "transformative change" in his expectation of privacy resulting from the trial and conviction.[252] An arrestee, still armed with the presumption of innocence, deserves an expectation of privacy higher than that reserved for convicted offenders.[253] King's contention was not that DNA should never be used as a criminal investigation tool but that DNA should not be taken from a pre-trial arrestee.[254] In light of this, the Court should have noted the three scenarios in which a suspect may be at risk for having his DNA taken and should have distinguished them.

The first scenario is one where the defendant is arrested and a DNA sample is taken to match against the crime for which he was arrested. Under existing Fourth Amendment jurisprudence, this is reasonable because individualized suspicion for that crime exists.[255] All bases are covered and the Fourth Amendment is satisfied.[256]

The second scenario is one where a defendant is arrested and charged with a crime, and upon conviction, law enforcement takes a DNA sample and submits it to CODIS for future crimes. This is also reasonable because a convicted felon has a lowered expectation of privacy, compared to an ordinary citizen, and thus is subject to suspicionless searches.[257] While it is true that convicted felons still have Fourth Amendment rights, their rights are less than law-abiding citizens or pre-trial arrestees.[258] Even within the realm of

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249. *See supra* Part II.

250. *See* Brief for the Respondent, *supra* note 210, at 23 (citing Samson v. California, 547 U.S. 843 (2006)).

251. *Id.*

252. *Id.* (citing United States v. Kincade, 379 F.3d 813, 834 (9th Cir. 2004) (en banc), *cert. denied*, 544 U.S. 924 (2005)).

253. *Id.* at 24-25; *see also* Estelle v. Williams, 425 U.S. 501, 518 (1976) ("[E]very person is presumed innocent until proved guilty beyond a reasonable doubt.").

254. Brief for the Respondent, *supra* note 210, at 21-22.

255. *See supra* Part III.

256. *See supra* Part III.

257. *See supra* Part III.

258. Noah Ehrenpreis, *Constitutional Law – Diminished Expectations of Privacy and the Human Genome: Circuits Align on Mandatory DNA Profiling of Convicted Felons* – U.S. v. Weikert*, 504 F.3d 1 (1st Cir. 2007)*, 41 SUFFOLK U. L. REV. 337, 341 (2008).

"criminal offenders," there are people who are afforded greater Fourth Amendment protections than others, depending on the crime they committed and the punishment imposed.[259] So, while a case-by-case analysis must be used to determine a specific offender's Fourth Amendment rights, many DNA tests on convicted felons will be reasonable due to their diminished status.[260] The Fourth Amendment is satisfied in this situation.

The third scenario is the scene played out before us in *King*, which is different from the prior scenarios because of the lack of either reduced expectation of privacy or individualized suspicion.[261] As illustrated, the Court could have preserved the Fourth Amendment in a more effective manner by separating the rhetoric from reality and proscribing DNA tests without the proper Fourth Amendment constraints in place. Unfortunately, as the law stands, law enforcement and prosecutors are given obvious ways to skirt the Fourth Amendment's protections.

VI. CONCLUSION

The Court's holding in *King* distorts the Fourth Amendment's protections and erodes an arrestee's rights. While DNA testing aids in crime solving, taking DNA samples from pre-trial arrestees for suspicionless criminal investigatory searches violates the Fourth Amendment's proscription against unreasonable searches, and *King*'s holding further erodes the protections of those who are presumed innocent. As Justice Scalia announced in his dissent, while solving unsolved crimes is a noble objective, "it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches. The Fourth Amendment must prevail."[262]

259. *Id.*
260. *See id.*
261. *See supra* Part V.B.
262. *King*, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting).