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SUPREME COURT 2012 TERM POINT- COUNTERPOINT

“You Can Look But You Better Not Touch”: The Supreme Court Endorses Police Invasion of Privacy in *Maryland v. King*

*Craig Hemmens and Lauren M. Block***

INTRODUCTION

The Fourth Amendment prohibits “unreasonable” searches. The reasonableness of a search, according to current Supreme Court precedent, is determined by balancing the privacy interests of the suspect with the state’s interest in solving crimes. In *Maryland v. King* (2012),¹ the United States Supreme Court held, in a 5-4 decision, that police officers may, when they arrest someone for “a serious offense,” take and analyze the suspect’s DNA. Doing so, the majority contended, is justified as a means of identifying the arrestee. The dissent disputed the majority’s claim that the primary purpose of taking a DNA sample was to identify the suspect, and argued the procedure would allow the police to conduct warrantless, suspicionless searches of thousands of arrestees.

This Article is the second in a series of “point-counterpoint” style articles written for the *Criminal Law Bulletin* examining the majority and dissenting opinions of a recent Supreme Court decision involving the criminal justice system. Our colleague, Dr. O’Connor has written an article asserting the majority got it right in this case; in this Article

*Bruce Springsteen, *You Can Look But You Better Not Touch*, on *The River* (1980). New York: CBS/Sony Records.

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¹*Maryland v. King*, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013).

we contend the dissent had the better argument, that the police have no business collecting an arrestee's DNA and using it to investigate unsolved crimes.

THE FOURTH AMENDMENT AND THE POLICE

There are two competing models of the criminal justice system—the due process and crime control models.² The due process model emphasizes the protection of individual privacy, even at the expense of factually guilty parties occasionally evading justice. The due process model focuses on the role of the legal process as a means of ensuring mistakes are kept to a minimum, and it operates on the presumption of innocence. The crime control model is concerned primarily with the reduction of crime and the protection of public order. It emphasizes the use of police power as a means of quickly and efficiently investigating and screening cases, and it operates on the presumption that a defendant is likely guilty.

Criminal procedure law attempts to balance the differing goals of these two models, but it is a zero-sum game—granting the police greater power to investigate crime means reducing individual liberty and privacy, while increasing individual rights may result in suspects who are factually guilty going free because the state is unable to prove legal guilt beyond a reasonable doubt.

Search and seizure law is governed in large part by the Fourth Amendment, which states that citizens have a right to be free from “unreasonable” searches and seizure and that warrants shall be issued only upon a showing of “probable cause.” These two portions of the amendment sometimes are referred to as the reasonableness clause and the warrant clause. At one point in our history many legal scholars believed that any search without a warrant was *per se* unreasonable, but in the latter part of the twentieth century the Supreme Court made it clear that while there was a preference for warrants, warrants were not always required.³ The Supreme Court has interpreted the reasonableness clause to allow searches without warrants, provided there exists both probable cause and an “exigent circumstance” of some sort that justifies the failure to obtain a warrant. These exigent circumstances, or exceptions to the warrant requirement, have been spelled out by the Court on a case-by-case basis and apply to a variety of situations. Examples of such situations might be officers chasing a suspect into the suspect's home to apprehend

²Herbert L. Packer, *The Limits of the Criminal Sanction* (1968).

³Akhil Reed Amar 1994, *Fourth Amendment First Principles*, 107 *Harv. L. Rev.* 757 (1994); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 *Boston Univ. L. Rev.* 925 (1997).

him before he or she can do something to make an arrest more difficult, such as obtaining a weapon.⁴

Additionally, the Supreme Court has, in recent years, allowed warrantless searches under the reasonableness standard if the government's legitimate interest in conducting the search outweighs the privacy interests of the person being searched. Essentially, the Court has engaged in a simple balancing of governmental and individual interests. When the government's interest is determined to outweigh, or minimally intrude upon, an individual's expectation of privacy, the warrantless search is deemed appropriate.⁵

POLICE SEARCHES AND SEIZURES AND THE EXPECTATION OF PRIVACY

A search is the examination of an individual's house, person, or effects to discover items related to criminal activity. Taking a swab of a person's saliva from inside their mouth is unquestionably a form of search, as it involves an examination of a suspect's body.

The concept of "reasonable expectation of privacy" is a relatively recent addition to criminal procedural law. Until the decision in *Katz v. United States*,⁶ courts seeking to determine when a search had occurred focused on whether police conduct infringed on a property interest. If so, then the police conduct constituted a search and the protections of the Fourth Amendment applied. The decision in *Katz* abandoned the focus on property interests in favor of a consideration of the expectation of privacy the individual and society had in a given situation. A "reasonable expectation of privacy" has subjective and objective components: (1) the subject of the search must have a subjective expectation of privacy, and (2) society must view that expectation as reasonable.⁷

The Court has also addressed the lengths to which the police may go to obtain evidence from a suspect. In the most recent relevant case, the Supreme Court held, in *Cupp v. Murphy*⁸ that scraping material from underneath the fingernails of a suspect in custody constituted a search, but that it was reasonable to do so without a warrant based on exigent circumstances.

⁴Rolando Del Carmen & Craig Hemmens eds., *Criminal Procedure and the Supreme Court: A Guide to the Major Decisions on Search and Seizure, Privacy, and Individual Rights* (2010).

⁵Stephen J. Schulhofer, *More Essential Than Ever: The Fourth Amendment in the Twenty-first Century* (2012).

⁶*Katz v. U.S.*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

⁷Thomas N. McInnis, *The Evolution of the Fourth Amendment* (2009).

⁸*Cupp v. Murphy*, 412 U.S. 291, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973).

MARYLAND V. KING

King was arrested for first and second-degree assault for menacing a group of people with a shotgun on April 10, 2009. He was taken to the central booking facility in Wicomico County, Maryland. During his booking, a buccal swab was taken from the inside of King's cheek to gather a DNA sample. The Maryland DNA Collection Act makes it routine procedure to take DNA samples at booking from persons arrested for felonies that are considered "violent crimes or attempts to commit violent crimes and burglary or attempts to commit burglary."⁹ A crime of violence includes murder, rape, first-degree assault, kidnapping, arson, sexual assault, and other serious crimes as defined by Maryland Law. The Act only allows the DNA to be processed and entered into a database once the defendant is arraigned. On June 25, 2009, the DNA sample was sent to a lab for testing and the results were entered into the Maryland DNA database on July 13, 2009.

On August 4, 2009, upon analyzing King's DNA sample it was discovered that it matched DNA collected from the victim of an unsolved rape in Salisbury, Maryland in 2003. This new evidence was presented to a grand jury and King was indicted for the rape. Detectives then obtained a search warrant and took a second DNA sample from King, which was again found to match the DNA from the rape. During trial for the rape King filed a motion to suppress the DNA evidence taken at his booking, claiming that the Maryland DNA Collection Act violated the Fourth Amendment. The trial judge ruled that the Act was constitutional and allowed the DNA evidence to be used against King. King was convicted of rape and sentenced to life in prison without the possibility of parole.

On appeal, the Maryland Court of Appeals ruled several parts of the Maryland DNA Collection Act as unconstitutional and set aside King's conviction.¹⁰ The majority held that the collection of DNA samples from felony arrestees constituted an unlawful seizure and violated the Fourth Amendment, as King had an expectation of privacy in his DNA and the warrantless search was unreasonable as it was unrelated to the offense for which King was arrested. At the time of this ruling, both federal and state courts had come to differing opinions on whether the Fourth Amendment prevents the collection and analysis of DNA evidence taken from arrestees who had not yet been convicted of felony charges.

Maryland sought a writ of certiorari in the Supreme Court. While that appeal was pending, the state also asked Chief Justice Roberts

⁹Md. Pub Code Ann., Pub. Safety § 2-504(a)(3) (West 2013).

¹⁰*King v. State*, 425 Md. 550, 42 A.3d 549 (2012), cert. granted, 133 S. Ct. 594, 184 L. Ed. 2d 390 (2012) and rev'd, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013).

to allow the state to continue collecting DNA samples from arrestees while the case was on appeal. Chief Justice Roberts issued an order allowing Maryland to continue collecting DNA samples, and while he did not express an opinion on the merits of Maryland's appeal he did note that collecting DNA samples from arrestees was "a valuable tool for investigating unsolved crimes."¹¹

THE SUPREME COURT DECISION

In a 5-4 decision, the Supreme Court reversed the decision of the Court of Appeals of Maryland, with Justice Kennedy writing the majority opinion. He was joined by Chief Justice Roberts and Justices Thomas, Breyer and Alito. In examining the legitimate government interest and the intrusive search of King, the Court held that it was constitutional to take DNA samples from felony arrestees booked on serious charges like King because the collection and analysis of DNA serves the legitimate government interest of accurately identifying arrestees.

Justice Kennedy noted the police have a legitimate and compelling interest in processing and obtaining an accurate identification of the person and possessions being taken into custody. He argued that the accurate identification of arrestees ensures that the correct person has been arrested, as persons involved in criminality may attempt to conceal their identity. Justice Kennedy further argued that the use of DNA in this regard makes it comparable to using booking photographs, sketch artists' depictions, and fingerprinting to establish a person's identity and that the taking of a DNA sample was little more than a new and even more accurate means of making this identification.

In addition to correctly identifying a "person," Justice Kennedy also argued that the collection and analysis of a person's DNA can provide a person's criminal history, something he considers to be "a critical part of a person's identity that officers should know when processing them for detention." He also viewed criminal history gained through identification as being used to identify arrestees who are potential flight risks or dangers to the community if released on bail, stating that "release [on bail] is not appropriate until a further determination is made as to the person's identity . . ." Justice Kennedy then argued that the buccal swab of the inside of an arrestee's cheek should be viewed as a minimal intrusion in comparison to this "substantial government interest" in identifying arrestees and "the unique effectiveness of DNA identification." He further argued that the cheek swab does not intrude upon a person's reasonable expectation of privacy because this expectation is lowered once a person is arrested and

¹¹*Maryland v. King*, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013).

booked. This especially applies when that person has been arrested for a dangerous offense requiring detention. Justice Kennedy then argued that a buccal swab is minimally invasive and unlikely to threaten the health or safety of the arrestee, at least less so when compared to other searches, such as invasive surgery.

Justice Kennedy also asserted that the DNA collection and analysis was performed solely for identification purposes and the portion of the sample that was examined did not provide any other private medical information about the individual. Justice Kennedy concluded that the collection and analysis of DNA from arrestees can be considered a routine booking procedure and reasonable search under the Fourth Amendment.

JUSTICE SCALIA'S DISSENT

The dissent was written by Justice Scalia and joined by Justices Ginsburg, Sotomayor, and Kagan. True to form, he based his argument on the original intent of the Founding Fathers in the U.S. Constitution. Justice Scalia compared the taking of a DNA sample to a general warrant, the colonial era document that led to the writing of the Fourth Amendment. A general warrant allowed searches without individualized suspicion. While the Court has permitted searches without individualized suspicion in specific instances, it has never been allowed for searches "designed to serve the normal need for law enforcement"¹² or "whose primary purpose was to detect evidence of ordinary criminal wrongdoing."¹³ Justice Scalia wholeheartedly disagreed with the majority's proposition that the primary purpose of taking DNA samples from arrestees is anything other than to detect evidence of ordinary criminal wrongdoing.

Justice Scalia still takes issue with the majority's claim that a DNA swab is necessary to accurately identify an arrestee, asserting that such a claim "taxes the credulity of the credulous." His central argument being that it not only takes a significant period of time to obtain the results of a DNA sample, but Maryland law actually forbids the DNA sample to be processed prior to arraignment. Therefore, it is unlikely that a DNA sample would be processed and analyzed in time to provide any utility in identifying an arrestee.

Justice Scalia also pointed out that none of the five purposes listed

¹²*Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639, 4 I.E.R. Cas. (BNA) 224, 130 L.R.R.M. (BNA) 2857, 13 O.S.H. Cas. (BNA) 2065, 49 Empl. Prac. Dec. (CCH) P 38791, 111 Lab. Cas. (CCH) P 11001, 1989 O.S.H. Dec. (CCH) P 28476 (1989).

¹³*City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000).

in the Maryland DNA Collection Act include anything about using DNA for the purpose of accurately identifying arrestees and the Act specifically forbids using DNA samples for any purpose other than those listed. Furthermore, the Act requires that the “individual collecting a sample . . . verify the identity of the individual from whom a sample is taken by name and, if applicable, State Identification (SID) number.”¹⁴ It would appear that there were purposes in mind when the Maryland DNA Collection Act was enacted into law, yet none of them included relying on DNA to accurately identify arrestees.

By allowing law enforcement to take a DNA sample and run it through a database to determine if it matches the DNA from any unsolved crimes, it also allows police to circumvent the warrant and probable cause requirements of the Fourth Amendment. While there is merit in trying to bring justice to unsolved cases, as Justice Scalia concluded, “the proud men who wrote the charter of our liberties would not have been so eager to open their mouths for royal inspection.”

WHY THE DISSENT GOT IT RIGHT AND THE MAJORITY GOT IT WRONG

Justice Kennedy’s majority opinion is wrong on several points. His definition of identity to include criminal history expands the concept beyond all historical precedent; his definition of the arrestee’s privacy interest as minimal based on the physical act of taking the swab ignores the greater interest the arrestee has in his genetic information; and he fails to recognize the tremendous impact this decision, coupled with other recent Supreme Court decisions, will have on police investigatory practices.

Justice Kennedy claims that a person’s “identity has never been considered limited to the name on the arrestee’s birth certificate,” but “the whole context of who the person really is” including his “past conduct.” Never before has a court held that a person’s prior activities are part of their identity. This assertion is an attempt to justify using the information that can be gained from a DNA sample not to merely verify who an arrestee’s identity, but to discover if that person has been involved in any other criminal activity. This turns the identification process into a search without a warrant or exigent circumstance of a person’s prior activity. Being arrested does not justify a warrantless, suspicionless search.

Since it would be permissible to take a DNA sample after King was convicted, the only reason to allow the sample collection prior to the conviction is to allow the police to gather evidence from someone who is not eventually found guilty of committing the crime for which they

¹⁴Md. Pub Code Ann., Pub. Safety § 2-504(a)(3) (West 2013).

have been arrested. As the Maryland Supreme Court pointed out, only 16% of people arrested for some felonies are convicted.¹⁵ This means that DNA testing at arrest will involve the testing of a large number of people who are not found guilty of any crime.

Furthermore, taking a DNA swab to determine identity is pointless, since it often takes months to conduct a DNA test.¹⁶ By the time King's DNA sample was entered into the database, bail had been set, discovery had occurred, and a speedy trial had been requested, all before using the DNA to accurately identify him as the correct arrestee. Once it was analyzed King's DNA was not compared to a national database, but to a database of DNA samples from unsolved cases. This clearly demonstrates the taking and analyzing of King's DNA was not done to determine who he was, but to investigate whether he had committed any other crimes. This is a warrantless, suspicionless search, not an identification procedure. For the majority to assert otherwise is disingenuous at best.

The majority opinion goes onto to claim that the taking of a DNA sample at arrest rather than after conviction (as the defense argued was the appropriate time) is better because if a defendant knows that his other crimes are likely to be discovered only if he is convicted, he may be more likely to flee before trial to prevent that from happening. If DNA samples are taken at arrest, however, the possibility of the defendant's other crimes being discovered already exists, and a possible conviction does not increase the likelihood of discovery. This argument simply makes no sense. A defendant will fear that the taking of a DNA sample will expose his other crimes whenever it is taken. If the DNA sample cannot be taken until after a conviction, then the defendant may decide that fleeing prior to trial is not necessary, since he may not be convicted. On the other hand, if the DNA sample is taken after arrest, there is absolutely no reason for the defendant to wait around for his trial. However, if the majority's proposition that DNA identification of an arrestee should occur prior to judicial officials making a bail determination were to actually be implemented, arrestees fleeing prior to trial would not be much of a concern as all arrestees would spend their entire pretrial period detained while awaiting DNA results.

Justice Kennedy also insists that the "intrusion of a cheek swab is a minimal one." This misses the point—it is not the insertion of the swab into the mouth of an arrestee that is the issue, it is the obtaining of sensitive information as a result of that cheek swab that is what

¹⁵*Maryland v. King*, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013).

¹⁶Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011).

matters. Comparing a cheek swab to fingerprinting focuses wrongly on the procedure instead of on the information that can be obtained as a result of the procedure. The information obtained from a DNA sample is so much greater than that obtained from a fingerprint or a photograph, the other booking procedures that Justice Kennedy views as comparable to the taking of a person's DNA.

Additionally, the majority claims that because the DNA profile that is entered into the national database is not complete and does not include genetic information regarding medical conditions, there is no violation of an individual's expectation of privacy regarding his or her medical history and conditions, none of which are relevant to their identity. But this information is nonetheless obtained in the original sample, and who is to say how it may be used in the future? While some have argued that this is an unfounded fear, as DNA laboratories "do not rummage through the genome for information,"¹⁷ can we be sure this will always be the case? Should someone have their entire genetic makeup stored somewhere and potentially available for others to see just because they have been arrested? Obviously someone who is convicted has a lowered expectation of privacy, and even someone who is arrested has a somewhat diminished expectation of privacy, but this is going too far. Justice Scalia argues that allowing the police to take a DNA sample at arrest will create a "genetic panopticon." The numbers demonstrate that he is absolutely right. If the taking of DNA samples upon arrest becomes commonplace, the DNA database will be enormous. A recent study indicates that approximately 30% of all Americans are arrested by the age of twenty-three.¹⁸ Currently, at least twenty-eight states allow for the collection of DNA samples upon arrest.¹⁹ It is possible that this grossly underestimates the percentage of people who may be subject to DNA sampling. While the majority opinion indicates DNA sampling is appropriate when someone is arrested for a "serious offense" it is unclear what that term covers, and when considering the Court's justification for taking DNA samples, there is really no logical reason to restrict DNA sampling for identification purposes to "serious offenses." Since the Court has already upheld the authority of the police to ar-

¹⁷David H. Kaye, On the "Considered Analysis" of Collecting DNA Before Conviction, 60 UCLA L. Rev. Discourse 104 (2013).

¹⁸Robert Brame et al., Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample, 129 Pediatrics 21(2012).

¹⁹Nina Totenberg, Supreme Court Considers If Warrantless DNA Swab Violates Constitution. NPR Today, Feb. 26, 2013, available at <http://www.npr.org/2013/02/26/172886713/supreme-court-considers-if-warrantless-dna-swab-violates-constitution>.

rest for infractions such as seat belt violations,²⁰ the potential is tremendous. Justice Scalia acknowledged this in his dissent, when he stated: “make no mistake about it: As an entirely predictable consequence of today’s decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason.”

CONCLUSION

All fifty states and the federal government supported Maryland in this case. President Obama in a 2010 appearance on the television show *America’s Most Wanted*, stated that taking DNA from all arrestees is “the right thing to do.”²¹ In 2012 Congress passed the Katie Sepich Enhanced DNA Collection Act (2012),²² creating a grant program to help states create and expand their DNA collection systems. A number of lower federal courts and state courts have upheld DNA collection from arrestees, using much of the same logic that Justice Kennedy found so persuasive.²³ Clearly there is tremendous public, political, and judicial support for DNA collection, as it is rightly seen as a tremendous tool in the investigation of crime. But solving crimes cannot be done at the expense of the Fourth Amendment. The end does not justify the means.

The Court was deeply split in *King*, as indicated by the narrow 5-4 margin and Justice Scalia reading his dissent from the bench, a traditional sign of a justice’s acute displeasure. Also notable was the unusual split among the justices, with Justice Breyer joining the majority and Justice Scalia in the dissent. While Justice Breyer is generally regarded as a member of the “liberal” wing of the Court and Justice Scalia is seen as a member of the “conservative” wing, in criminal procedure cases these stereotypes do not always hold.

The Court’s decision has greatly undermined a person’s reasonable expectation of privacy and given the police yet another means of conducting warrantless, suspicionless searches. They did it in part because the majority mischaracterized the privacy interest at stake. The proper balancing in this case is not between the government’s interest in identifying arrestees and the privacy interest in the portion

²⁰ *Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001).

²¹ Josh Gerstein, *Obama Talks DNA On America’s Most Wanted*, Politico Under the Radar (2010), available at http://www.politico.com/blogs/joshgerstein/0310/Obama_talks_DNA_on_Americas_Most_Wanted_transcript.html.

²² H.R. 6014, 112th Congress.

²³ Kevin Lapp & Joy Radice, *A Better Balancing: Reconsidering Pre-Conviction DNA Extraction From Federal Arrestees*, 90 N.C. L. Rev. 157 (2012).

of the DNA sample that is examined, but in the privacy interest in the arrestee's entire DNA profile. This DNA profile is retained in the database and the promises made to not look at it are simply not sufficient protection of such an important privacy interest.

During the oral argument in *Maryland v. King*, Justice Alito said, "this is the most important criminal procedure case this Court has had in decades."²⁴ If all the case was about was using DNA to identify an arrestee, and not to use the arrest as a pretext to collect DNA and conduct a criminal investigation, why was the case so important? Justice Alito, perhaps unwittingly, acknowledged what Justice Kennedy refused to admit in his majority opinion—that this case was about giving the police another way to investigate crime without the bother of getting a warrant or developing probable cause, not about making sure the person arrested was who he said he was.

This decision will have a significant impact on the administration of criminal justice. More states will allow the collection of DNA samples from arrestees, and in short order the collection will be expanded from those arrested for serious offenses to all arrestees. No doubt one result will be that some "cold cases" are solved. But at what cost?

²⁴*Maryland v. King*, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013), transcript of Oral Argument, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-207.pdf.