

MARYLAND V. KING: THE FOURTH AMENDMENT SPIRALS DOWN THE DOUBLE HELIX

SITARA V. WITANACHCHI*

I. INTRODUCTION

In *Maryland v. King*,¹ the United States Supreme Court will consider the constitutionality of Maryland's DNA Collection Act (the Act),² which enables law enforcement to obtain DNA samples of arrestees, enter the samples into a database, and compare the samples to unknown DNA profiles for possible matches.³ Specifically, the Court will consider whether DNA testing individuals arrested for violent crimes violates the Fourth Amendment right to freedom from unreasonable search and seizure.⁴ The novelty of the question before the Court comes from the Act's application to arrestees⁵—the Court will examine the nature of arrestees' privacy expectations as implicated by DNA testing. The Court will also consider the efficacy of DNA testing as a law enforcement tool as well as its facilitation of compelling government interests—resolving unsolved crimes and aiding the law enforcement efforts of other states and of the Federal Bureau of Investigation. Upon balancing arrestees' privacy interests against the government's interests in obtaining arrestees' DNA, the Court will likely find the government's interests to be stronger. Thus, the Court will hold post-arrest DNA testing reasonable and the Act constitutional within the meaning of the Fourth Amendment.

* J.D. Candidate, 2014, Duke University School of Law. I am grateful to Professors Joseph Blocher and Nita Farahany for their guidance and support. I thank the members of *DJCLPP*, in particular Tara McGrath and Jonathan Rash, for their insight and careful editing.

1. *Maryland v. King*, No. 12-207 (U.S. argued Feb. 26, 2013).

2. DNA Collection Act, MD. CODE ANN., PUB. SAFETY § 2-504(a)(3) (West 2013).

3. *Id.*

4. *Id.*

5. *Id.*; see also Transcript of Oral Argument at 35, No. 12-207 (U.S. argued Feb. 26, 2013) (Alito, J.) (“[B]y the way, I think this is perhaps the most important criminal procedure case that this Court has heard in decades.”).

II. FACTUAL BACKGROUND

In September 2003, Vonette W. was raped and robbed in her home by an unidentified individual.⁶ The recovered semen was submitted for analysis to discover the perpetrator's DNA profile.⁷ The resulting profile did not match any pre-existing DNA profiles in the state or federal databases.⁸

In April 2009, respondent Alonzo Jay King, Jr. was arrested for an unrelated incident in Wicimico County, Maryland,⁹ and charged with first- and second-degree assault.¹⁰ Under the Act, an arrestee charged with a crime of violence must provide a buccal swab for DNA testing;¹¹ because first-degree assault constitutes a crime of violence, King was required to submit to a buccal swab.¹² King's DNA profile was obtained from this swab and submitted to the FBI's DNA database system,¹³ known as CODIS.¹⁴ It was then compared to unmatched DNA samples on file.¹⁵ King's DNA profile matched the previously unidentified DNA recovered following the rape of Vonette W.¹⁶ King was ultimately charged with the rape and robbery of Vonette W.¹⁷

At trial, King raised a constitutional challenge to the Act, arguing that requiring an arrestee to submit to a buccal swab constitutes a warrantless search in violation of the Fourth Amendment.¹⁸ King moved to suppress the DNA evidence.¹⁹ His suppression motion was

6. King v. State, 42 A.3d 549, 554 (Md.), *cert. granted*, 133 S. Ct. 594 (2012) (No. 12-207).

7. *Id.*

8. *Id.*

9. *Id.* at 552.

10. *Id.*

11. DNA Collection Act, MD. CODE ANN., PUB. SAFETY § 2-504(a)(3) (West 2013).

12. King v. State, 42 A.3d 549, 552 (Md.), *cert. granted*, 133 S. Ct. 594 (2012) (No. 12-207).

13. Brief of Petitioner at 4, Maryland v. King, No. 12-207 (U.S. Dec. 26, 2012).

14. Congress authorized the FBI to establish a national database of DNA profiles of convicted persons. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210304(a)(1)–(3), 108 Stat. 2069 (codified as amended at 42 U.S.C. § 14132). Under this authority, the FBI created the Combined DNA Index System (CODIS), a coordinated system of federal, state, and local databases designed to permit participating law enforcement agencies to submit profiles and to search profiles within the compiled database. See *CODIS Brochure*, THE FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_brochure (last visited Feb. 13, 2013).

15. Brief of Petitioner, *supra* note 13, at 4.

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

17. *Id.* at 554.

18. *Id.*

19. *Id.*

denied, and on July 27, 2010, he was convicted of first-degree rape.²⁰ He appealed his conviction to the Court of Special Appeals of Maryland.²¹ The appeal was removed to the Court of Appeals of Maryland, which held that the Act was unconstitutional as applied to King and reversed King's conviction.²² The State of Maryland appealed that decision to the United States Supreme Court.²³

Concerned with the impact the Maryland Court of Appeals's holding could have on public safety initiatives, the State applied for a stay of judgment pending the Supreme Court's disposition of the petition for writ of certiorari.²⁴ Chief Justice Roberts granted the motion,²⁵ finding: (1) "a reasonable probability" that the Court would grant certiorari; (2) "a fair prospect" that it would reverse the decision below; and (3) "a likelihood that irreparable harm [would] result from the denial of a stay."²⁶

Looking to the first element, Roberts noted that approximately half of the states and the federal government have adopted similar statutes providing for DNA sampling and the compilation of DNA databases as a law enforcement tool;²⁷ these various DNA databases are often checked against one another for matches.²⁸ Roberts conveyed a concern that the decision below may decrease the effectiveness of other states' DNA database systems and of the FBI's federal database system.²⁹ Thus, the case appeared to be a good candidate for a grant of certiorari.

Jumping to the third element, Roberts noted that if Maryland was forced to shut down its DNA databases, even temporarily, irreparable harm was likely for two reasons.³⁰ First, there is an inherent harm to the public interest when a State is enjoined from the application of a statute passed by the representatives of its people.³¹ Second, the

20. *Id.*

21. *Id.* at 555.

22. *Id.* at 581.

23. Petition for Writ of Certiorari, *Maryland v. King*, 133 S. Ct. 594 (No. 12-207).

24. Petitioner's Motion for Reconsideration or Alternatively, for Stay of Enforcement of the Mandate, *King v. Maryland*, 42 A.3d 549 (Md. 2012) (No. 68).

25. *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (granting the State of Maryland's motion for stay of judgment).

26. See *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (establishing the three elements required for a motion for stay to be granted).

27. *King*, 133 S. Ct. at 2 (Roberts, C.J., in chambers).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 3.

decision below harms public safety interests because DNA sampling has empirically proven to be a valuable tool for Maryland law enforcement.³² Finally, as to the second element, Roberts concluded, without any elaboration, that there is a “fair prospect” that the Maryland Court of Appeals’s holding will be reversed.³³

III. LEGAL BACKGROUND

A. *The Maryland DNA Collection Act*

In relevant part, the Maryland DNA Collection Act requires an individual charged with a crime of violence to submit a buccal swab.³⁴ Because Maryland’s forensic laboratory collaborates with the National DNA Index System (NDIS),³⁵ extracted DNA samples are analyzed according to FBI standards.³⁶ The material from the buccal swab is converted into a DNA profile unique to the owner of the sample through the following process: Under FBI standards, DNA is found on the chromosomes in the nuclei of the extracted cells.³⁷ Testing is done on parts of the chromosome referred to as loci.³⁸

32. See *id.* (“According to Maryland, from 2009—the year that Maryland began collecting samples from arrestees—to 2011, ‘matches from arrestee swabs [from Maryland] have resulted in 58 criminal prosecutions.’” (citation omitted)).

33. *Id.* at 2.

34. Under the Act, DNA samples may be collected from individuals charged with “[a] crime of violence,” “burglary,” or an attempt to commit either. DNA Collection Act, MD. CODE ANN., PUB. SAFETY § 2-504(a)(3) (West 2013). When the DNA sample is collected, the arrestee is to be informed that the DNA record “may be expunged and the DNA sample destroyed” in accordance with § 2-511. *Id.* DNA evidence that has been recovered from “a crime scene or collected as evidence of sexual assault at a hospital” is to be tested “as soon as reasonably possible” if a law enforcement investigator considers the evidence “relevant to the identification or exoneration of a suspect.” *Id.*

35. NDIS is a subset of CODIS; NDIS contains all DNA profiles contributed by federal, state, and local participating forensic laboratories. States participating in NDIS must comply with the FBI standards of DNA testing and specific requirements for participation stipulated in the DNA Identification Act of 1994. See *Frequently Asked Questions on the CODIS Program and the National DNA Index System*, THE FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet> (last visited Feb. 13, 2013) (citing DNA Identification Act of 1994, 42 U.S.C. § 14132).

36. The DNA Identification Act of 1994 requires, among other things, that laboratories participating in NDIS must: (1) comply with the quality assurance standards issued by the FBI director; (2) be accredited by a nationally-recognized, nonprofit professional association of individuals actively engaged in forensic science; and (3) undergo an external audit every two years to confirm compliance with the FBI Director’s quality assurance standards. See DNA Identification Act, 42 U.S.C.A. § 14132 (West 2013).

37. See *Frequently Asked Questions on the CODIS Program and the National DNA Index System*, THE FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet> (last visited Feb. 13, 2013).

38. DNA testing in conformance with FBI standards consists of using the polymerase

Thirteen loci were specifically chosen by the FBI for DNA analysis because they contain non-coding DNA, which the FBI believed did not include personal information such as medical susceptibilities and behavioral traits.³⁹ Rather, the FBI thought that non-coding DNA revealed information “no more intimate than the particular blood serum enzyme that an individual happens to have, the pattern of blood vessels in the retina of the eye, or the whorls and ridges in a fingerprint.”⁴⁰

The resulting DNA profile is stored and collected along with others in Maryland’s DNA database.⁴¹ Because this collection is strictly regulated to follow FBI testing standards,⁴² Maryland is only permitted to gather “DNA records that directly relate to the identification of the individuals.”⁴³ If an arrestee is not ultimately convicted, the Act requires that the DNA record be destroyed within sixty days.⁴⁴ If the record is willfully not destroyed or misused, or if the DNA sample is tested in a manner not authorized by the Act, there are statutory penalties.⁴⁵

chain reaction (PCR) method, which replicates 13 core short-tandem-repeat (STR) loci. On the loci, short sequences of base pairs repeat themselves. The number of times the sequences repeat themselves varies from person to person. The DNA profile is represented as a numerical depiction of this information found on the loci. *See id.*

39. *See id.*; accord MD. CODE ANN., PUB. SAFETY § 2-505(b)(1) (“Only DNA records that directly relate to the identification of individuals shall be collected and stored.”).

40. D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL’Y 455, 461–62 (2001).

41. MD. CODE ANN., PUB. SAFETY § 2-501.

42. *See id.* § 2-503(b) (“Each procedure adopted by the Director shall include quality assurance guidelines to ensure that DNA records meet standards and audit requirements that submit DNA records for inclusion in the statewide DNA data base system and CODIS.”); accord Storing Typing Results, MD. CODE REGS. 29.05.01.09(A) (2011) (“Blood, body fluid, or tissue samples shall be analyzed according to State Police protocol and standard operating procedures by personnel qualified under the FBI standards and CODIS requirements.”).

43. MD. CODE ANN., PUB. SAFETY § 2-505(b)(1).

44. *Id.* § 2-511.

45. An individual is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding five years or a fine not exceeding \$5000 for committing any of the following violations: willfully accessing DNA information without authorization, willfully disclosing said information to others not authorized to receive it, and/or willfully testing the DNA sample for information that does not relate to identification. *Id.* § 2-512. If an individual willfully fails to destroy the DNA sample pursuant to an order to destroy it, she is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding one year or a fine not exceeding \$1000. *Id.*

As originally enacted in 1994, the Act applied solely to convicted felons.⁴⁶ The first Fourth Amendment challenge to the Act, *State v. Raines*,⁴⁷ included a fact pattern strikingly similar to the one here, with one major divergence—the defendant was a convicted felon as opposed to an arrestee.⁴⁸ However, the Maryland Court of Appeals upheld the Act as applied to convicted felons in light of their reduced expectation of privacy.⁴⁹ The Act was amended in 2008 to include persons arrested for violent crimes among the class of individuals required to submit to DNA testing.⁵⁰

B. Fourth Amendment Analysis: The Focus on Reasonableness

As a general rule, government searches must be authorized by judicial warrants issued on the basis of probable cause.⁵¹ However, the Supreme Court has effectively whittled away the warrant requirement over time.⁵² Today, in practice, the *ex ante* issuance of a warrant has become the exception as opposed to the rule, making Fourth Amendment analysis more often an *ex post* assessment of the reasonableness of the intrusion in question.⁵³

46. See Act of May 13, 2008, ch. 337, § 1, 2008 Md. Laws (codified as amended at MD. CODE ANN., PUB. SAFETY § 2-504(a)(3) (2008)) (amending MD. CODE ANN., PUB. SAFETY § 2-504 to include arrestees of violent crimes in addition to convicted offenders).

47. 857 A.2d 19 (Md. 2004).

48. See *id.* at 23 (framing the issue around the privacy interests of the convicted offender).

49. *Id.* at 29.

50. Act of May 13, 2008 § 1. The amended provision took effect on January 1, 2009 and will expire after December 31, 2013. *Id.* § 4.

51. See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) (“[W]e have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause.”).

52. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 10 (1968) (noting the impracticality of the warrant requirement for certain police-civilian encounters and using a reasonableness test to assess whether the search/seizure violated the Fourth Amendment); see also Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camera and Terry*, 72 MINN. L. REV. 383, 393–94 (noting that *Camara* “reversed the roles of probable cause and reasonableness”: Prior to *Camara*, “[a] search or arrest was reasonable only when a warrant based on probable cause issued,” but after *Camara* “reasonableness, in the form of the balancing test, defined probable cause” (citing *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967))).

53. See *Samson v. California*, 547 U.S. 843, 855 n.4 (2006) (“The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion.”); see also William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 922 (1991) (noting that in contemporary practice, “warrants are presumptively required for searches of the home or office and for wiretaps, but not for anything else”).

The reasonableness of a warrantless administrative inspection⁵⁴ is assessed using the “totality of the circumstances balancing test,” set forth in *United States v. Knights*,⁵⁵ where the Supreme Court upheld a warrantless search of a probationer’s apartment.⁵⁶ There, the Court held that the reasonableness of a search is determined by weighing “the degree to which it intrudes upon an individual’s privacy” against “the degree to which it is needed for the promotion of legitimate government interests.”⁵⁷

One’s involvement with the criminal justice system informs one’s expectation of privacy. The Court has suggested a hypothetical spectrum, with a convicted individual on one end and an ordinary citizen⁵⁸ on the other.⁵⁹ The convicted offender’s privacy interests are at a minimum and the ordinary citizen’s privacy interests are at a maximum.⁶⁰ Somewhere between these two points lie the probationer, the parolee, the pre-trial detainee, and presumably, the arrestee.⁶¹ In *Knights*, the Court held that the defendant’s expectation of privacy was diminished because of his status as a probationer.⁶² The Court

54. Administrative searches include government searches of every person in a specific location or involved in a specific activity. These searches are not supported by probable cause or individualized suspicion; the reasonableness of the search is evaluated by balancing the competing interests. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1983) (holding that the warrant requirement was unsuitable for the maintenance of the swift disciplinary procedures needed in a school and assessing the reasonableness of the intrusion). “[C]ommon examples [of administrative searches] include checkpoints where government officials stop every car (or every third car) driving on a particular roadway, and drug testing programs that require every person involved in a given activity to submit to urinalysis.” Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 262 (2011) (citations omitted).

55. 534 U.S. 112 (2001).

56. *Id.* at 112–13 (observing the link between one’s privacy expectation and one’s placement on a “continuum of possible punishments ranging from solitary confinement . . . to a few hours of mandatory community service”).

57. *Id.* (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)) (internal quotation marks omitted).

58. An “ordinary citizen” is an individual who has not entered the criminal justice system and consequently has no physical relationship to the State.

59. *See Samson v. California*, 547 U.S. 843, 848 (2006) (“In evaluating the degree of intrusion into *Knights*’ privacy, we found *Knights*’ probationary status ‘salient,’ observing that ‘probation is one point . . . on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service.’” (citation omitted)).

60. *See id.* at 864 (“Threaded through the Court’s reasoning is the suggestion that deprivation of Fourth Amendment rights is part and parcel of any convict’s punishment.”).

61. *See id.* (establishing that apprehended individuals with a physical relationship to the State have diminished privacy interests, yet they are situated along a continuum based on the seriousness of their physical relationship to the State).

62. *See Knights*, 534 U.S. at 119 (2001) (“Inherent in the very nature of probation is that probationers ‘do not enjoy the absolute liberty to which every citizen is entitled.’” (quoting

next held in *Samson v. California*⁶³ that the parolee's privacy interests are even less than those of the probationer because a parolee's relationship to the State is comparatively more serious.⁶⁴

Sidling closer to addressing the privacy interests of arrestees, the Court addressed those of pre-trial detainees in *Bell v. Wolfish*.⁶⁵ In *Bell*, the Court held that certain conditions pre-trial detainees endure, including visual body-cavity searches after a contact visit, do not infringe upon their privacy rights.⁶⁶ Because administrative practices are deemed necessary for managing pre-trial detainees, their privacy interests protected by the Fourth Amendment are necessarily reduced.⁶⁷ Similarly, the Court's holding in *Florence v. Board of Chosen Freeholders*⁶⁸—that arrestees can be subjected to suspicionless strip searches before entering prison—implies that arrestees possess diminished privacy interests compared to those of ordinary citizens.⁶⁹

C. Federal Courts' Assessment of DNA Testing Arrestees

To date, only two federal circuit courts have addressed the issue of obtaining DNA samples from arrestees—the Court of Appeals for the Ninth Circuit in *United States v. Pool*⁷⁰ and the Court of Appeals for the Third Circuit in *United States v. Mitchell*.⁷¹ In both cases, the courts employed the *Knights* balancing test to affirm the reasonableness of the warrantless DNA sampling of arrestees.⁷²

Morrissey v. Brewer, 408 U.S. 471, 480 (1972))).

63. 547 U.S. 842 (2006).

64. See *id.* at 843–44 (“Parolees, who are on the ‘continuum’ of state-imposed punishments, have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is.”).

65. 441 U.S. 520 (1979).

66. *Id.* at 558–60 (“Admittedly, this practice gives us the most pause. However, assuming for present purposes that inmates, both convicted prisoners and pre-trial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility, we nonetheless conclude that these searches do not violate the Fourth Amendment.”).

67. See *id.* at 557 (“[A]ny reasonable expectation of privacy that a detainee retained necessarily would be of a diminished scope.” (citing *Lanza v. New York*, 370 U.S. 139, 143 (1962))).

68. 132 S. Ct. 1510 (2011).

69. See *id.* at 1522 (“Even assuming all the facts in favor of petitioner, the search procedures at the Burlington County Detention Center and the Essex County Correctional Facility struck a reasonable balance between inmate privacy and the needs of the institutions.”).

70. 621 F.3d 1213 (9th Cir. 2010). The Ninth Circuit voted to rehear *Pool* en banc, *United States v. Pool*, 646 F.3d 659 (9th Cir. 2011). While the en banc rehearing was pending, Pool pleaded guilty, and the Ninth Circuit dismissed the case as moot. *United States v. Pool*, 659 F.3d 761 (9th Cir. 2011) (en banc).

71. 652 F.3d 387 (3rd Cir. 2011).

72. See, e.g., *id.* at 403 (“We and the majority of circuits—the First, Fourth, Fifth, Sixth,

In *Pool*, the defendant asserted a Fourth Amendment challenge to amendments of the Bail Reform Act, which required arrestees to provide a DNA sample as a condition of pre-trial release.⁷³ The Ninth Circuit determined that the defendant's privacy interests were reduced because of his arrestee status.⁷⁴ The court applied the totality of the circumstances test to assess the reasonableness of compelling a DNA test from the defendant.⁷⁵ Looking first to the degree of intrusion on the defendant's privacy interests, the court dismissed the defendant's argument that the information gathered from the sample could be used for purposes other than identification.⁷⁶ By both design and law, the government had narrowed the scope of its DNA analysis to identifying the individual,⁷⁷ and so the court would not speculate on potential government abuse.⁷⁸ In contrast, the court found the State's interests to be considerable.⁷⁹ First, the State had a noted interest in using the most accurate means of identification available.⁸⁰ The State also had a recognized interest in learning the criminal background of the arrestee to better determine whether the arrestee could be released before trial without posing a danger to society.⁸¹ The court found that the State's interests outweighed the defendant's privacy interest⁸² and thus held that the amendments to the Bail Reform Act

Eighth, Ninth, Eleventh, and District of Columbia—have endorsed a totality of the circumstances approach.” (citations omitted)).

73. *Pool*, 621 F.3d at 1215.

74. *See id.* at 1219 (“[The magistrate] noted that at this point, ‘the defendant may be deprived of his very liberty Certainly the magistrate is correct that at this point the government may, through the judiciary, impose conditions on an individual that it could not otherwise impose on a citizen.’ (citation omitted)).

75. *See id.* at 1220 (“However, our opinions suggest that there may be a pre-requisite to the application of this [totality of the circumstances] test: there must be some legitimate reason for the individual having less than the full rights of a citizen.”).

76. *Id.*

77. *Id.*

78. *See id.* at 1221–22 (“If, . . . and when, some future program permits the parade of horrors the DNA Act’s opponents fear—unregulated disclosure of CODIS profiles to private parties, genetic discrimination, state-sponsored eugenics, . . . —we have confidence that courts will respond appropriately.”); *see also* *Whalen v. Roe*, 429 U.S. 589, 603 (1977) (assessing the constitutionality of the challenged statute based on what the statute explicitly provides for as opposed to speculations as to how the statute could be misapplied).

79. *Id.* at 1222–23.

80. *See id.* (“The government’s interests in DNA samples for law enforcement purposes are well established. It is the most accurate means of identification available.” (citing *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 55 (2009))).

81. *See id.* at 1225 (“In *Pool*’s case, the government seeks only his definitive identification which it relates to its ability to check on his activities while on pre-trial release.”).

82. *See id.* at 1226 (“[W]here a court . . . [finds] probable cause . . . that the defendant committed a felony, the government’s interest in definitively determining the defendant’s

did not violate the Fourth Amendment.⁸³

In *United States v. Mitchell*, the defendant challenged the 2006 revision to the federal DNA Act, which added arrestees and pretrial detainees to the class of individuals subject to DNA testing.⁸⁴ Applying the *Knights* balancing test,⁸⁵ the Third Circuit found that the State's interests outweighed those of the individual.⁸⁶ Without much discussion, the court dismissed the argument that the procedure itself poses a significant physical intrusion.⁸⁷ Next, the court noted that the extracted DNA material (referred to as "junk" DNA)⁸⁸ used to create the DNA profile does not contain personal information such as medical conditions and predispositions.⁸⁹ The Act sets strict guidelines limiting the use and purpose of the DNA samples to identification only.⁹⁰ As for the State's interests, the court recognized legitimate government interests in accurately identifying⁹¹ arrestees and aiding law enforcement in criminal investigations and prosecutions.⁹² Upon weighing the individual's interests against the State's interests, the Third Circuit determined that the balancing test tipped in favor of the State.⁹³

identity outweighs the defendant's privacy interest in giving a DNA sample as a condition of pre-trial release where the government's use of the DNA is limited . . .").

83. *Id.*

84. 652 F.3d 387, 398–99 (3d Cir. 2011).

85. *United States v. Knights*, 534 U.S. 112, 112–13 (2001).

86. *Mitchell*, 652 F.3d at 413–15.

87. *See id.* ("The Supreme Court has repeatedly held that the 'intrusion occasioned by a blood test is not significant, since such tests are commonplace . . . and that for most people the procedure involves virtually no risk, trauma, or pain.'" (quoting *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 625 (1989))).

88. H.R. REP. NO. 106-900(I), at 27 (2000) (stating that the "genetic markers [were] purposely selected because they are not associated with any known physical or medical characteristics, providing further assurance against the use of . . . DNA profiles for purposes other than law enforcement identification").

89. *See Mitchell*, 652 F.3d at 401 (pointing out that the use of "junk" DNA ensures that the government is limited to attaining identification information from the sample, so it will not be privy to personal information).

90. *See id.* at 403 ("The mere possibility of such misuse 'can be accorded only limited weight in a balancing analysis that focuses on present circumstances.'" (quoting *United States v. Weikert*, 504 F.3d 1, 13 (1st Cir. 2007))).

91. The court noted that identification includes ascertaining the arrestee's criminal history. *Id.* at 413.

92. *Id.* at 413–15.

93. *Id.* at 416.

III. HOLDING

In the Maryland Court of Appeals, Alonzo Jay King, Jr. brought both an as-applied challenge and a facial challenge to the Maryland DNA Collection Act.⁹⁴ The court ruled in favor of King on the as-applied challenge and rejected his facial challenge.⁹⁵ First, the court addressed King's claim that the Act was unconstitutional as applied to him because the first acquisition of his DNA sample was not based on any individualized suspicion.⁹⁶ Unlike the convicted felon challenging the statute in *Raines*,⁹⁷ King had a higher expectation of privacy.⁹⁸ The court held that "the presumption of innocence cloaking the arrestee"—a presumption absent in *Raines*—was at the heart of the case.⁹⁹ According to the court, until the arrestee is convicted, the presumption of innocence increases his expectation of privacy and correspondingly reduces the State's interest.¹⁰⁰ As a result, 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."¹⁰¹

The court rejected the State's argument that obtaining DNA samples was analogous to a routine booking procedure, such as fingerprinting;¹⁰² a buccal swab, by comparison, is more physically intrusive than fingerprinting.¹⁰³ Furthermore, fingerprinting reveals only the physical characteristics of the individual for identification purposes.¹⁰⁴ In contrast, a DNA sample contains what the court called

94. *King v. State*, 42 A.3d 549, 553 (Md.), *cert. granted*, 133 S. Ct. 594 (2012) (No. 12-207).

95. *Id.* at 580.

96. *Id.* at 553.

97. *See State v. Raines*, 857 A.2d 19, 23 (Md. 2004) ("The central issue dealing with the constitutionality of the Act is whether the collection of DNA from a certain class of convicted persons is in accord with the protections of the Fourth Amendment of the United States Constitution.").

98. *See King*, 42 A.3d at 577 ("Although arrestees do not have all the expectations enjoyed by the general public, the presumption of innocence bestows on them greater protections than convicted felons, parolees, or probationers.").

99. *Id.* at 563.

100. *See id.* ("Here, however, the expectation of privacy of an arrestee renders the government's purported interests in DNA collection reduced greatly."). In making this point, the court presents no case law supporting the notion that there is a correlation between the two interests.

101. *Id.* at 576.

102. *See id.* at 574 (noting that even though fingerprinting has been de facto treated as a routine booking procedure without Fourth Amendment implications, the same approach does not necessarily apply to DNA sampling).

103. *See id.* at 576 ("While the physical intrusion of a buccal swab is deemed minimal, it remains distinct from a fingerprint.").

104. *See id.* at 576-77 ("The information derived from a fingerprint is related only to

a “genetic treasure map,”¹⁰⁵ giving the government unique access to an arrestee’s personal information.¹⁰⁶

The court found no compelling state interest sufficient to outweigh King’s expectation of privacy.¹⁰⁷ The State had already confirmed King’s identity through other means, including fingerprinting and photographs.¹⁰⁸ Although the State has a generalized interest in solving crimes, the court found that this interest did not outweigh King’s expectation of privacy.¹⁰⁹ The court thus held that the Act, as applied to King, failed to survive Fourth Amendment scrutiny.¹¹⁰ However, King’s facial challenge failed because the court envisioned a conceivable context in which it would be appropriate for an arrestee to submit to a warrantless DNA test.¹¹¹

V. ARGUMENTS

A. Petitioner’s Arguments

The State of Maryland structures its argument according to the framework of the *Knights* balancing test, weighing King’s privacy interests against the State’s interests in collecting and analyzing DNA samples of arrestees.¹¹² The State argues that King’s post-arrest search under the DNA Collection Act was reasonable and therefore not a violation of the Fourth Amendment.¹¹³

physical characteristics and can be used to identify a person, but no more.”).

105. *Id.* at 577.

106. *Id.* at 576–77.

107. *See id.* at 577 (“Convicted felons are not at issue here. The greater expectation of privacy of an arrestee and the lesser legitimate interest of the State bring concerns about the privacy of genetic material to a different dynamic in the application of the balancing test.”).

108. *See id.* at 579 (“[T]he State presented no evidence that it had any problems whatsoever identifying accurately King through traditional booking routines. King had been arrested previously, given earlier fingerprint samples, and had been photographed.”).

109. *See id.* at 578 (“Although we have recognized . . . that solving cold cases is a legitimate governmental interest, a warrantless, suspicionless search can not [sic] be upheld by a ‘generalized interest’ in solving crimes.”).

110. *Id.* at 580.

111. *See id.* (concluding that King’s facial challenge fails because identification through warrantless DNA testing would be reasonable if “an arrestee may have altered his or her fingerprints or facial features (making difficult or doubtful identification through comparison to earlier fingerprints or photographs on records)”).

112. Brief of Petitioner, *supra* note 13, at 12.

113. *Id.* at 11.

1. An Assessment of the Arrestee's Interests

The State argues that a search authorized by the Act only minimally intrudes upon the arrestee's privacy interest.¹¹⁴ The Act expressly prohibits the State from using the DNA samples to attain personal information.¹¹⁵ Supporting this argument is the premise that statutes should be assessed based on their plain language as opposed to speculative scenarios not provided for by the law.¹¹⁶ Therefore, King's fear that the State could access sensitive information beyond the arrestee's identification becomes immaterial when evaluating the constitutionality of the Act.¹¹⁷

Furthermore, persons arrested for violent crimes generally have a reduced expectation of privacy.¹¹⁸ A lawful arrest alters one's physical relationship to the State, thus one's reasonable expectation of privacy correspondingly decreases.¹¹⁹ Because an arrestee has no legitimate expectation of anonymity,¹²⁰ and because the Act primarily serves the purpose of identifying the arrestee,¹²¹ the Act serves a function that the arrestee is unable to evade.¹²²

114. *Id.* at 13–14.

115. *See id.* at 15 (“When the Court of Appeals expressed concern about the disclosure of the ‘vast genetic treasure map’ of the human genome, 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.”).

116. *Id.* at 14 (noting that an evaluation of the statute requires the court to not “go beyond the statute’s facial requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases” (internal quotation marks omitted) (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008))).

117. *See id.* at 15–16 (“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.”).

118. *See id.* at 17 (“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.”).

119. *Id.* at 16–19; *see also* *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.”).

120. *See id.* at 18 (“This Court has already ruled that there is no Fourth Amendment right to anonymity after being lawfully stopped by the police.” (citing *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 185 (2004))).

121. *Id.* at 14.

122. *See id.* at 18 (“An arrestee may hope that his identity, and thus his participation in other crimes, goes undiscovered by the State. But ‘the mere expectation . . . 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.’” (citing *United States v. Jacobsen*, 466 U.S. 109, 122 (1984))).

Lastly, the State criticizes the Maryland Court of Appeals' conclusion that the arrestee is cloaked with a presumption of innocence, which consequently increases the arrestee's privacy interest.¹²³ Because the presumption of innocence is part of the trial right to due process, it does not implicate the Fourth Amendment's pre-trial application to arrestees.¹²⁴ Consequently, it should have no bearing on the arrestee's expectation of privacy.¹²⁵

2. An Assessment of the State's Interests

The State argues that it has a compelling interest in accurately identifying people within its custody¹²⁶ and that DNA testing provides the most precise means for doing so.¹²⁷ Unlike identification via fingerprinting or photographs, the immutability of a DNA profile makes it impossible to alter.¹²⁸ Supervising pretrial detainees is another relevant state interest advanced by the Act.¹²⁹ A comprehensive identification of pre-trial detainees, provided by DNA sampling, helps the State (1) determine whether the arrestee should be charged under recidivist statutes, (2) set bail, (3) make decisions on institutional security for detainees not released, and (4) set the terms of community supervision for those released.¹³⁰

Finally, the Act facilitates the State's interest in solving crimes as efficiently as possible.¹³¹ It enables law enforcement to identify suspects with greater precision, conserve valuable state resources, and free those who are unjustifiably held as suspects from the scrutiny of the criminal justice system.¹³² It also helps to identify dangerous criminals who otherwise would not have been apprehended without

123. *Id.* at 20–21.

124. *Id.* at 20 (citing *Bell v. Wolfish*, 441 U.S. 520, 533 (1979)).

125. *Id.* at 20–21 (“[T]he presumption of innocence has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.” (internal quotation marks omitted) (citing *Bell*, 441 U.S. at 533)).

126. *See id.* at 21–22 (“The 2008 extension of the Act to arrestees advances the State’s interest in accurately identifying people in its custody. King, like many . . . 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.”).

127. *See id.* at 22 (“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 [twenty-six]-number sequence derived from his DNA.”).

128. *Id.* at 23.

129. *Id.* at 22.

130. *Id.* at 22–23.

131. *Id.* at 23.

132. *Id.* at 23–25.

the aid of DNA sampling.¹³³

Having set all the aforementioned arguments on the scale, the State contends that its legitimate interests outweigh King's minimal privacy interests.¹³⁴ Hence, the State argues that obtaining King's DNA after his arrest was reasonable and did not violate the Fourth Amendment.¹³⁵

B. Respondent's Arguments

King argues that the Act violates the Fourth Amendment by permitting the warrantless collection and analysis of DNA from an arrestee.¹³⁶ King offers four primary arguments in support of his position: (1) His DNA test was not authorized by either a warrant or an individualized suspicion;¹³⁷ (2) no existing exception to the warrant requirement was applicable;¹³⁸ (3) DNA testing is not analogous to fingerprinting;¹³⁹ and (4) his privacy interests outweigh any relevant government interests.¹⁴⁰

First, King notes the general requirement that searches¹⁴¹ are to be supported by a warrant obtained *ex ante* by a "neutral and detached magistrate."¹⁴² The State not only failed to obtain a warrant to conduct this search, but it also lacked probable cause or individualized suspicion to link King to the rape of Vonette W. six years earlier.¹⁴³ Second, King argues that no existing exception to the warrant requirement applies.¹⁴⁴ Exceptions to the warrant requirement include the "special needs" doctrine¹⁴⁵ and the "search-incident-to-arrest"

133. See *id.* at 25 (noting that "[t]he facts of this case dramatically underscore the value of expanding the database to include arrestees charged with violent crimes" because when King raped Vonette W. at gunpoint, "[h]e did not leave behind his photograph, his fingerprints, or his name—but he did leave his identity . . . in the form of a string of numbers engraved upon every cell.").

134. *Id.*

135. *Id.*

136. Brief for Respondent at 13, *Maryland v. King*, No. 12-207 (U.S. Jan. 25, 2013).

137. *Id.* at 18–21.

138. *Id.* at 34–38.

139. *Id.*

140. *Id.* at 46–54.

141. In this case, a search was conducted when law enforcement extracted from King a DNA sample by means of a buccal swab. *Id.* at 18–19.

142. *Id.* at 20.

143. *Id.* at 20–21.

144. *Id.* at 23.

145. See, e.g., *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1986) (holding that roadblocks designed to identify drunk drivers on the road primarily served a public safety purpose, so the roadblocks did not violate the Fourth Amendment).

doctrine.¹⁴⁶ The “special needs” doctrine applies when the primary purpose of the government activity extends beyond its general interest in crime control.¹⁴⁷ King argues that crime control is the primary purpose of DNA testing arrestees because it solves unsolved crimes.¹⁴⁸ The “search-incident-to-arrest” doctrine is also inapplicable.¹⁴⁹ The doctrine allows police to remove weapons and search for evidence contemporaneous with the arrest to prevent concealment or destruction.¹⁵⁰ King’s DNA was not evidence of the crime for which he was arrested.¹⁵¹ King further contends that there is no valid justification for creating a new exception to the warrant requirement for DNA testing.¹⁵² Even if DNA testing constitutes a minimal intrusion, and the State has a compelling interest in using precise testing procedures, these factors do not justify a departure from the warrant requirement.¹⁵³

Third, King argues that DNA testing is not a justified extension of routine booking procedures like fingerprinting.¹⁵⁴ He argues that fingerprinting does not involve an intrusion below the body surface,¹⁵⁵ so it is not as physically intrusive as DNA testing and therefore infringes less upon an individual’s privacy.¹⁵⁶ Fourth and finally, King argues that if the Court conducts a balancing test, it should find that his privacy interests outweigh those of the State.¹⁵⁷ The intrusive nature of DNA testing—both physically and in terms of the amount of information accessible to the government—tips the scale in his favor.¹⁵⁸ Though King acknowledges that FBI standards prohibit certain personal information from being extracted from the DNA

146. See, e.g., *United States v. Robinson*, 414 U.S. 218, 226 (1973) (holding that pursuant to a lawful arrest, police can search everything associated with the arrestee’s person assuming that there might be a weapon).

147. Brief for Respondent, *supra* note 136, at 28; see, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67, 83–84 (2001) (holding that the “special needs” doctrine did not apply because the public health rationale for prosecuting mothers whose infants tested positive for cocaine was too closely entangled with a crime control purpose).

148. Brief for Respondent, *supra* note 136, at 28.

149. *Id.* at 33–34.

150. *Id.*

151. See *id.* at 34 (“[I]t is undisputed that the [S]tate did not conduct the DNA testing to link respondent to the alleged assault.”).

152. *Id.* at 38.

153. *Id.* at 40–42.

154. *Id.* at 34–38.

155. *Id.* at 35.

156. *Id.*

157. *Id.* at 45–54.

158. *Id.* at 45.

material examined,¹⁵⁹ he argues that the State does not account for the possibility that future scientific advancement will expand the significance of the specific loci selected beyond mere identification.¹⁶⁰ For these reasons, King argues that the DNA testing was unreasonable and therefore constitutes a violation of the Fourth Amendment.¹⁶¹

V. ANALYSIS

Chief Justice Roberts's opinion granting the State of Maryland's motion for a stay of judgment suggests that the Supreme Court will ultimately overturn the Maryland Court of Appeals's holding.¹⁶² To grant the stay, Roberts had to find: (1) "a reasonable probability" that the Court would grant certiorari; (2) "a fair prospect" that it would reverse the decision below; and (3) "a likelihood that irreparable harm [would] result from the denial of stay."¹⁶³ The first two elements "[b]oth depend on an individual Justice's predictions not only of how he will vote on a future certiorari petition or rule on the merits after full consideration of a case, but also on how he thinks each of the other Justices will react."¹⁶⁴ Though Roberts alone granted the stay, in so doing he was obliged to act "as a surrogate for the entire Court" and to reach a decision that would "reflect the views of a majority of the sitting Justices."¹⁶⁵

In granting the stay, Roberts likely concluded that the majority of the sitting Justices would overturn the lower court's decision and uphold the Act. There are at least three possible approaches the Court could take to find the Act constitutional. First, the Court could recognize that King's privacy interests are diminished because of his arrestee status. Second, the Court could focus on the fact that the arrestee has no right to anonymity, so the Act, which is limited to

159. See *id.* at 46 ("[W]hile it is true that the loci at issue were initially selected because it was believed that they did not correspond to any particular traits or characteristics, the scientific understanding is rapidly evolving . . .").

160. *Id.*

161. *Id.* at 53–54.

162. See *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers).

163. See *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (outlining the three elements required for a motion for stay to be granted).

164. Lois J. Scali, Comment, *Prediction-Making in the Supreme Court: The Granting of Stays by Individual Justices*, 32 UCLA L. REV. 1020, 1032 (1985).

165. See *Holtzman v. Schlesinger*, 414 U.S. 1304, 1313 (1973) (Marshall, Circuit Justice) ("[W]hen I sit in my capacity as a Circuit Justice, I act not for myself alone but as a surrogate for the entire Court A Circuit Justice therefore bears a heavy responsibility to conscientiously reflect the views of his Brethren . . .").

identifying arrestees only, does not infringe on any legitimate privacy expectation. Third, the Court could explicitly clarify that an assessment of an individual's privacy interests revolves primarily around the physical intrusiveness of DNA testing. This way, the Court's Fourth Amendment analysis of DNA testing will not depend entirely on whether the science of "junk" DNA evolves.

A. *Calibrating the Scale*

The balancing test used to determine the reasonableness of a Fourth Amendment intrusion weighs the individual's privacy interests against the State's interests in conducting the search.¹⁶⁶ The Court could explicitly conclude that an arrestee's privacy interest is reduced due to her status as an arrestee. As *Knights* illustrated, one's privacy interests are informed by one's physical relationship to the State.¹⁶⁷ In *Knights*, because of the defendant's reduced expectation of privacy due to his probationer status, the State's interest in decreasing recidivism outweighed the defendant's interests.¹⁶⁸ If the Court takes a similar approach here, it need not be exact about the extent to which the arrestee's privacy interests are reduced. Rather, it would suffice to determine that the arrestee's privacy interests are reduced just enough to make the State's interests in DNA sampling greater than those of the arrestee's.¹⁶⁹

Additionally, the Court may highlight the value of the safeguards and expungement provisions in the Act. In so doing, the Court would stress that the Act enables DNA sampling of arrestees solely for identification purposes. Safeguards include adhering to FBI standards of collecting and analyzing DNA samples,¹⁷⁰ namely using the specific genetic loci the FBI has identified as optimal for maintaining a

166. *United States v. Knights*, 534 U.S. 112, 118–19 (2001).

167. *See id.* at 119 (“Just as other punishments for criminal convictions curtail an offender’s freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.”).

168. *See id.* at 120 (noting that a major reason why probationers have diminished privacy interests in comparison to ordinary citizens is because of the fear that they are more likely to violate the law).

169. *See* Scott E. Sundby, “*Everyman’s Fourth Amendment: Privacy or Mutual Trust between Government and Citizen?*,” 94 COLUM. L. REV. 1751, 1765 (1994) (“[I]f resolving a clash of rights is simply a playing of each actor’s rights card and deciding which right is more valuable, the government’s card . . . almost always will outweigh an individual’s claim of a right to privacy, especially where the intrusion can be characterized as minimal.”).

170. DNA Collection Act, MD. CODE ANN., PUB. SAFETY § 2-503 (West 2013); *accord id.* § 2-502(c)(3).

database system.¹⁷¹ This way, the State gains only the information it requires for identification purposes.¹⁷² The Act also includes provisions expressing limitations on where the samples are to be located,¹⁷³ who is granted access to these samples,¹⁷⁴ and the purposes for which the samples can be used.¹⁷⁵ These provisions provide security after the samples are attained to ensure that they are not misused.¹⁷⁶ Finally, the Act requires the destruction of the DNA information if “a criminal action begun against the individual . . . does not result in a conviction of the individual, the conviction is finally reversed or vacated and no new trial is permitted, or the individual is granted an unconditional pardon.”¹⁷⁷

Admittedly, despite these safeguard provisions the potential for abuse remains. However, the Court has previously found in *Whalen v. Roe*¹⁷⁸ that the risk of abuse leading to the potential misuse of personal information is insufficient to invalidate a database or other stipulations codified in a statute.¹⁷⁹ By focusing on the safeguard provisions, the Court can recognize that the combination of these precautionary requirements limit the utility of the sample analysis to identification of the arrestee, which the arrestee cannot conceal from the State.¹⁸⁰ If the Court uses the safeguards and expungement provisions to characterize the Act as accomplishing nothing more than identifying lawfully arrested individuals, the Court can conclude

171. See *Kaye*, *supra* note 40, at 461–62.

172. Shortly after remarking on the unsolved murders and rapes that can be solved by this DNA technology, Justice Alito questioned why DNA is not the fingerprinting of the twenty-first century. Transcript of Oral Argument at 35, *Maryland v. King*, No. 12-207 (U.S. argued Feb. 26, 2013) (Alito, J.).

173. MD. CODE ANN., PUB. SAFETY § 2-504(b).

174. *Id.* § 2-504(c).

175. *Id.* § 2-505.

176. See, e.g., *id.* § 2-502(c)(4) (providing that the Crime Laboratory Director shall “ensure the security and confidentiality of all records in the statewide DNA data base system”).

177. *Id.* § 2-511(a)(1)(i)–(iii).

178. 429 U.S. 589 (1977).

179. See *id.* at 603 (holding that a New York law requiring physicians to file prescriptions with the Department of Health so the Department could maintain a computerized database of the information, including the patient’s name, was constitutional despite the inescapable risk that the database could be misused); see also Transcript of Oral Argument at 36, *Maryland v. King*, No. 12-207 (U.S. argued Feb. 26, 2013) (Alito, J.) (“[W]here a urine sample is taken to determine drug use, the urine can be analyzed for all sorts of things . . . and . . . this is a reasonable search with respect to the determination of whether the person has taken drugs, not all the other information.”).

180. See *United States v. Jacobsen*, 466 U.S. 109, 122 (1984) (“The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities.”).

that concealment of identification is not a recognized privacy interest.¹⁸¹ At the very least, it is not a privacy interest that elevates the arrestee's interests above the State's.

The State's interests are undoubtedly substantial. They include aiding law enforcement within Maryland by resolving previously unsolved crimes,¹⁸² aiding law enforcement efforts of other states and of the FBI,¹⁸³ releasing wrongfully held suspects exonerated by DNA hits, using the most precise means of identification available, and adding efficiency to the criminal justice system.¹⁸⁴ These interests are particularly palpable in this case: After other avenues had failed,¹⁸⁵ the perpetrator of a previously unsolved rape was discovered six years later through Maryland's DNA database system.¹⁸⁶ Hence, when the arrestee's reduced privacy interests are weighed against the various state interests in attaining DNA samples of arrestees, the Court may face minimal difficulty establishing that the balance weighs in favor of the State's interests. The fact that Chief Justice Roberts finds it disconcerting that Maryland will be deprived of this law enforcement tool, even for a temporary period, suggests that there is some support on the Court for recognizing the weight of the government interests involved.¹⁸⁷

181. See Nita A. Farahany, *Searching Secrets*, 160 U. PA. L. REV. 1239, 1280–81 (2012) (“As identifying information is a set of facts, a suspect can rarely, if ever, claim that such information contains original expressive content. Consequently, individuals have only a privacy interest in the seclusion of identifying information, but not in its secrecy.”).

182. Maryland Governor Martin O'Malley made a statement supporting the expansion of the Act to include DNA testing of arrestees “to more efficiently resolve open criminal investigations, pursue repeat offenders, and save valuable time pursuing false leads by effectively eliminating suspects from ongoing investigations.” Press Release, Office of the Governor of Maryland, O'Malley Testifies on Proposal to Improve Public Safety (Feb. 13, 2008) (on file with author).

183. *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers).

184. See *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 55 (2009) (“DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty.”); *id.* (“DNA testing . . . has the potential to significantly improve both the criminal justice system and police investigative practices.”).

185. The victim was unable to identify her attacker because he covered his face with a ski mask. Furthermore, he left no fingerprint marks. The only trace left behind was a sample of his semen recovered from the victim in the hospital. *King v. Maryland*, 42 A.3d 549, 555.

186. Brief of Petitioner, *supra* note 13, at 25.

187. See *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Robert, C.J., in chambers) (expressing concern that if the DNA testing is discontinued pursuant to the Maryland Court of Appeals decision, severe repercussions will be suffered by the public, the State, other states that rely on similar databases, and the national database system). *But see* Transcript of Oral Argument at 3, *Maryland v. King*, No. 12-207 (U.S. argued Feb. 26, 2013) (Scalia, J.) (responding to the empirics the State presented on the efficacy of the Act, Scalia said, “I’ll bet you, if you conducted a lot of unreasonable searches and seizures, you’d get more convictions too That

B. *The Evolving Science on “Junk” DNA*

The Encyclopedia of DNA Elements (ENCODE), a project funded by the Human Genome Research Institute, presented new data in 2012 revealing that “junk” DNA may be a misnomer.¹⁸⁸ According to the ENCODE team, what was thought to be “junk” DNA turns out to be biochemically active material that regulates the expression of genes and controls hundreds of common diseases.¹⁸⁹ Even though Maryland’s DNA database follows the FBI standards of testing the specific loci identified as “junk” DNA,¹⁹⁰ ENCODE’s data suggests that the information the government can access from the sample is not limited to identification. If ENCODE has correctly unveiled the true nature of what was previously considered biological dark matter, the government can gain access to personal information from DNA samples, including medical susceptibilities and conditions.

Although this new development may create a sensation in the world of human genome research, it is not as monumental for Fourth Amendment reasonableness analysis, because the reasonableness analysis is not driven by the nature of the information being accessed by law enforcement. The reasonableness analysis has instead focused on the degree of the physical intrusiveness of the search.¹⁹¹ Professor Nita Farahany elaborates: “Because an individual cannot claim authorship over her biometric data, seclusion is the only recognized privacy interest that these searches could implicate. When seclusion is

proves absolutely nothing”).

188. See The ENCODE Project Consortium, *An Integrated Encyclopedia of DNA Elements in the Human Genome*, NATURE (Sept. 6, 2012), <http://www.nature.com/nature/journal/v489/n7414/full/nature11247.html>.

189. See *id.* (“These data enabled us to assign biochemical functions for 80% of the genome . . . providing new insights into the mechanisms of gene regulation. The newly identified elements also show a statistical correspondence to sequence variants linked to human disease . . .”).

190. See Storing Typing Results, MD. CODE REGS. 29.05.01.09(A) (2011) (“Blood, body fluid, or tissue samples shall be analyzed according to State Police protocol and standard operating procedures by personnel qualified under the FBI standards and CODIS requirements.”).

191. Farahany, *supra* note 181, at 1282. Farahany points out that searches of identifying information, like biometric data, involve the search of information not authored by the individual whose sample is attained. *Id.* Accordingly, that individual has no privacy interest in the information contained therein, so the relevant question in conducting a privacy inquiry revolves around the physical intrusiveness of the search. *Id.* The Court has almost always focused on the physical nature of the intrusion as opposed to focusing on the nature of the information to which the government gains access. *Id.*; see also, e.g., *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 616 (1989) (assessing the reasonableness of governmentally imposed urine tests by focusing on the intrusiveness of the procedure as opposed to focusing on the extent of information accessible from the samples attained).

the sole cognizable interest at stake, the physical intrusiveness of the search governs its reasonableness.”¹⁹² Because the physical intrusiveness of the search is at the heart of the privacy inquiry,¹⁹³ revelations about the type of information certain loci reveal become immaterial.¹⁹⁴ As long as the actual procedure of DNA testing constitutes a *de minimis* intrusion, the State’s interests will outweigh the individual’s privacy interests.

Here, the search consisted of rubbing a cotton swab against the inside of the arrestee’s cheek.¹⁹⁵ The Court has already determined that more intrusive procedures involving the use of needles to attain samples below the body surface do not compromise bodily integrity to an inordinate degree.¹⁹⁶ In comparison, the buccal swab is minimally intrusive, so King’s privacy interests are not considerably weighty in comparison to the State’s interests.

VI. CONCLUSION

There is something unsettling about the notion of the government accessing a bodily sample that has the potential to reveal more about an individual than the scientific community currently contemplates. Surely the ENCODE project’s discovery does not mark the apex of our understanding of the contents of our DNA material. The lack of confidence in what exactly the government can access when it collects DNA animates King’s argument that the Act empowers the government too generously. His concern triggers a recurring question in Fourth amendment jurisprudence—how much should citizens trust law enforcement to act reasonably and do the right thing? The speculative nature of what exactly this DNA material conveys to the government might differentiate this case from other cases involving

192. Farahany, *supra* note 181, at 1282.

193. *See id.* at 1265 (“[W]hether a search reveals a soccer ball or a sex tape, the seclusion interest is . . . the same. The place upon which law enforcement intruded and the manner and means used . . . determine the reasonableness of the search.”).

194. In oral argument, Chief Justice Roberts considered the hypothetical individual who leaves behind her DNA by sipping a glass of water. He suggested that the fact that DNA material is easily and unconsciously shed may also inform an individual’s expectation of privacy over her DNA material. *See* Transcript of Oral Argument at 31, *Maryland v. King*, No. 12-207 (U.S. argued Feb. 26, 2013) (Roberts, C.J.) (“[DNA] is not something that people are or can keep private.”).

195. Brief of Petitioner, *supra* note 13, at 4.

196. *See, e.g., Schmerber v. California*, 384 U.S. 757, 772 (1966) (“[Extraction of blood samples is] commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.”).

biometric information. *Maryland v. King* presents the Court with an opportunity to consider more than just physical intrusiveness when assessing the reasonableness of the search. The Court can also contemplate what level of privacy protections, if any, should extend to the individual's informational secrecy. The Court has the chance to expand the individual's privacy interests to encompass a secrecy interest in shielding identifying attributes. Nonetheless, the Court will likely conform to past precedents by assessing the reasonableness of DNA testing according to the physical intrusiveness of the procedure. In so doing, the Supreme Court will likely find Maryland's DNA Collection Act constitutional under the Fourth Amendment and reverse the lower court's decision.