DETHRONING *KING*: WHY THE WARRANTLESS DNA TESTING OF ARRESTEES SHOULD BE PROHIBITED UNDER STATE CONSTITUTIONS

INTRODUCTION

In South Carolina, a nosy, elderly woman is arrested for eavesdropping on her neighbors' argument while crouched under their window.[1] In New Orleans, a man is arrested for playing a trumpet duet with his sixteen-year-old son in the French Quarter for tips.[2] In Florida, an innocent man fitting a murder suspect's physical description is arrested on his way to work. In Kansas, a man turns in his eighteen-year-old estranged wife for sleeping with a seventeen-year-old high school senior, and both lovers are arrested for adultery.[3] In Arizona, a couple is arrested for indecent exposure after getting a little too amorous at a drive-in movie theater.[4] What do all of these hypothetical people have in

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[1] *See* S.C. CODE ANN. § 16-17-470 (2003) (citing the state statute that would theoretically apply to this situation, as this and the following three scenarios are merely hypothetical).

[2] *See* LA. REV. STAT. ANN. § 14:92 (2012) (To "play any musical instrument in any public place for . . . alms" with a person under seventeen is "[c]ontributing to the delinquency of juveniles.").

[3] *See* KAN. STAT. ANN. § 21-5511 (Supp. 2011) (making adultery a misdemeanor under Kansas state law). The age of consent for sexual intercourse in Kansas is sixteen. *See id.* § 21-5506.

[4] *See* ARIZ. REV. STAT. ANN. § 13-1402 (2012).

common? Each will have samples of their DNA taken when booked at the local jail, without a warrant.[5] Their DNA samples will be placed in databases, where they will likely remain even if they are exonerated.[6] The innocent will only be able to have their samples removed by submitting requests in writing, along with a court order proving their exonerations.[7] The testing will likely occur at the law enforcement agency's discretion, without judicial oversight.[8]

In *Maryland v. King*, the Supreme Court ruled in a 5-4 decision that Maryland's DNA Collection Act did not violate the Fourth Amendment.[9] The DNA act requires law enforcement to take a DNA sample of every person arrested for a violent felony.[10] The DNA process involves swiping the inside of the arrestee's mouth with a cotton swab.[11] The law enforcement agency then runs the DNA sample through the Combined DNA Index System

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[5] *See* S.C. CODE ANN. § 23-3-620 (Supp. 2010) (requiring DNA samples for those arrested for eavesdropping); LA. REV. STAT. ANN. § 15:609(A)(1) (2012) (requiring the drawing of a DNA sample from anyone who is arrested for an "other specified offense"); *id.* § 15:603(10)(n) (citing § 14:92, "[c]ontributing to the delinquency of juveniles," as an "other specified offense" to which the DNA statute applies); FLA. STAT. ANN. § 943.325(2)-(3) (West Supp. 2014) (requiring DNA samples to be taken from anyone arrested for a felony); KAN. STAT. ANN. § 21-2511(e)(2) (Supp. 2011) (requiring any adult or juvenile arrested for adultery to submit a DNA sample as part of the booking procedure when one of the arrested parties is under eighteen years of age); ARIZ. REV. STAT. ANN. § 13-610(O)(3) (2010 & Supp. 2013) (providing for DNA sampling of persons arrested for indecent exposure).

[6] The majority of states with arrestee DNA collection statutes do not provide for automatic expungement, although some do. *See infra* Appendix.

[7] *See, e.g.*, N.M. STAT. ANN. § 29-16-10 (West 2011). Arrestees must provide the DNA administrative center with a written request for expungement and a certified copy of the dismissal or a sworn affidavit that no felony charges arising out of the arrest have been filed within a year. *Id.*

[8] *See infra* Appendix. The majority of states with arrestee DNA collection statutes do not require a court order or probable cause for the testing, although some do. *Id.* Although the Supreme Court's decision in *Maryland v. King*, 133 S. Ct. 1958 (2013), only addressed a DNA law that applied to violent felonies, which seemingly would not apply to the hypotheticals above, the Court did not appear to seriously restrict its holding to those crimes anywhere in its opinion. Indeed, Justice Scalia warned in his dissent that the majority opinion will apply to everyone arrested, even if they are arrested for a traffic violation. *See infra* text accompanying notes 172-73.

[9] *King*, 133 S. Ct. at 1980 (ruling on DNA Collection Act, MD. CODE ANN., PUB. SAFETY § 2-504 (LexisNexis 2011)).

[10] *Id.* at 1966.

[11] *Id.*

("CODIS") to determine whether the DNA sample matches any unsolved crime.[12] The Court held that, while it was a search under the Fourth Amendment, the search was reasonable, and the government interest outweighed the infringed privacy right.[13] In particular, the majority ruled that the DNA sample was most important for the purpose of identifying the arrestee.[14]

In a sharp dissent, Justice Scalia denounced the majority's identification justification.[15] He argued that the DNA sample was not used to identify the arrestee, but rather to possibly identify a DNA sample in an unsolved crime.[16] This "identification" was nothing more than normal police investigative work and therefore should require a warrant supported by probable cause.[17]

The states cannot restrict rights guaranteed by the Supreme Court's interpretation of the Fourth Amendment.[18] However, states are free to extend rights under their analogous "search and seizure" state constitution provisions.[19] The Supreme Court does not have jurisdiction over state constitutional rights, as long as those rights are not more restrictive than the federal constitutional rights.[20]

This Comment will contend that each state should apply the "search and seizure" provision in its state constitution to arrestee DNA collection statutes the way that the *King* dissent would have applied the Fourth Amendment to Maryland's DNA act. That is, state courts should hold that law enforcement agencies must obtain warrants supported by probable cause before obtaining DNA samples from arrestees. Part I of this Comment will examine the *Maryland v. King* decision and dissent and how states have addressed the constitutionality of obtaining DNA from arrestees.

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[12] *Id.* at 1968.

[13] *Id.* at 1980.

[14] *Id.*

[15] *Id.* (Scalia, J., dissenting).

[16] *Id.* at 1985.

[17] *Id.* at 1981-82.

[18] Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court").

[19] *See infra* Part I.E.

[20] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 626 (1874); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).

Part II will present arguments to support the assertion that states should require warrants for the taking of DNA samples from arrestees. Part III will discuss when law enforcement officers may obtain DNA samples from arrestees. The Appendix will provide a brief survey of the DNA statutes of all fifty states that apply to arrestees.

I. BACKGROUND

A. DNA Testing

Humans are composed of cells.[21] Each cell contains deoxyribonucleic acid ("DNA") within its nucleus.[22] DNA contains all of a person's genetic information.[23] A person's genome is the cell's entire DNA, which contains "[t]he complete set of instructions for making [the person]."[24] DNA contains twenty-three chromosomes, with each chromosome consisting of "'coding' and 'noncoding' regions."[25] Coding regions are commonly referred to as genes.[26] The noncoding regions, also known as "'junk' DNA," contain markers that are different for each person.[27] Junk DNA is not supposed to reveal any genetic traits about a person.[28] The locations of the DNA markers are known as loci.[29]

In cases like *Maryland v. King*, the law enforcement agency obtains the DNA sample from the arrestee by scraping the inside of the arrestee's cheek with a buccal swab.[30] The law enforcement agency then sends the sample to a state laboratory where a DNA profile is created using part of the DNA sample.[31] The laboratory creates the profile from thirteen CODIS loci.[32] The state then

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[21] *See* JOHN M. BUTLER, FUNDAMENTALS OF FORENSIC DNA TYPING 19 (2010).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 23, 25.

[26] *Id.* at 25.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 86. A buccal swab is "a cotton swab similar to a Q-tip." *Id.*

[31] State DNA databanks are created by statute. *See, e.g.*, MD. CODE ANN., PUB. SAFETY § 2-502 (LexisNexis 2011).

[32] BUTLER, *supra* note 21, at 155.

uploads this DNA profile to the CODIS system, and the DNA profile is placed in the Convicted Offender and Arrestee Index.[33] The index does not contain names or other personal identifiers of the arrestees.[34] Instead, it contains the DNA profile, an Agency Identifier to show who submitted the profile, and a Specimen Identification Number to identify the sample.[35] When a DNA sample is collected from a crime scene, the law enforcement agency uploads the sample into the CODIS Forensic Index.[36] From there, a state agency can compare the sample it placed in the Convicted Offender and Arrestee Index with all of the samples in the Forensic Index and vice versa.[37]

B. DNA Statutes

Currently, twenty-nine states have enacted statutes that require DNA testing of arrestees.[38] These statutes vary in what crimes trigger the DNA testing. All of the statutes cover felonies, while some cover misdemeanors.[39] Many of the statutes require the testing of juvenile arrestees.[40] The majority of the statutes require an arrestee to provide a DNA sample at booking, although some statutes require the law enforcement agencies to wait to

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[33] *CODIS and NDIS Fact Sheet*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet/ (last visited Mar. 1, 2014).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *See infra* Appendix. The Appendix contains a brief survey of the arrestee DNA testing statutes of all fifty states, including whether a state has a statute, what crimes trigger the statute, whether juveniles are subjected to testing, and the expungement procedures.

[39] *See, e.g.*, N.M. STAT. ANN. § 29-3-10(A) (West 2011) (covering all felonies); ARIZ. REV. STAT. ANN. § 13-610(L) (2011 & Supp. 2013) (covering certain felonies and misdemeanors).

[40] *See, e.g.*, MINN. STAT. § 299C.105(1)(a)(3) (2006), *invalidated by In re* Welfare of C.T.L., 722 N.W.2d 484 (Minn. Ct. App. 2006), *abrogated by* Maryland v. King, 133 S. Ct. 1958 (2013). Although the Minnesota Court of Appeals held that the statute was unconstitutional under both the federal and state constitutions, that holding was seemingly abrogated by the King decisions. *See infra* note 287.

collect the sample until arraignment.[41] Some of the statutes require a probable cause determination for the arrest prior to either obtaining the sample or analyzing it.[42] The statutes set minimum quality standards for the DNA testing (usually equivalent to FBI standards) and also limit who may collect the samples.[43] A few statutes provide for the immediate destruction of the samples if criminal charges are dropped.[44] The majority of statutes, however, require the innocent person to obtain a court order to remove the sample.[45] The DNA statutes generally make the profiles available to all law enforcement agencies and also to state prosecutors in all states.[46] The DNA statutes also usually contain some criminal penalty that applies to those who violate the statutes, including the arrestees and the law enforcement agencies.[47] Nevertheless, states usually will allow information obtained from DNA in court proceedings even when gleaned from profiles that exist contrary to state law.[48]

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[41] *See, e.g.*, COLO. REV. STAT. § 16-23-103(1)(a) (2010) (must submit DNA sample at booking); VT. STAT. ANN. tit. 20, § 1933(a)(2) (2011) (must submit DNA sample at arraignment).

[42] *See, e.g.*, 730 ILL. COMP. STAT. ANN. 5/5-4-3(a-3.2) (West 2007 & Supp. 2013) (cannot obtain DNA sample until a judge finds that there was probable cause for the arrest); N.M. STAT. ANN. § 29-3-10(B) (West 2011) (cannot analyze DNA sample unless the arrest was made upon an arrest warrant, a judge finds there was probable cause for the arrest, or the arrestee posted bond, was released from custody, and failed to appear for a scheduled hearing).

[43] *See, e.g.*, CAL. PENAL CODE § 297 (West 2008) (providing minimum standards for laboratories).

[44] *See, e.g.*, MO. REV. STAT. § 650.055(10)-(11) (2000 & Supp. 2013) (expunging both the DNA sample and record if the prosecutor drops the charges, the charges are dismissed, there is no probable cause to support the arrest, or the arrestee is acquitted).

[45] *See, e.g.*, N.D. CENT. CODE § 31-13-07 (Supp. 2011) (requiring an arrestee to submit a certified court order before having a DNA sample and profile expunged).

[46] *See, e.g.*, LA. REV. STAT. ANN. § 15:612 (2012) (giving criminal justice agencies and laboratories access to the results of the DNA profiles).

[47] *See, e.g.*, FLA. STAT. ANN. § 943.325(15) (West 2006 & Supp. 2013) (punishing any arrestee who refuses to provide a DNA sample); N.J. STAT. ANN. § 53:1-20.26 (West 2010) (penalizing any person who discloses any identifiable DNA information to another person or agency).

[48] *See, e.g.*, CAL. PENAL CODE § 297(g) (West 2008) (providing that "[t]he detention, arrest, wardship, adjudication, or conviction of a person based upon a databank match or database information is not invalidated if it is determined that the specimens, samples, or print impressions were obtained or placed or retained in a database by

C. Pre-Maryland v. King Cases Addressing State Arrestee DNA Statutes

1. Pro-Investigation

a. Anderson v. Commonwealth

A Virginia statute requires the DNA testing of any person arrested for a violent felony.[49] Angel M. Anderson was arrested for rape and was required to submit a DNA sample.[50] After running the sample through CODIS, the law enforcement agencies determined that Anderson had committed another rape several years earlier.[51] Anderson was convicted of the past rape and sentenced to life in prison.[52] After the Virginia Court of Appeals affirmed the conviction, the Virginia Supreme Court decided to hear the case.[53]

The court found that the DNA testing was a part of the normal booking procedure, much like fingerprinting.[54] The court held that the government had a legitimate interest in identifying the arrestee.[55] Since the DNA testing was part of the booking procedure, no individualized suspicion or probable cause was needed.[56] The state's important interest in identifying the arrestee outweighed the minor intrusion of the DNA sample.[57] Therefore, the Fourth Amendment did not prohibit the DNA test.[58]

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mistake"). *But see* N.C. GEN. STAT. ANN. § 15A-266.3A(m) (West 2009) (mandating that "[a]ny identification, warrant, probable cause to arrest, or arrest based upon a database match of the defendant's DNA sample which occurs after the expiration of the statutory periods prescribed for expunction of the defendant's DNA sample, shall be invalid and inadmissible in the prosecution of the defendant for any criminal offense").

[49] *See* VA. CODE ANN. § 19.2-310.2:1 (2008).

[50] Anderson v. Commonwealth, 650 S.E.2d 702, 704 (Va. 2007).

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* at 705.

[55] *Id.*

[56] *Id.* at 706.

[57] *Id.*

[58] *Id.*

b. Haskell v. Harris

A California statute requires all persons arrested for a felony to submit a DNA sample.[59] Plaintiffs consisting of people arrested for felonies in California filed a class action suit challenging the statute and sought a preliminary injunction stopping the DNA testing of all arrestees.[60] After the district court declined to implement the preliminary injunction, the Court of Appeals for the Ninth Circuit heard the plaintiffs' appeal.[61]

The court began by affirming that the DNA testing of arrestees was a Fourth Amendment search.[62] The court determined the reasonableness of the search by applying the "totality of the circumstances" balancing test, weighing the arrestee's privacy against the government's interest.[63] The court found that "a felony arrestee has a significantly diminished expectation of privacy."[64] Furthermore, the court held that the DNA test was "little more than a minor inconvenience to felony arrestees."[65] The court was not persuaded that DNA profiles reveal anything more than traditional fingerprinting.[66] On the other hand, the court found that the government had legitimate interests in "identifying arrestees, solving past crimes, preventing future crimes, and exonerating the innocent."[67] The court found that the balancing test favored the government, and therefore it upheld the district court's judgment.[68]

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[59] CAL. PENAL CODE § 296(a) (West 2008).
[60] Haskell v. Harris, 669 F.3d 1049, 1052 (9th Cir. 2012).
[61] *Id.*
[62] *Id.* at 1053.
[63] *Id.* at 1053-54.
[64] *Id.* at 1058.
[65] *Id.* at 1059.
[66] *Id.* at 1059-60.
[67] *Id.* at 1062.
[68] *Id.* at 1065.

2. Pro-Privacy

a. People v. Buza

In another California case, Mark Buza was arrested for arson.[69] Buza allowed himself to be fingerprinted but refused to give a DNA sample, even after the police informed him that his refusal would result in a misdemeanor charge.[70] The trial court found Buza guilty of arson.[71] Before sentencing and after learning of Buza's refusal to comply with an order to provide a DNA sample, the court issued an order permitting the law enforcement agency to use reasonable force to obtain the sample.[72] Buza then provided the sample.[73] Buza appealed the order compelling him to submit a DNA sample.[74]

The California Court of Appeals analyzed Buza's claim under the Fourth Amendment, recognizing that obtaining the DNA sample was a search.[75] However, the court found that an arrestee is subjected to a second search "when the DNA sample is analyzed and a profile created for use in state and federal DNA databases."[76] The court determined the reasonableness of the search by reviewing the "totality of the circumstances," which involved balancing the intrusion upon the arrestee's expectation of privacy with the government interest.[77]

The court first looked at the comparison of DNA testing with fingerprinting.[78] The court discussed how the DNA sample contains a person's entire genome, even though the government only uses part of the sample to create the DNA profile.[79] However, the court recognized that even the so-called "junk" DNA that the

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[69] People v. Buza, 129 Cal. Rptr. 3d 753, 755 (Cal. Ct. App. 2011), *abrogated by* Maryland v. King, 133 S. Ct. 1958 (2013).

[70] *Id.* at 756.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 755.

[75] *Id.* at 759.

[76] *Id.* at 760.

[77] *Id.* at 761.

[78] *Id.* at 768.

[79] *Id.*

government uses to create the profile might contain much more information than previously thought.[80] Technological advances could reveal even more about the junk DNA.[81]

The court asserted that fingerprinting is commonplace in everyday society, while "DNA testing is viewed by society as a process reserved exclusively for criminals."[82] The court also pointed out that fingerprinting had never been analyzed under the Fourth Amendment.[83] The court discussed how DNA testing could not show "who a person is" because of the significant time it takes to analyze a DNA sample, while a fingerprint could be analyzed in minutes.[84] The court also discussed how law enforcement agencies in California were required to identify the arrestee before taking the sample.[85] The court stated that determining "what a person has done" goes beyond identifying the person if the inquiry leads to investigating unsolved crimes.[86] The court recognized the potential for abuse, with the arrestee not having any recourse should it be determined that the law enforcement officer conducted an improper arrest.[87] An officer might be tempted to arrest a person for a felony if the officer desires a DNA sample from the person.[88] Although an arrestee may have an expectation of privacy that is less than an ordinary citizen, the arrestee has a higher expectation of privacy than a convict.[89] Because the real government interest was investigating crimes, and not identifying suspects, the DNA testing of arrestees violated the Fourth Amendment.[90]

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[80] *Id.* at 768-69.

[81] *Id.* at 769 (citing United States v. Kriesel, 508 F.3d 941, 947 (9th Cir. 2007)).

[82] *Id.*

[83] *Id.* at 770.

[84] *Id.* at 772.

[85] *Id.* at 773.

[86] *Id.* at 774 (quoting Haskell v. Brown, 677 F. Supp. 2d 1187, 1199 (N.D. Cal. 2009), *aff'd sub nom.* Haskell v. Harris, 669 F.3d 1049 (9th Cir. 2012) (alteration in original)).

[87] *Id.* at 780.

[88] *Id.* at 780-81. California's DNA Act made "warrantless seizure of DNA . . . required of any adult arrested for or charged with any felony." *Id.* at 757 (citing CAL. PENAL CODE § 296(a)(2)(C) (West 2008)).

[89] *Id.* at 782.

[90] *Id.* at 783.

b. Mario W. v. Kaipio

An Arizona statute requires juveniles charged with certain felonies or misdemeanors to provide a DNA sample upon arrest.[91] A group of seven juveniles, each charged with a crime covered by the statute, appealed the orders that demanded the samples.[92] After the case wound its way through the appellate courts, the Supreme Court of Arizona heard the case.[93]

Each party stipulated that the DNA testing was a Fourth Amendment search.[94] The government also stipulated that it did not need the DNA samples from the juveniles to determine their identities (i.e. "who they are") but to determine whether the juveniles had committed other crimes.[95] The court analyzed the DNA testing under the "totality of the circumstances test."[96]

The court found two intrusions on the juveniles' privacy: one when the sample was taken and one when the law enforcement agency created a DNA profile from the sample.[97] The court stated that the taking of the DNA sample using a buccal swab was minimally intrusive.[98] The court found that the state had a legitimate government interest in obtaining the sample because the sample would allow the government to identify the juvenile if the "juvenile [was] released pending adjudication and later fail[ed] to appear for trial."[99] Therefore, the first search was constitutional.[100] However, the state did not have an interest in extracting a DNA profile from the sample if the juvenile appeared at trial and was "not eventually adjudicated delinquent."[101] Although extracting a DNA profile is an important crime-fighting

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[91] ARIZ. REV. STAT. ANN. § 8-238(A) (Supp. 2010), *invalidated by* Mario W. v. Kaipio, 281 P.3d 476 (Ariz. 2012), *abrogated by* Maryland v. King, 133 S. Ct. 1958 (2013).

[92] *Kaipio*, 281 P.3d at 478.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 479.

[96] *Id.* at 480.

[97] *Id.* at 480-81.

[98] *Id.* at 481.

[99] *Id.* at 482.

[100] *Id.*

[101] *Id.* at 483.

"tool," it must be supported by "probable cause or reasonable suspicion."[102] Therefore, the second search violated the Fourth Amendment.[103]

D. Maryland v. King

1. Facts

On April 10, 2009, Alonzo J. King, Jr., was arrested on first- and second-degree assault charges.[104] As part of the booking procedure, jail personnel used a buccal swab to collect a DNA sample from King's mouth.[105] They conducted the warrantless test pursuant to Maryland law.[106] A Maryland statute requires the DNA testing of any person arrested for "a crime of violence or an attempt to commit a crime of violence."[107] After they obtained the DNA sample, they processed and uploaded the sample to the Maryland DNA database.[108] The DNA sample matched an unidentified DNA sample from an unsolved rape[109] unrelated to the assault charges. Although no other evidence implicated King in the rape, the DNA match alone supported an indictment.[110] King attempted to suppress the DNA match at trial on the basis that it violated the Fourth Amendment, but the trial judge was not persuaded.[111] King was convicted of rape and sentenced to life without parole.[112]

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[102] *Id.*

[103] *Id.*

[104] King v. State, 42 A.3d 549, 553 (Md. 2012).

[105] *Id.*

[106] MD. CODE ANN., PUB. SAFETY § 2-504 (LexisNexis 2011), *invalidated by King*, 42 A.3d at 581, *rev'd by* Maryland v. King, 133 S. Ct. 1958 (2013).

[107] MD. CODE ANN., PUB. SAFETY § 2-504(a)(3)(i) (LexisNexis 2011). The statute also requires DNA testing of any person arrested for "burglary or an attempt to commit burglary." *Id.* Of the declared purposes of the Maryland legislature for the enactment of the DNA sampling statute, only the purpose of investigating crime applies to King's situation. *See id.* § 2-505(a)(2). Excluded from the list of purposes is the identification of arrestees. *Id.*

[108] *See King*, 42 A.3d at 553.

[109] *Id.* at 553-54.

[110] *Id.* at 554.

[111] *Id.*

[112] *Id.* at 555.

2. The Maryland Court of Appeals

King appealed the case, and the Maryland Court of Appeals, the state's highest court, granted certiorari.[113] The court analyzed the constitutionality of the DNA statute under the "totality of the circumstances" balancing test, which involves balancing the "intru[sion] upon an individual's privacy and . . . the degree to which [the intrusion] is needed for the promotion of legitimate government interests."[114] The court determined that an arrestee has a higher expectation of privacy than a convicted criminal, though slightly lower than that of a member of the general public.[115] The court also determined that the government interest was not in identification but in the "solving" of cold cases.[116] The Maryland Court of Appeals was not persuaded that "identify[ing]" an arrestee included determining what, if any, unsolved crimes the arrestee had committed.[117] While the government's interest was legitimate, it did not justify the warrantless taking of DNA.[118] The court found that DNA sampling is distinct from fingerprinting, since collecting DNA requires a physical intrusion, albeit "minimal."[119] Also, while a fingerprint can only be used to identify a person, a DNA sample contains much more information.[120] Furthermore, DNA sampling does not return results nearly as quickly as fingerprinting.[121] Because of this, DNA testing is redundant when fingerprinting is already available.[122] Maryland's highest court held that the testing violated the Fourth Amendment and reversed King's conviction.[123]

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[113] King v. State, 30 A.3d 193 (Md. 2011) (granting certiorari).

[114] *King*, 42 A.3d at 557 (quoting United States v. Knights, 534 U.S. 112, 119 (2001) (alteration in original)).

[115] *Id.* at 577.

[116] *Id.* at 578.

[117] *Id.*

[118] *Id.*

[119] *Id.* at 576.

[120] *Id.* at 576-77.

[121] *Id.* at 579.

[122] *Id.*

[123] *Id.* at 580-581.

3. The United States Supreme Court

Maryland appealed the Maryland Court of Appeals decision to the United States Supreme Court and requested a stay of the Maryland court's judgment.[124] In granting the stay request, Chief Justice Roberts stated that there was "a fair prospect" that the Court would reverse the Maryland court's decision.[125] After granting certiorari, the Court proceeded to do so in a 5-4 decision.[126]

a. Majority Opinion

Justice Kennedy's analysis began by stating that the DNA testing was a Fourth Amendment search.[127] However, the warrantless search was not necessarily prohibited if the search was reasonable.[128] In order to determine whether the testing was reasonable, the Court balanced the government interest in the testing with the degree to which the testing intruded upon King's expectation of privacy, similar to the Maryland court's analysis.[129] However, unlike the Maryland court, the Supreme Court found that the government's interest in identification was legitimate.[130] The Court found it important to determine who exactly was arrested because the arrestee could be concealing his or her identity.[131] The Court also found it important that a law enforcement agency is able to ensure an arrestee does not pose a danger to the detention center employees, other detainees, and the detainee him- or herself.[132] In addition, the DNA testing could reveal whether the arrestee is wanted for another crime or has a

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[124] Maryland v. King, 133 S. Ct. 1, 2 (2012).

[125] *Id.* at 2-3. The court discussed three reasons to grant certiorari: "To warrant that relief, Maryland must demonstrate (1) a reasonable probability that this Court will grant certiorari; (2) a fair prospect that the Court will then reverse the decision below; and (3) a likelihood that irreparable harm [will] result from the denial of a stay." *Id.* (alteration in original) (citation omitted) (internal quotations marks omitted).

[126] *See* Maryland v. King, 133 S. Ct. 1958, 1965-66 (2013).

[127] *Id.* at 1968-69.

[128] *Id.* at 1970.

[129] *Id.*; *see supra* text accompanying notes 116-23.

[130] *Id.*

[131] *Id.* at 1971.

[132] *Id.* at 1972.

violent past.[133] The majority also believed that the DNA testing could predict whether an arrestee would flee if granted bail.[134] The Court determined that "an arrestee's past conduct is essential to an assessment of the danger he poses to the public, and this will inform a court's determination whether the individual should be released on bail."[135] Finally, Justice Kennedy stated that the DNA testing and identification of an arrestee may be able to free someone "wrongfully imprisoned for the same offense."[136]

The Court next compared the DNA testing to fingerprinting.[137] The majority found fingerprinting to be part of the normal booking procedure, and DNA testing was not meaningfully different.[138] In fact, DNA testing was superior to fingerprinting because, although one may be able to alter his or her fingerprints, DNA cannot be hidden or changed.[139] King argued that "DNA identification was not as fast as fingerprinting"; however, the Court stated that the quick turnaround of fingerprint analyses had only recently become the norm.[140] The analysis of DNA samples is in fact getting quicker, with some states processing DNA samples in twenty days.[141] Ultimately, the Court found that the government had a legitimate interest in identification.[142]

Justice Kennedy next discussed the privacy interest of the arrestee.[143] The Court found the intrusion of the DNA test to be "a minimal one."[144] The majority stated that the expectation of privacy of an arrestee was diminished upon arrest.[145] The Court went on to say that, since an arrestee has been arrested on probable cause, the reduced expectation of privacy supersedes the

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[133] *Id.*
[134] *Id.* at 1972-73.
[135] *Id.* at 1973.
[136] *Id.* at 1974.
[137] *Id.* at 1976.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.* at 1977.
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.* at 1978.

need to apply the "special needs" doctrine.[146] Furthermore, the DNA test as part of the booking procedure was a legitimate search incident to arrest.[147] The Court stated that the DNA profiles could not reveal the genetic traits of arrestees, and the law enforcement agencies did not test the samples for those traits regardless.[148] The majority also discussed how the warrantless DNA testing was not at the discretion of the arresting officers but mandated by statute.[149] Justice Kennedy concluded that the government interest in identification outweighed the arrestee's diminished expectation of privacy.[150] Therefore, the warrantless search was reasonable under the Fourth Amendment.[151] The Supreme Court reversed and remanded the Maryland court's decision.[152]

b. Dissent

Justice Scalia disagreed that the government interest was really in identification instead of investigating a crime.[153] The dissent asserted that the Court had never before allowed searches to be conducted for normal police work without warrants.[154] It pointed out that the DNA testing is not a search incident to arrest because "[t]he objects of a [valid] search incident to arrest must be either (1) weapons or evidence that might easily be destroyed, or (2) evidence relevant to the crime of arrest," neither of which were present in this case.[155] The dissent opined that the arrestee

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[146] *Id.*

[147] *Id.* at 1980.

[148] *Id.* at 1979.

[149] *Id.* at 1970.

[150] *Id.* at 1980.

[151] *Id.*

[152] *Id.* Upon reconsideration, the Maryland Court of Appeals reversed its decision, as expected. *See* King v. State, 76 A.3d 1035 (Md. 2013). However, it also separately analyzed the case under the Maryland constitution. *Id.* at 1040-42. The court determined that the state constitution did not afford any greater protection than the Fourth Amendment. *Id.* at 1041. Therefore, the jury verdict against King was reinstated. *Id.* at 1048. Retired Chief Justice Bell dissented, stating "the conclusion this Court reached applying the Fourth Amendment is equally supported by application of [the Maryland state constitution's search and seizure provision]." *Id.*

[153] *King*, 133 S. Ct. at 1980 (Scalia, J., dissenting). Justice Scalia was joined by Justices Ginsburg, Kagan, and Sotomayor.

[154] *Id.* at 1980-81.

[155] *Id.* at 1982.

deserved at least as much privacy when suffering a bodily intrusion as when his or her home is searched.[156] The dissent stated that identification really meant "searching for evidence that [the arrestee] has committed crimes unrelated to the crime of his arrest."[157]

The dissenting justices pointed out some specific evidence that showed the DNA sample in the *King* case was not used for identification. First, Maryland did not begin the DNA sample testing process until at least several days after the arrest.[158] Justice Scalia assumed that the law enforcement officers "did not wait three days to ask his name or take his fingerprints."[159] He did not believe that the Maryland court did not know the person it was arraigning, nor did he think that the DNA sample was used to determine whether to grant bail if the sample could not be tested until the arraignment.[160] The dissent then explained how King's DNA sample was not compared with samples in the "Convict and Arrestee Collection" but with those in the "Unsolved Crimes Collection."[161] This, more than anything, showed that the law enforcement officers attempted to solve a crime, not identify King.[162]

Like the Maryland court, the dissent discussed how the Maryland legislature declared investigating unsolved crimes as one of the purposes of the DNA testing statute.[163] The dissent also discussed how two of the other purposes enumerated in the statute are "to help identify *human remains*" and "to help identify *missing individuals*."[164] Because the legislature included these

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156 *Id.*

157 *Id.* at 1983.

158 *Id.* Maryland does not allow a DNA sample to be tested until after the arrestee's arraignment date. *See* MD. CODE ANN., PUB. SAFETY § 2-504(d)(1) (LexisNexis 2011).

159 *See King*, 133 S. Ct. at 1983.

160 *Id.* at 1983-84.

161 *Id.* at 1984-85. The dissent's terminology of "Unsolved Crimes Collection" and "Convict and Arrestee Collection" is equivalent to the proper terms "Forensic Index" and "Convicted Offender and Arrestee Index," respectively.

162 *Id.* at 1985.

163 *Id.*; *see also* MD. CODE ANN., PUB. SAFETY § 2-205(a)(2) (LexisNexis 2011).

164 *King*, 133 S. Ct. at 1986 (quoting MD. CODE ANN., PUB. SAFETY § 2-505(a)(3)-(4) (LexisNexis 2011)) (internal quotation marks omitted); *see also* MD. CODE ANN., PUB. SAFETY § 2-505(a)(3)-(4) (LexisNexis 2011).

two specific forms of identification, it did not intend to include any other form of identification.[165]

As for the fingerprinting analogy used by the majority, the dissenting justices stated that the "[f]ingerprints of arrestees are taken primarily to identify them," while "the DNA of arrestees is taken to solve crimes (and nothing else)."[166] The dissent discussed the wide discrepancy between the short amount of time it takes to process a fingerprint and the much longer time it takes to process DNA.[167] The dissent specified how the fingerprint database contains detailed information about the people in it, while the DNA database contains no personal identifiers of the people in its system.[168] Justice Scalia also discussed how "'[l]atent prints' recovered from crime scenes are not systematically compared against the database of known fingerprints, since that requires further forensic work," while "[t]he entire *point* of the DNA database is to check crime scene evidence against the profiles of arrestees and convicts as they come in."[169] Furthermore, despite the Court's contention that fingerprinting is constitutional, the dissent asserted that the Court has never analyzed fingerprinting under the Fourth Amendment.[170] The dissent agreed with the Maryland court that the ready availability of fingerprinting makes DNA testing redundant.[171]

Finally, the dissenting justices warned that the Court's holding would not be limited to just violent crimes in the future.[172] If the identification justification worked for violent arrestees, then it will work just as well to support the DNA testing of "someone arrested for a traffic offense."[173] Justice Scalia concluded that the

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165 *King*, 133 S. Ct. at 1986.

166 *Id.* at 1987.

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.* at 1988 (citing United States v. Kincade, 379 F.3d 813, 874 (9th Cir. 2004) (Kozinski, J., dissenting)).

171 *Id.* at 1989; *see also supra* text accompanying notes 119-22.

172 *Id.*

173 *Id.*

Fourth Amendment could not support the warrantless DNA testing of arrestees.[174]

E. Federalism and State Constitutions

In 1977, Harvard Law Review published a celebrated article on federalism authored by then Supreme Court Justice William Brennan.[175] Justice Brennan recognized "a trend in recent opinions of the United States Supreme Court to pull back from" the Court's liberal construal of the rights granted by the Constitution in the 1960s.[176] Justice Brennan discussed recent limitations placed on the Fourth Amendment in favor of the government.[177] He recognized that states could interpret their analogous constitutional provisions different than the federal interpretation of the United States Constitution "even where the state and federal constitutions are similarly or identically phrased,"[178] provided the state provisions did not restrict a right granted by the federal provision.[179] Justice Brennan also elaborated that the United States Supreme Court could not review any decision made by a state court based on state constitutional grounds unless the issue involved federal law.[180] Justice Brennan believed that federalism "provide[d] a double source of protection for the rights of our citizens" in the form of the federal and state constitutions.[181] To blindly allow the federal Constitution to control the state constitutions would seriously inhibit the federalism system.[182]

Indeed, if the federal Constitution is the sole source of each citizen's rights, then state constitutions are duplicitous and superfluous. Justice Brennan emphasized the importance of state constitutions, asserting that the Framers based the Constitution

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[174] *Id.*

[175] *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[176] *Id.* at 495.

[177] *Id.* at 497.

[178] *Id.* at 500.

[179] *See id.* at 493.

[180] *Id.* at 501 n.80.

[181] *Id.* at 503.

[182] *Id.*

on the various state constitutions in existence at the time, and that state constitutions have a long history of being the "primary restraints on state action."[183] Several states have in fact held that their state constitutions provide more protection than the Fourth Amendment.[184] For example, unlike the United States Supreme Court,[185] Georgia does not allow law enforcement to use evidence obtained in a search based on a faulty warrant, even if they acted in good faith.[186] New Jersey prohibits warrantless searches of trash bags left at curbside for pickup.[187] As these states and others have found, the extension of rights under state constitutions is important. In the case of DNA testing of arrestees, federalism can allow states to further protect innocent citizens from unreasonable searches and seizures.[188]

Fortunately, the doctrine of federalism allows the states to overcome the Supreme Court's restriction on individual privacy rights.[189] State courts can extend the protection of their state constitutional provisions that are analogous to the Fourth Amendment to cover the DNA testing of arrestees.[190] Even when the wording of the state's constitutional provision is virtually identical to the Fourth Amendment, the state can still interpret the state provision to provide broader privacy rights than the

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[183] *Id.* at 501-02.

[184] For an extremely useful (although perhaps slightly outdated) collection of Fourth Amendment state analogs and their corresponding interpretations, see Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417 (2007).

[185] *See* United States v. Leon, 468 U.S. 897, 922 (1984) (establishing the "good faith" exception to the exclusionary rule).

[186] *See* Gary v. State, 422 S.E.2d 426, 428-29 (Ga. 1992) ("[W]e conclude that Georgia law precludes the adoption of the *Leon* 'good-faith exception' to the exclusionary rule as part of the jurisprudence of Georgia.").

[187] *See* State v. Hempele, 576 A.2d 793, 814 (N.J. 1990). *Contra* California v. Greenwood, 486 U.S. 35, 37 (1988) (holding that the Fourth Amendment allows "the warrantless search and seizure of garbage left for collection outside the curtilage of a home").

[188] It has long been a facet of American criminal law that the accused are presumed innocent until proven guilty. *See* Coffin v. United States, 156 U.S. 432, 453-56 (1895).

[189] *See supra* notes 175-88.

[190] *See* Cooper v. California, 386 U.S. 58, 62 (1967) ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.").

Supreme Court's interpretation of the Fourth Amendment.[191] Here, the decision is obvious. Because the Supreme Court was unable to convincingly support its decision that the warrantless DNA testing of arrestees is permitted by the Fourth Amendment, the state courts should hold that the warrantless testing is prohibited by state constitutions.

Although the Court asserted that arrestees have diminished privacy rights, it admitted that the Fourth Amendment covered the search. Therefore, the search infringed upon the arrestee's privacy interest. Only a legitimate government interest, other than normal police work, could provide justification for this infringement, and the government does not have one. Therefore, state courts should require a warrant for DNA testing. The remainder of this Comment will elaborate why the warrantless DNA testing of arrestees is not covered under any of the exceptions to the Fourth Amendment. This Comment also implores each state to require a warrant supported by probable cause before a law enforcement officer can legally obtain a DNA sample from an arrestee.

II. THE STATES SHOULD EXTEND THE ANALOGOUS FOURTH AMENDMENT PROVISIONS IN THEIR STATE CONSTITUTIONS TO COVER THE DNA TESTING OF ARRESTEES.

A. The Warrantless DNA Testing of Arrestees Is Not a Normal Booking Procedure and Does Not Pass the "Totality of the Circumstances" Balancing Test.

In *Maryland v. King*, no party disputed the fact that the DNA testing of arrestees constituted a search under the Fourth Amendment.[192] Justice Kennedy stated that the warrantless

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[191] Some states have decided to do exactly that. *See, e.g.*, State v. Pierce, 642 A.2d 947, 960 (N.J. 1994) ("On several occasions this Court has determined that article I, paragraph 7 of our State Constitution affords greater protection against unreasonable searches and seizures than the federal Constitution affords."); Vasquez v. State, 990 P.2d 476, 483-84 (Wyo. 1999) (stating that the court will analyze several factors to determine whether the protections afforded by the state constitution are different than those provided by the United States Constitution).

[192] *See* Maryland v. King, 133 S. Ct. 1958, 1968-69 (2013).

search was only unconstitutional if it was found to be unreasonable.[193] To determine the reasonableness of the search, the Court balanced the arrestee's privacy interest with the government's interest.[194] The Court's resolution that the DNA testing was a routine booking procedure effectively eliminated judicial oversight.[195]

1. DNA Testing Invades the Arrestees' Reasonable Expectation of Privacy.

Because the Court asserted that the DNA testing constituted a Fourth Amendment search,[196] a privacy interest was automatically implicated.[197] The majority attempted to downplay this interest by stating that arrestees have a reduced privacy interest, and therefore the DNA testing "booking procedure" was constitutional.[198] Specifically, the Court stated that "[t]he arrestee is already in valid police custody for a serious offense supported by probable cause."[199] The Court even went so far as to say that the arrestee has a reduced privacy interest because he or she has "been suspected of a wrong."[200]

The majority's argument greatly overestimated the reduction in a person's expectation of privacy as a result of arrest. A search is not presumed reasonable merely because the subject has been arrested.[201] An arrestee does not have the same reduced

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193 *Id.*

194 *Id.* at 1970.

195 *See* Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 HARV. L. REV. 161, 169 (2013) (asserting that the Court's holding "seems to expressly indicate that judicial preapproval is not required").

196 *See King*, 133 S. Ct. at 1968-69.

197 *See* Missouri v. McNeeley, 133 S. Ct. 1552, 1565 (2013) (asserting that the Court "has never retreated . . . from our recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests").

198 *See supra* notes 137-52 and accompanying text.

199 *See King*, 133 S. Ct. at 1970.

200 *Id.* at 1978.

201 *See* Murphy, *supra* note 195, at 176 ("[P]olice do not have carte blanche to strip search and syringe jab any arrestee; they must have a justification *beyond* mere arrest."); *see also* Brief for the Respondent at 25, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) (Other than searches incident to arrest, the Court "has never suggested that the mere fact of arrest could justify a suspicionless search for evidence of criminal activity unrelated to the offense of arrest."); Brief for the Nat'l Ass'n of

expectation of privacy as a person convicted of a crime.[202] Rather, an arrestee's expectation of privacy resembles that of an "ordinary citizen," particularly since an arrestee is presumed innocent until proven guilty.[203] While the convicted person had her day in court, the arrestee has had no such benefit. Furthermore, allowing warrantless DNA testing of arrestees "will lead to a disproportionate impact on [innocent] minorities."[204] Besides a few

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Criminal Def. Lawyers as Amicus Curiae Supporting Respondent at 26, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) ("It does not follow that because arrestees' expectations of privacy are diminished . . . any intrusion is presumably permissible.").

[202] *See* Brief for the Respondent, *supra* note 201, at 24 (asserting "conviction - not mere arrest . . . result[s] in an across-the-board curtailment of an individual's expectations of privacy").

[203] *See* Brief for the Respondent, *supra* note 201, at 26 ("When it comes to the government's authority to conduct searches for investigative purposes, however, an arrestee is presumed to be innocent, and stands in the same position as an ordinary citizen in every respect but one: the government assertedly has probable cause to believe that the arrestee has committed the offense of arrest."); *see also* Brief of Amicus Curiae Elec. Frontier Found. in Support of Respondent at 7, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207); Brief for the Nat'l Ass'n of Criminal Def. Lawyers as Amicus Curiae Supporting Respondent, *supra* note 201, at 29-30 ("Indeed, arrestees stand in no different position from law-abiding individuals in society who pass through an airport, or travel in a car. . . . Beyond the limited intrusions on privacy during their period of arrest, which are permitted to ensure the safety of those who have taken them into custody, arrestees' expectation of privacy is not diminished whatsoever."); Brief for the Nat'l Ass'n of Fed. Defenders as Amicus Curiae Supporting Respondent at 8, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) ("People who are arrested are presumed innocent. A lawful arrest merely reflects probable cause to believe, at the time of arrest, that the arrestee has committed a crime. And probable cause is hardly certainty."); Brief for Genetic Scientists Robert Nussbaum and Sara H. Katsanis as Amici Curiae in Support of Respondent at 33, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) ("Permitting law enforcement access to such a rich store of personal information from an arrestee who is presumed innocent is a serious, and unprecedented, incursion on core privacy interests.").

[204] *See* Brief of Council For Responsible Genetics as Amicus Curiae in Support of Respondent at 3, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) (asserting that a "disproportionate impact" will occur because "minorities – especially young black men – are arrested at much higher rates than their white counterparts" and warning that "a substantial number of those innocent arrestees [who are minorities] will not have the knowledge, resources, or determination required to successfully navigate the onerous expungement procedures that most jurisdictions have implemented"); *see also* Brief for the Howard Univ. Sch. of Law Civil Rights Clinic as Amicus Curiae in Support of Respondent at 18-29, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207); Elizabeth E. Joh, Maryland v. King*: Policing and Genetic Privacy*, 11 OHIO ST. J. CRIM. L. 281, 287 (2013).

exceptions, discussed in Part II.C, an arrest does not justify a warrantless, suspicionless search.

The majority also deemed the search reasonable because the intrusion into an arrestee's body "to obtain a DNA sample was a minimal one."[205] The Court based its finding of minimal intrusiveness on the quickness of the DNA test and the lack of pain experienced by the arrestee during the test.[206] While the test itself may be quick and painless, it is difficult to see how the test is minimally intrusive when it involves a governmental authority forcibly sticking a foreign object into a person's mouth without his or her consent. People dislike dental appointments for this very reason, but at least they visit the dentist voluntarily.[207] Although one amicus brief, submitted in support of Maryland, likened the DNA test to teeth brushing,[208] the brief's authors would almost certainly not like someone other than themselves brushing their own teeth. It is also difficult to reconcile how this bodily intrusion is somehow more acceptable than the strictly prohibited warrantless search of an arrestee's home.[209] Indeed, the Court

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[205] Maryland v. King, 133 S. Ct. 1958, 1977 (2013).

[206] *Id.* at 1968. The test is conducted by rubbing the foam tip of a buccal swab along a person's "gum-line, at the fold line of the cheek, and under the tongue, soaking up as much saliva as possible." *See High-Resolution Buccal Collection Procedure Poster*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/lab/biometric-analysis/dna-nuclear/image/high-resolution-buccal-collection-procedure-poster/view/ (last visited Dec. 3, 2013). The law enforcement officer then "rub[s] the foam tip on the inside of [both] cheek[s] for 15 seconds [each]." *Id.*

[207] Close to a quarter of Americans avoid the dentist altogether out of fear, while dentists try to ease patient anxiety by offering sedation. *See* Melinda Beck, *More Dentists Taking Pains to Win Back Fearful Patients*, WALL ST. J., Feb. 1, 2011, http://wsj.com/news/articles/SB10001424052748703439504576116053190333540.

[208] *See* Brief of Amicus Curiae Nat'l Dist. Attorneys Ass'n in Support of Petitioner at 14, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) (In supporting Maryland in the state's petition for writ of certiorari, the brief author wrote, "When evaluating the de minimis nature of this procedure, it is not facetious to compare it to a real world, every day example – dental health professionals recommend brushing teeth two or more times per day, for at least two minutes each session.").

[209] The majority recognized that ordinarily police need a warrant to search an arrestee's home. *See King*, 133 S. Ct. at 1979 (A "search of the arrestee's home" would not be allowable "solely because [the arrestee] is in custody."); *see also* Brief for the Nat'l Ass'n of Criminal Def. Lawyers as Amicus Curiae Supporting Respondent, *supra* note 201, at 6 (Warrantless searches "violating the sanctity of one's body" are especially unreasonable.); Brief for the Nat'l Ass'n of Fed. Defenders as Amicus Curiae Supporting Respondent, *supra* note 203, at 16 ("Arresting an individual in his home

previously held that, like the search of a home, bodily intrusions required search warrants.[210]

Finally, the majority asserted that the law enforcement officer conducting the search has minimal discretion in administering the search, since the search automatically occurs upon an arrest for a serious offense.[211] The Court's argument seems to ignore the complete discretion the law enforcement officer has in making the arrest in the first place.[212] For states like Maryland, where only certain felonies require DNA testing, the arresting officer or the prosecutor may decide to charge the arrestee with a higher level of an offense than warranted to qualify the person for DNA testing.[213] In states where all arrests

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does not authorize the police to search the home for evidence without a search warrant. Precisely the same principle should apply here.").

[210] *See* Schmerber v. California, 384 U.S. 757, 770 (1966) ("Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned."). The four dissenting justices recognized this principle in the *King* dissent. *See King*, 133 S. Ct. at 1982 (Scalia, J., dissenting) (asserting that the intrusion into the body is just as "weighty," if not more so, than the search of a home).

[211] *King*, 133 S. Ct. at 1970.

[212] *See* Murphy, *supra* note 195, at 189 ("The notion that arrestee testing invites no law enforcement discretion makes sense only if one believes that the police lack discretion in making decisions about arrest."); *see also* Brief of Amici Curiae ACLU et al. Supporting Respondent at 35, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) ("This lack of prosecutorial, much less judicial, oversight means that every individual police officer has the unreviewable discretion to force an individual to provide a DNA sample, which will be analyzed and uploaded to CODIS even if the person is never charged with a crime.").

[213] This contention is not exactly farfetched, particularly since this is what happened to the defendant in *King*. "[R]espondent was initially charged with both first-degree assault and second-degree assault, but the first-degree assault charge was subsequently dropped. If respondent had been charged only with second-degree assault in the first place, he would not have been subject to DNA testing under the Act." Brief for the Respondent, *supra* note 201, at 43; *see also* Joh, *supra* note 204, at 283-84; Brief for the Nat'l Ass'n of Fed. Defenders as Amicus Curiae Supporting Respondent, *supra* note 203, at 23 ("[A]ny rule allowing police to test whomever they arrest will inevitably begin to skew who gets arrested. And any rule that makes this investigative tool available, but conditions it on asserting particular charges, will only encourage prosecutors to seek those charges."). The Court has indicated that it is not overly concerned with the motives of the arresting officer in a Fourth Amendment challenge. *See* Whren v. United States, 517 U.S. 806, 813 (1996) (The Court has "foreclose[d] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."). The states that limit DNA testing to

require DNA testing, the police officer may make arrests more quickly than normal.[214] An officer may also decide to make an arrest when he or she would have previously only issued a citation.[215] There is the potential for escalated law enforcement actions in response to the majority's holding in *King*.[216]

An arrestee should be presumed innocent until proven guilty, and therefore should not have his or her privacy interest reduced to the point where warrantless intrusions into the body are justified, no matter how quick and painless the intrusion. States should not allow law enforcement agencies to DNA test arrestees without warrants simply because the arrestees have "been suspected of a wrong."[217] Otherwise, the potential for governmental abuse is substantial.[218]

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certain offenses are likely to expand their statutes to cover more offenses. *See* Joh, *supra* note 204, at 288 ("If the government is interested in 'identifying' arrestees, why would the gravity of the offense matter?").

[214] *See* Joh, *supra* note 204, at 285 ("What *King* fails to acknowledge is that the very existence of a DNA database gives the police incentives to turn every encounter into an arrest."); *see also* Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001) (asserting that the Fourth Amendment allows "a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine").

[215] *See* Joh, *supra* note 204, at 285-86. For a British perspective, see HUMAN GENETICS COMM'N, NOTHING TO HIDE, NOTHING TO FEAR?: BALANCING INDIVIDUAL RIGHTS AND THE PUBLIC INTEREST IN THE GOVERNANCE AND USE OF THE NATIONAL DATABASE 21-22 (2009). A retired police officer stated, "It is now the norm to arrest offenders for everything if there is a power to do so . . . It is apparently understood by serving police officers that one of the reasons, if not the reason, for the change in practice is so that the DNA of the offender can be obtained: samples can be obtained after arrest but not if there is a report for summons." *Id.*

[216] In one amicus brief, military veterans voiced their concerns that a Department of Defense database, which holds DNA from service members for the purpose of identifying human remains, will be used for investigative purposes. *See generally* Brief for Veterans for Common Sense as Amicus Curiae Supporting Respondent at 1-2, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207).

[217] *See supra* note 200 and accompanying text. While it is difficult to sympathize with the defendant in *Maryland v. King*, it is important to remember that the Court's decision affects the innocent and the guilty alike.

[218] *See infra* notes 252-55.

2. The Government Interest in the DNA Testing of Arrestees Is for Investigative Police Work Instead of Identification.

Justice Kennedy based his majority opinion on the grounds of "identification."[219] He asserted that DNA samples should be taken from arrestees in order to identify them, to ensure they were not assuming false identities, and to determine whether they were dangerous.[220] These reasons provided enough justification for the state to overcome the normal warrant requirement.[221] In other words, the government's legitimate interest in DNA testing as part of its booking procedure outweighed the arrestee's expectation of privacy.[222]

Holding that the government's interest is in identification rather than investigation is a stretch.[223] The way the CODIS system works provides no help. When a DNA sample is taken from an arrestee, a DNA profile is extracted from the sample and placed in a state database.[224] The profile is then uploaded into the Convicted Offender and Arrestee Index of the CODIS system.[225] The sample is not compared with the other profiles in the Convicted Offender and Arrestee Index.[226] Rather, the sample is compared with samples in the Forensic Index, which holds samples from unsolved crimes.[227] The very purpose of the CODIS system is to help solve unsolved crimes, not to verify the identity

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[219] Maryland v. King, 133 S. Ct. 1958, 1970 (2013).

[220] *Id.* at 1971-73.

[221] *Id.* at 1980.

[222] *Id.*

[223] In the dissent, the four justices opined that the Court really meant "investigation" when it used "identification." *Id.* at 1983 (Scalia, J., dissenting) ("If identifying someone means finding out what unsolved crimes he has committed, then identification is indistinguishable from the ordinary law-enforcement aims that have never been thought to justify a suspicionless search."); *see also* Brief for the Respondent, *supra* note 201, at 28 ("It cannot seriously be disputed that the 'primary purpose' of the Maryland Act – like other DNA-testing statutes – is to serve the 'general interest in crime control,' by helping both to solve unsolved crimes and to prevent future ones.") (citation omitted); Brief of Amici Curiae ACLU et al. Supporting Respondent, *supra* note 212, at 5 (The state is not identifying arrestees but trying to "connect them to unsolved crimes.").

[224] *See supra* text accompanying note 31.

[225] *See supra* text accompanying note 33.

[226] *See supra* notes 37, 161-62 and accompanying text.

[227] *See supra* notes 37, 161-62 and accompanying text.

of arrestees, or any living person for that matter.[228] Even if the investigatory agency did somehow compare its sample with other samples in the Convicted Offender and Arrestee Index, a matching hit only provides a number, without any kind of identifying information attached.[229] To determine the identity of the matching hit, the agency that submitted the sample must contact the agency that submitted the matching sample in the system.[230] This defeats the supposed efficiency of DNA testing. DNA testing in its current form simply will not work for identification. DNA testing is investigatory in nature, and thus its "identification purpose" is illegitimate.

However, the majority justified its holding by adding *what a person has done* to the definition of identification.[231] The Court needed to adopt a definition of identification that included solving unsolved crimes because normal police investigation will not support the legitimate government interest needed to overcome even a reduced expectation of privacy.[232] By defining identification this way, the Court's holding opened Pandora's box. Officers conduct investigations to determine what a person has done. It is not a big leap from DNA testing to justifying warrantless searches of houses and cars in order to determine what the person has done. There is also a legitimate fear that law enforcement, emboldened by the Court's finding that past involvement in crime is part of a person's identity, may one day decide to use the DNA sample for other information, such as determining an arrestee's genetic predisposition to violence.[233]

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[228] *Privacy Impact Assessment: National DNA Index System (DNS)*, FED. BUREAU OF INVESTIGATION (Feb. 4, 2004), http://www.fbi.gov/foia/privacy-impact-assesments/dns ("The information in NDIS is used to match DNA profiles with crime scenes and human remains (missing persons).").

[229] *See supra* text accompanying notes 34-35.

[230] *See supra* text accompanying notes 34-35.

[231] *See* Maryland v. King, 133 S. Ct. 1958, 1971 (2013).

[232] *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (stating that exceptions to the Warrant Clause do not include "the normal need for law enforcement"); *see also King*, 133 S. Ct. at 1982 (Scalia, J., dissenting) ("No matter the degree of invasiveness, suspicionless searches are *never* allowed if their principal end is ordinary crime-solving.").

[233] *See* Murphy, *supra* note 195, at 180. Allowing the criminal history of a person to be considered a part of that person's identity will open up more in-depth genetic

The state of Maryland and some of its corresponding amici were not as creative as the Court in attempting to avoid the investigatory purpose justification. Rather, their briefs embraced the investigatory purpose justification. Maryland stated that it had "an interest in solving crimes as expeditiously as possible."[234] The state argued that normal law enforcement could be used as the legitimate government interest in the balancing test.[235] Several organizations came to Maryland's aid, with many urging the Court to hold that the investigatory nature of the DNA testing outweighed the arrestee's expectation of privacy.[236] The Court obliged them in a roundabout way.

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testing. "If the 'pedophile gene' were found, or the 'violence gene' established, then surely law enforcement will seek to mine genetic information for that 'identification purpose.' After all, law enforcement needs to know just whom they are dealing with." *Id. See also* Erin Murphy, *Legal and Ethical Issues in Forensic DNA Phenotyping* 1 (N.Y.U. Sch. of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 13-46, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2288204##/. The government is very interested in DNA research, including funding studies to determine "age, ethnicity, skin tone, hair color, eye color, face shape, and other physical characteristics" from DNA. *Id.* "If money talks, then the government – including the law enforcement arm of the government – is telling us that it is very interested in genetic tests that go far beyond the 'string of numbers.'" *Id.*

[234] *See* Brief of Petitioner at 23, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207). Blurring the demarcation line between investigation and identification, Maryland also said it had an interest in "identifying the donors of previously recovered crime scene evidence." Reply Brief of Petitioner at 12, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) (This was the brief submitted by the petitioner in response to the respondent's brief *after* the Court granted certiorari.). The state's unabashed pursuit of criminals did provide some levity at oral argument. After counsel for Maryland elaborated on the importance of warrantless DNA testing in solving crimes, Justice Scalia remarked, "Well, that's really good. I'll bet you, if you conducted a lot of unreasonable searches and seizures, you'd get more convictions, too." Transcript of Oral Argument at 3, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207).

[235] *See* Reply Brief of Petitioner, *supra* note 234, at 2-3.

[236] *See* Brief for Amici Curiae DNA Saves et al. in Support of Petitioner at 12, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) (stressing how important it was to solve past crimes); Brief of Susana Martinez, Governor of the State of N.M., as Amicus Curiae in Support of Petitioner at 6, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) (asserting a strong interest in solving cold cases); Amicus Curiae Brief in Support of Petitioner, the State of Md., by the L.A. Cnty. Dist. Attorney on Behalf of L.A. Cnty. at 7, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) (In the author's second brief, submitted *after* the Court granted certiorari, the author asserted that ascertaining identity includes determining whether they were involved in unsolved crimes.); Brief of Md. Chiefs of Police Ass'n, Inc. et al. as Amici Curiae in Support of

Besides the way CODIS operates, it also takes several weeks, if not months, before a sample is processed.[237] Other forms of identification, such as fingerprinting or government identification cards, provide much quicker ways to verify a person's identity.[238] The statutes themselves are set up for investigatory purposes and not for identification. For example, the statute in *Maryland v. King* sets out the purposes for the statute in its text:

1) to analyze and type the genetic markers contained in or derived from the DNA samples;

2) as part of an official investigation into a crime;

3) to help identify human remains;

Petitioner at 6, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) (In the authors' second brief, submitted *after* the Court granted certiorari, the authors stressed that the state has a "strong interest in ascertaining the true identity of those in custody."); Brief for Amici Curiae Md. Coal. Against Sexual Assault in Support of Petitioner at 9, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) (arguing that the state's interest in solving and preventing sexual crimes outweighs privacy interests); Brief for the Md. Crime Victims' Res. Ctr., Inc. et al. as Amici Curiae in Support of Petitioner at 16-17, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) (stating that the government has an interest in catching criminals and "providing victims with finality and justice"); Brief of Amicus Curiae Nat'l Dist. Attorneys Ass'n in Support of Petitioner at 22, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) (In the author's second brief, this time supporting Maryland *after* the Court had granted certiorari, the author stated, "Also important is the government interest in solving crimes."); Brief for the States of Cal. et al. as Amici Curiae Supporting Petitioner at 7, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) (asserting that solving crimes is a "compelling interest"); Brief for the United States as Amicus Curiae Supporting Petitioner at 29, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) (arguing the government has a "fundamental interest in accurately solving crimes").

[237] In this case, the results of the DNA comparison in CODIS did not arrive until almost four months after King's arrest. Maryland v. King, 133 S. Ct. 1958, 1984 (2013) (Scalia, J., dissenting). The golden standard for DNA testing turnaround currently appears to be approximately twenty days. *Id.* at 1988 (citing *Attorney General DeWine Announces Significant Drop in DNA Turnaround Time*, MIKE DEWINE: OHIO ATTORNEY GENERAL (Jan. 4, 2013), http://ohioattorneygeneral.gov/Media/News-Releases/January-2013/Attorney-General-DeWine-Announces-Significant-Drop; *Gov. Jindal Announces Elimination of DNA Backlog, DNA Unit Now Operating in Real Time*, OFFICE OF THE GOVERNOR BOBBY JINDAL: STATE OF LOUISIANA (Nov. 17, 2011), http://www.gov.state.la.us/index.cfm?md=newsroom&tmp=detail&articleID=3102) (discussing Ohio's and Louisiana's boasts of "reductions in [their DNA testing] backlog[s]" to a turnaround time of twenty days).

[238] Fingerprinting results are received in mere minutes. *See infra* note 270.

4) to help identify missing individuals; and

5) for research and administrative purposes, including:

   i. development of a population database after personal identifying information is removed;

   ii. support of identification research and protocol development of forensic DNA analysis methods; and

   iii. quality control.[239]

The only identification mentioned involves human remains and missing individuals. A strict reading of the statute indicates that the legislature did not mean to include identification of arrestees as a reason for the statute since it left that reason out while enumerating other identification uses.[240] Many states provide opportunities for exonerated arrestees to have their DNA profiles and samples expunged.[241] If the DNA information is really used for identification, why can it be expunged?[242] State statutes and regulations also provide another hit to the identification reasoning through their duplicative testing provisions. For example, as discussed by the dissent, a Maryland regulation allows the law enforcement agency to forego testing an arrestee if his or her DNA sample is already in the system.[243] If the sample

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[239] MD. CODE ANN., PUB. SAFETY § 2-505(a)(1)-(5) (LexisNexis 2011).

[240] *See King*, 133 S. Ct. at 1985-86 (Scalia, J., dissenting) (discussing the purposes for the Maryland DNA Collection Act enumerated by the Maryland legislature).

[241] *See infra* Appendix for a list of states. Despite this relief for the innocent, expungement procedures can be onerous and expensive. *See, e.g.*, ARK. CODE ANN. § 12-12-1019 (2009) (requiring an arrestee to obtain a court order for expungement).

[242] *See* United States v. Mitchell, 652 F.3d 387, 423 (3d Cir. 2011) (Rendell, J., dissenting) ("If the Government's real interest were in maintaining records of arrestees' identities, there would be no need to expunge those records upon an acquittal or failure to file charges against the arrestee. Indeed, this statutory provision serves as an admission that the fact of *conviction,* not of mere arrest, justifies a finding that an individual has a diminished expectation of privacy in his DNA.").

[243] *King*, 133 S. Ct. at 1986 (Scalia, J., dissenting). *See* MD. CODE REGS. 29.05.01.04(B)(4) (2013) ("If the collecting agency determines that a convicted offender Statewide DNA Data Base sample already exists for an arrestee, the agency is not required to obtain a new sample."). Another Maryland regulation removes all doubt that the DNA sample is used for investigation instead of identification. *See* MD. CODE

were needed to identify the suspect, why would they forego the testing?

If DNA testing can be supported by the identification justification, then it follows that the Court's holding is not restricted to arrestees.[244] Police officers commonly stop and request identification from ordinary citizens, without much provocation.[245] If DNA samples are forms of identification, then every ordinary citizen will be subject to the testing in situations where presently the officer asks for a driver's license.[246] The DNA testing will not be limited to law enforcement either. Other government agencies will begin to take DNA samples from the general public.[247] The expansion of government DNA testing will

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REGS. 29.05.01.04(K) (2013) ("The individual collecting a sample shall verify the identity of the individual from whom a sample is taken by name and, if applicable, State identification (SID) number."). If the state determines the identity of the arrestee *before* taking the DNA sample, then the state cannot exactly claim that they take the DNA sample to determine the arrestee's identity.

[244] *See* Joh, *supra* note 204, at 291-92 ("If 'knowledge of identity' has long been an acceptable objective . . . and a DNA profile is a part of the individual's identity for Fourth Amendment purposes, its collection would seem appropriate even in circumstances short of arrest."); Brief of Amicus Curiae Elec. Frontier Found. in Support of Respondent, *supra* note 203, at 14 (expressing that the expansion of DNA collection is leading to a day when everybody's DNA is "sampled and profiled"); Brief of Amici Curiae Elec. Privacy Info. Ctr. et al. in Support of Respondent at 13, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207) ("Without the application of a clear Fourth Amendment standard protecting genetic material, there is no limiting principle to prevent ongoing expansions in the collection, retention, or use of private genetic information.").

[245] *See* Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cnty., 542 U.S. 177, 185 (2004) ("In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment.").

[246] *See* Murphy, *supra* note 195, at 170 ("The logical structure of the majority's opinion also depends upon treating DNA samples as equivalent to other means of identification, whether social security number, driver's license, photograph, or fingerprint.").

[247] *See* Brief for the Respondent, *supra* note 201, at 52 (warning that, if the majority ruled for Maryland, "DNA fingerprinting" might be required to "obtain[] a driver's license, receive certain welfare benefits . . . [or] becom[e] a member of the Bar") (citations omitted); Brief of Amici Curiae ACLU et al. Supporting Respondent, *supra* note 212, at 19 (If DNA testing is really used to confirm identity, then it will expand to "enrolling in school, applying for a driver's license, passport, or firearm license, sitting for the bar, or entering federal buildings.").

then logically increase DNA testing by private organizations.[248] In the not-so-distant future, the intimate details of a person's life contained in his or her DNA will not be so private anymore.

The general public will almost certainly disapprove of an expansion of the law enforcement's DNA database to cover everyone.[249] Ordinary citizens are likely to be wary of the government's possession of the most intimate details of their lives.[250] Despite the general public's concern, the government's admitted objective is to make the DNA databases as large as it can.[251] One may also find it disturbing that, after extracting the DNA profile from the DNA sample, the sample is not merely discarded.[252] Rather, the government keeps the sample

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[248] For example, some banks require fingerprints from their customers to complete transactions. *See, e.g.*, Charlie Breitrose, *Framingham Native Irked by Local Bank Asking for Fingerprint*, METROWEST DAILY NEWS, Jan. 1, 2009, http://www.metrowestdailynews.com/x983453425/Framingham-native-irked-by-local-bank-asking-for-fingerprint (reporting that a bank required a customer, who was not an account holder with the bank, to provide a fingerprint in order to cash a check).

[249] In a recent study, over half of the participants had little to no trust that their genetic information would be kept private if law enforcement officials had access to it. *See U.S. Public Opinion On Uses of Genetic Information and Genetic Discrimination*, GENETICS & PUB. POLICY CTR. 2 (Apr. 24, 2007), http://www.dnapolicy.org/resources/GINAPublic_Opinion_Genetic_Information_Discrimination.pdf.

[250] *See* David J. Kaufman et al., *Public Opinion About the Importance of Privacy in Biobank Research*, 85 AM. J. HUM. GENETICS 643, 649 (2009) (finding an overwhelming majority of people in the study "felt that it would be important to have a law protecting [genetic] research information from law-enforcement officials"); *see also* Brief of Amicus Curiae Elec. Frontier Found. in Support of Respondent, *supra* note 203, at 21 ("Government seizure of DNA also results in an individual's inability to control the dissemination of her sensitive, private data.").

[251] *See* Brief of Petitioner, *supra* note 234, at 24 ("[T]he more profiles in the comparative DNA database, the more useful the database in identifying suspects."). *See generally* Michael Purtill, Comment, *Everybody's Got A Price: Why Orange County's Practice of Taking DNA Samples from Misdemeanor Arrestees is an Excessive Fine*, 101 J. CRIM. L. & CRIMINOLOGY 309 (2011) (a disturbing account of one jurisdiction's expansion of its DNA database).

[252] *See* FED. BUREAU OF INVESTIGATION, QUALITY ASSURANCE STANDARDS FOR DNA DATABASING LABORATORIES 17 (2009), *available at* http://www.fbi.gov/about-us/lab/biometric-analysis/codis/qas_databaselabs.pdf ("Where possible, the laboratory shall retain the database sample for retesting for quality assurance and sample confirmation purposes."); *see also* BUTLER, *supra* note 21, at 262 ("Most jurisdictions permit the retention of the biological specimen even after . . . the DNA profile [is] entered into the database.").

indefinitely, for possible future analysis.[253] The majority was not concerned with any potential abuse of the vast amount of information held by the government, stating that "statutory protections . . . guard against further invasion of privacy."[254] This is unlikely to bring comfort to the ordinary citizen with the recent news of the National Security Agency prying into personal communications and correspondence.[255] While this complete database encompassing everyone's DNA might be useful for both true identification and criminal investigation,[256] it is difficult to imagine a scenario where it could be implemented without the general population justifiably thinking of "Big Brother" and *1984*.

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[253] *See* Brief of Amici Curiae ACLU et al. Supporting Respondent, *supra* note 212, at 18; Brief of Amici Curiae Elec. Privacy Info. Ctr. et al., *supra* note 244, at 24. The glut of information available at a law enforcement officer's fingertips through retained DNA specimens has not gone unnoticed by disinterested parties either. A presidential commission recommended that law enforcement agencies not be allowed to have regular access to personal DNA information. *See* PRESIDENTIAL COMM'N FOR THE STUDY OF BIOETHICAL ISSUES, PRIVACY AND PROGRESS IN WHOLE GENOME SEQUENCING 6 (2012), *available at* http://bioethics.gov/sites/default/files/PrivacyProgress508_1.pdf ("Only in exceptional circumstances should entities such as law enforcement or defense and security have access to biospecimens or whole genome data for non health-related purposes without consent.").

[254] *See* Maryland v. King, 133 S. Ct. 1958, 1979-80 (2013). The Court has not always felt this way. *See* United States v. Stevens, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."); *see also* Brief of Amici Curiae ACLU et al. Supporting Respondent, *supra* note 212, at 14 ("The Fourth Amendment does not allow the government to seize and warehouse our personal papers just because it promises not to examine them, and the rule should be no different with our genetic blueprint.").

[255] *See, e.g.*, Danny Yadron et al., *When NSA Calls, Phone Companies Answer*, WALL ST. J., June 6, 2013, http://online.wsj.com/news/articles/SB10001424127887324069104578529244291792214/ (one of the many articles about just a small part of the NSA's "vast domestic data-gathering operation").

[256] Some dispute that a larger Convicted Offender and Arrestee Index would lead to more solved crimes. Rather, they argue that the expansion of the Forensic Index is the better investigative strategy. *See* JEREMIAH GOULKA ET AL., RAND CORP. CTR. ON QUALITY POLICING, ISSUES IN POLICING: TOWARD A COMPARISON OF DNA PROFILING AND DATABASES IN THE UNITED STATES AND ENGLAND 1 (2010) (concluding that "database matches are more strongly related to the number of crime-scene samples than to the number of offender profiles in the database"); *see also* Brief of 14 Scholars of Forensic Evidence as Amici Curiae Supporting Respondent at 4-6, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207).

B. The DNA Testing of Arrestees Is Not Comparable to Fingerprinting.

Justice Kennedy attempted to rationalize the DNA testing as a normal booking procedure by comparing it to fingerprinting.[257] Fingerprinting is used to identify arrestees.[258] Stating that fingerprinting had been held constitutional under the Fourth Amendment as part of the booking procedure,[259] the Court rationalized that DNA testing is similarly constitutional.[260] The majority deduced that the length of time it takes to analyze DNA samples was not relevant to determine whether the warrantless DNA testing was constitutional.[261] Regardless, the Court discussed how DNA processing times have been "reduced to a substantial degree" to approximately twenty days in some jurisdictions.[262] Because the DNA test is minimally intrusive and used for identification purposes, like fingerprinting, the Court upheld its constitutionality.[263]

The Court's decision ignored some major differences between fingerprinting and DNA testing.[264] Fingerprinting is used for identification,[265] while the discussion above shows that DNA

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[257] Maryland v. King, 133 S. Ct. 1958, 1976 (2013).

[258] *See infra* notes 265, 267-68, 272 and accompanying text.

[259] *King*, 133 S. Ct. at 1976 (citing Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 58 (1991)).

[260] *Id.* at 1976-77.

[261] *Id.* at 1976.

[262] *Id.* at 1977.

[263] *Id.*

[264] For a more extensive discussion than the one provided in this Comment, see Corey Preston, Note, *Faulty Foundations: How the False Analogy to Routine Fingerprinting Undermines the Argument for Arrestee DNA Sampling*, 19 WM. & MARY BILL RTS. J. 475 (2010). The Court also completely ignored the fact that it had never analyzed fingerprinting under the Fourth Amendment because fingerprinting was instituted well before the major 1960s Fourth Amendment jurisprudence. *See King*, 133 S. Ct. at 1987-88 (Scalia, J., dissenting).

[265] When fingerprinting is used for investigation rather than identification, the Court has ruled that it is a warrantless search prohibited by the Fourth Amendment. *See* Davis v. Mississippi, 394 U.S. 721, 726-27 (1969) ("But to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment."); Hayes v. Florida, 470 U.S. 811, 815-16 (1985) (reversing a lower court's allowance of fingerprint evidence obtained without a warrant).

testing is not.[266] The fingerprint system analogous to CODIS is the FBI's Integrated Automated Fingerprint Identification System ("IAFIS").[267] This system contains "[n]ot only fingerprints, but corresponding criminal histories; mug shots; scars and tattoo photos; physical characteristics like height, weight, and hair and eye color; and aliases."[268] Conversely, CODIS contains no names or personal identifiers.[269] While a fingerprint can be processed in minutes,[270] it takes weeks or even months to analyze DNA.[271] Furthermore, fingerprints taken from arrestees are not routinely compared to those found at crime scenes, which is exactly the opposite of how the CODIS system works.[272] Even if DNA is used to identify arrestees, it is redundant with identification through fingerprinting, and therefore unnecessary.[273]

Unlike fingerprinting, the DNA testing of arrestees is an intrusion. DNA samples are taken by swabbing a buccal swab on the inside of an arrestee's cheek.[274] The Court described the process as quick and painless.[275] Regardless, this is an intrusion into a person's body. It is baffling that the Court's holding considers the warrantless search of a house to be off-limits while condoning the forced entry of a foreign object into a person's body.[276] Fingerprinting is in no way as intrusive as DNA testing

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[266] Murphy, *supra* note 195, at 178 ("In contrast [with fingerprinting], DNA is collected for the primary purpose of solving past and future crimes, and can be grievously abused and misused."); Brief for the Respondent, *supra* note 201, at 38; Brief for the Nat'l Ass'n of Fed. Defenders as Amicus Curiae Supporting Respondent, *supra* note 203, at 28-30; Brief of Amicus Curiae Pub. Defender Serv. for D.C. in Support of Respondent at 19, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207).

[267] *Integrated Automated Fingerprint Identification System*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis/ (last visited Dec. 3, 2013).

[268] *Id.*

[269] *See supra* text accompanying notes 34-35.

[270] FED. BUREAU OF INVESTIGATION, *supra* note 267 (boasting that an "average response time for an electronic criminal fingerprint submission is about 27 minutes").

[271] *See supra* note 237.

[272] *See* Maryland v. King, 133 S. Ct. 1958, 1987 (2013) (Scalia, J., dissenting); Brief for the Respondent, *supra* note 201, at 37.

[273] *King*, 133 S. Ct. at 1989.

[274] *See supra* text accompanying note 206.

[275] *King*, 133. S. Ct. at 1968.

[276] The four dissenting justices also found the majority's holding confusing. *See supra* text accompanying note 156.

because fingerprinting does not involve the insertion of a foreign object into an orifice like DNA testing.[277] Fingerprinting only involves rolling an arrestee's finger on an inkpad and then placing the finger on a piece of paper.[278] The current DNA testing method is intrusive and therefore completely different from fingerprinting.

DNA samples and profiles can reveal much more information about the arrestee than fingerprinting. The Court asserted that DNA profiles extracted from the samples only reveal identification information about the arrestees.[279] However, the Court admitted that science and technology advances could cause the profiles to reveal much more than only identification information.[280] The majority set aside this worry by stating that statutes keep law enforcement agencies in check, preventing them from using the samples for anything other than identification purposes.[281] The Court's decision completely ignored the potential for government abuse.[282] While a DNA profile does not provide as much information about a person as a DNA sample,[283] a DNA profile

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[277] *See* Brief of Amicus Curiae Pub. Defender Serv. for D.C. in Support of Respondent, *supra* note 266, at 5 ("In short, the interior of the mouth is an intimate and private area, while hands and fingers are basic points of contact with the world at large."); *see also* Brief of Amicus Curiae Elec. Frontier Found. in Support of Respondent, *supra* note 203, at 23.

[278] *Recording Legible Fingerprints*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/recording-legible-fingerprints/ (last visited Dec. 3, 2013).

[279] *See* Maryland v. King, 133 S. Ct. 1958, 1968 (2013).

[280] *Id.* at 1979. On this point the respondent and supporting amicus briefs agree. *See* Brief for the Respondent, *supra* note 201, at 46 (arguing that "scientific advances may allow additional personal information to be gleaned from the data from the loci contained in the standard CODIS profile"); Brief for Genetic Scientists Robert Nussbaum and Sara H. Katsanis as Amici Curiae in Support of Respondent, *supra* note 203, at 13 ("[The Court's] analysis should also take into account the privacy risks likely to emerge in the future as science and technology evolve.").

[281] *King*, 133 S. Ct. at 1979-80.

[282] For a brief discussion on potential government abuse, see *supra* notes 252-55 and accompanying text.

[283] A DNA sample contains "a person's entire genetic makeup," so "the government [is] in possession of an enormous amount of private information." Brief for Genetic Scientists Robert Nussbaum and Sara H. Katsanis as Amici Curiae in Support of Respondent, *supra* note 203, at 30. Analysis of DNA samples "can determine whether a person was born a male or female; his natural eye and hair color; to whom he is related and how closely; in which parts of the world his ancestors lived; and whether he already suffers from or is likely to acquire (or pass on to his children) any among

still reveals more than fingerprinting.[284] For instance, unlike fingerprinting, DNA profiles can be used for familial matching.[285] DNA profiles can also reveal gender and possibly ethnicity.[286] Regardless of how much information DNA profiles reveal, they are completely different from fingerprints in that they reveal something more than identification, no matter how minor that additional information. Fingerprinting only reveals the identity of an arrestee and nothing more. Technological advances will not change that fact.

Using the DNA database for identification purposes simply will not work. Therefore, it cannot justify invading a person's bodily privacy without a warrant. Although no state has directly addressed the DNA testing of arrestees under its constitution,[287]

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hundreds of diseases, including Huntington's chorea, sickle cell anemia, and beta thalassemia." *Id.* at 31.

[284] "The CODIS loci can provide information about specific family relationships as well as weak information about racial or ethnic background." Brief of Genetics, Genomics and Forensic Sci. Researchers as Amici Curiae in Support of Neither Party at 33, Maryland v. King, 133 S. Ct. 1958 (2013) (No. 12-207). The researchers also conceded that, even though "no substantial correlations" had yet been found, "[v]ariations in CODIS loci could be correlated with physical or behavioral traits." *Id.* at 20. *See also* Brief of Amici Curiae Elec. Privacy Info. Ctr. et al., *supra* note 244, at 18; Brief for Genetic Scientists Robert Nussbaum and Sara H. Katsanis as Amici Curiae in Support of Respondent, *supra* note 203, at 14.

[285] *See* BUTLER, *supra* note 21, at 282 ("Since relatives will have similar DNA to one another, loosening the search stringency to permit partial matches rather than full high-stringency matches . . . may return a list of results that could include a brother or other close relative."); *see also* Brief for the Respondent, *supra* note 201, at 37; Brief of Amicus Curiae Elec. Frontier Found. in Support of Respondent, *supra* note 203, at 16; Brief for Genetic Scientists Robert Nussbaum and Sara H. Katsanis as Amici Curiae in Support of Respondent, *supra* note 203, at 17; Brief of Amici Curiae Elec. Privacy Info. Ctr. et al., *supra* note 244, at 20; Brief of Amici Curiae ACLU et al. Supporting Respondent, *supra* note 212, at 15-17. This means that a DNA profile can reveal "a case of misattributed paternity; reveal biological parents after a closed adoption; or disclose the identity of a sperm or egg donor. Revelations of such intimate details can have a profound and potentially devastating emotional impact on all involved." Brief for Genetic Scientists Robert Nussbaum and Sara H. Katsanis as Amici Curiae in Support of Respondent, *supra* note 203, at 21. This could also mean that "[s]o long as the government possesses [an arrestee's] DNA profile, his family will forever be subject to greater potential scrutiny from police." *Id.*

[286] *See supra* notes 283-84 and accompanying text.

[287] Minnesota did hold that the warrantless DNA testing of arrestees violated the Fourth Amendment and Article I, Section 10 of the Minnesota constitution. *See In re* Welfare of C.T.L., 722 N.W.2d 484, 492 (Minn. Ct. App. 2006). However, the court did

several states found, prior to the *King* decision, that the identification argument did not prevent the testing from being held unconstitutional under the Fourth Amendment. For example, the Maryland Court of Appeals found that the warrantless DNA testing of arrestees violated the arrestees' reasonable expectation of privacy since arrestees are presumed innocent, and the DNA samples were used for solving cold cases rather than identification.[288] The California Court of Appeals determined that the DNA testing of arrestees was not used for identification but rather for an investigatory purpose.[289] The reasoning of these states is sound. Although the Supreme Court eventually held otherwise, the states should follow the reasoning of Justice Scalia and these states and continue to outlaw this warrantless testing under their state constitutions.

C. The DNA Testing of Arrestees Is Not Allowable Under the Other Common Exceptions to the Warrant Clause.

1. Special Needs Doctrine

Although the Court stated the special needs doctrine was not applicable because the case involved a "reduced expectation of privacy,"[290] the majority still addressed each of the elements of the special needs doctrine when allowing the warrantless DNA testing

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not conduct a separate analysis of the DNA testing under both the United States Constitution and the Minnesota constitution. Therefore, the Supreme Court's ruling in *Maryland v. King* effectively abrogated the Minnesota court's ruling. *See* Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) ("Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."); Ohio v. Robinette, 519 U.S. 33, 44 (1996) (Ginsburg, J., concurring) ("It is incumbent on a state court, therefore, when it determines that its State's laws call for protection more complete than the Federal Constitution demands, to be clear about its ultimate reliance on state law.").

[288] King v. State, 42 A.3d 549, 578 (Md. 2012), *abrogated by* Maryland v. King, 133 S. Ct. 1958 (2013).

[289] People v. Buza, 129 Cal. Rptr. 3d 753, 773-74 (Cal. Ct. App. 2011), *review granted and opinion superseded*, 262 P.3d 854 (Cal. 2011) and *abrogated by* Maryland v. King, 133 S. Ct. 1958 (2013).

[290] Maryland v. King, 133 S. Ct. 1958, 1978 (2013).

of arrestees.[291] The special needs doctrine cannot justify the warrantless DNA testing of arrestees. The special needs doctrine requires that (1) the primary purpose of the search is for a government interest "beyond normal law enforcement,"[292] (2) that "the privacy interests implicated by the search are minimal," while the "governmental interest" is "important,"[293] (3) the officer's discretion in conducting the search is "narrowly limited in its objectives and scope,"[294] and (4) "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[295]

Each of these factors has been discussed above. The Court asserted that the government had a legitimate government interest in the identification of the arrestee.[296] However, the very way the CODIS system operates shows that the testing is not used for identification but for investigation.[297] State statutes and regulations also show how DNA testing is used for investigation. Furthermore, if the definition of "identification" is expanded to include "what a person has done," the DNA testing will expand beyond arrestees, eventually resulting in a comprehensive DNA database composed of samples from every person. Ultimately, the DNA testing is normal law enforcement and not a special government interest.[298]

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[291] *Id.* at 1969; *see also* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989).

[292] *Skinner*, 489 U.S. at 620 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987)) (internal quotation marks omitted).

[293] *Id.* at 624.

[294] *Id.* at 622.

[295] *Id.* at 623 (quoting Camara v. Mun. Court of S.F., 387 U.S. 523, 533 (1967)) (internal quotation marks omitted).

[296] Maryland v. King, 133 S. Ct. 1958, 1980 (2013).

[297] *See supra* notes 224-28. For a more in-depth discussion about why the government interest is in investigation rather than identification, see *supra* Part II.A.2.

[298] The Court has previously held that ordinary law enforcement is not a special governmental interest. Chandler v. Miller, 520 US 305, 314 (1997) (Special needs are "concerns other than crime detection."); Ferguson v. City of Charleston, 532 U.S. 67, 82-84 (2001) (Even if the "ultimate goal" of law enforcement may be something else, if "the immediate objective of the searches [is] to generate evidence *for law enforcement purposes* in order to reach that goal," then the search "is inconsistent with the Fourth Amendment."); City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (A warrant is

An arrestee has an expectation of privacy.[299] The arrestee is presumed innocent until proven guilty, and thus his or her expectation of privacy falls closer to that of an ordinary citizen than a convicted offender.[300] Regardless of whether that expectation is reduced, normal law enforcement is not a special government interest and therefore does not outweigh the privacy interest. Since the DNA testing of arrestees is not supported by the identification assertion, the balancing test tips in the arrestee's favor.

The Court justified its holding that the officer's discretion in the DNA testing of arrestees is minimal by asserting that "[t]he arrestee is already in valid police custody for a serious offense supported by probable cause."[301] This assertion assumes too much.[302] The officer may have arrested the wrong person. The officer may have made an invalid arrest. The majority's holding will expand DNA testing with officers more apt to arrest in those states that test all arrestees and prosecutors charging for more serious crimes in jurisdictions that test for only certain crimes.[303] Even if the arrest is completely legitimate, the arrestee deserves the constitutional protection against search and seizure. Because the arrestee has not yet been proven guilty, there is no diminished privacy interest.

Finally, it would be absurd to assert that obtaining a warrant frustrates the government purpose in the search when that purpose is investigatory.[304] The Warrant Clause, by its very nature, somewhat frustrates law enforcement investigations. To

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normally required where police are engaged in their "ordinary enterprise of investigating crimes."); *see also* Brief for the Respondent, *supra* note 201, at 32 ("The government's interest in identification therefore cannot supply a 'special need' to justify warrantless, suspicionless DNA testing.").

[299] For a more in-depth discussion on the privacy interest of the arrestee, see *supra* Part II.A.1.

[300] *See supra* note 203 and accompanying text.

[301] *King*, 133 S. Ct. at 1970.

[302] For a more in-depth discussion on the discretion of the law enforcement agencies, see *supra* notes 211-16 and accompanying text.

[303] *See supra* notes 213-15 and accompanying text.

[304] *See* Brief for the Respondent, *supra* note 201, at 44 ("The mere fact that the warrant requirement may serve as an impediment to law enforcement is no justification for discarding it.").

hold that the Warrant Clause does not apply when it frustrates a government investigation would be to remove the Warrant Clause's teeth and render it useless.[305] No, the DNA testing of arrestees simply cannot be justified by the special needs doctrine.

2. Incident to Arrest Doctrine

Although the majority opinion used identification as its foundation, the opinion seemed to try to justify the testing as incident to arrest.[306] The four dissenting justices disagreed that the testing was conducted incident to arrest.[307] DNA samples are not taken from arrestees until after the arrest during the booking procedure.[308] The Supreme Court previously held that a search "incident to arrest" included the arrestee's person and the immediately surrounding area.[309] The Court has construed this to mean that the purpose of a search incident to arrest is to protect the officer's safety and prevent the arrestee from destroying evidence.[310] A search several hours later at the police station does not meet either of those requirements. Taking a DNA sample of an arrestee in no way protects a police officer's safety. Likewise, since a person cannot destroy his or her DNA, immediate testing is not necessary. The "incident to arrest" contention loses further ground when looking at the amount of time the DNA testing process takes. After a person's DNA is taken at booking, the sample is not overnighted to a laboratory where it is processed immediately. Instead, the sample sits in a lab for weeks or even months.[311]

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[305] *See* Brief for the Nat'l Ass'n of Criminal Def. Lawyers as Amicus Curiae Supporting Respondent, *supra* note 201, at 13 ("The only conceivable obstacle a warrant presents here is the requirement of probable cause – the very difficulty that the Framers intended to impose.").

[306] *King*, 133 S. Ct. at 1971.

[307] *Id.* at 1982 (Scalia, J., dissenting). The dissent asserted that the DNA testing is not really a search incident to arrest because the object of the test is not to obtain "(1) weapons or evidence that might easily be destroyed, or (2) evidence related to the crime of arrest." *Id.* (citing Arizona v. Gant, 556 U.S. 332, 343-44 (2009)).

[308] This does not mean that the DNA is immediately analyzed. Some states require the law enforcement agency to wait until arraignment before analysis. *See, e.g.*, MD. CODE ANN., PUB. SAFETY § 2-504(d)(1) (LexisNexis 2011).

[309] Arizona v. Gant, 556 U.S. 332, 339 (2009).

[310] *Id.*

[311] *See supra* note 237 and accompanying text.

Although many DNA labs once had a backlog of months, some labs now boast a much quicker turnaround.[312] Even so, the DNA processing is not completed anywhere close to the time it takes to be considered "incident to arrest."

3. Exigent Circumstances Doctrine

Exigent circumstances are also used to justify warrantless searches. Exigent circumstances include the need to protect the safety of the arresting officers or the public, the "hot pursuit of a fleeing suspect," and the need to keep a suspect from destroying evidence.[313] None of these situations apply to the DNA testing of arrestees. A court may determine "whether warrantless searches were justified by emergency circumstances" by analyzing the following factors:

> (1) the degree of urgency involved and the amount of time necessary to obtain a warrant, (2) reasonable belief that [evidence] is about to be removed, (3) the possibility of danger to police officers guarding the site of the [evidence] while a search warrant is sought, (4) information indicating the [suspects] are aware that the police are on their trail, and (5) the ready destructibility of the [evidence] and the knowledge that efforts to dispose of [the evidence] and to escape are characteristic behavior of persons engaged in [crime].[314]

Absolutely none of these factors apply to the DNA testing of arrestees as part of the booking procedure. Although a law enforcement agency would probably like to have the DNA sample as soon as possible, the previous section shows that DNA samples are not readily analyzed. Therefore, the urgency factor does not apply. Similarly, the amount of time needed to obtain a warrant is not relevant. A person's DNA will not dissipate. It will not

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[312] *See supra* note 237 and accompanying text.

[313] *See* Terry v. Ohio, 392 U.S. 1, 29 (1968) (asserting that a justification for a warrantless search is "the protection of the police officer and others nearby"); Kentucky v. King, 131 S. Ct. 1849, 1856 (2011) (discussing the "hot pursuit" and "destruction of evidence" exigent circumstances).

[314] United States v. Rubin, 474 F.2d 262, 268-69 (3d Cir. 1973) (citations omitted) (internal quotation marks omitted).

disappear with time. The evidence cannot be removed or destroyed, readily or otherwise, because DNA cannot be destroyed. Finally, because the arrestee has already been arrested and is in the process of being booked, there is no danger to the arresting officers and no concern that the suspect will flee because he or she knows the officers are in "hot pursuit."

D. DNA Testing Is Not Infallible.

The majority appears to place the utmost faith in DNA testing.[315] While DNA testing is promoted as the "golden standard," as with any technology, DNA testing is not immune to problems. Mistakes can occur due to "[c]ontamination, inadvertent transfer, and deliberate malfeasance."[316] There is a possibility of a person transferring his or her own DNA to another person and then that person transferring the first person's DNA to an object at the crime scene.[317] DNA samples may also be "cross-contaminated" by mishandling in the DNA testing laboratory.[318] DNA testing has even led to erroneous convictions.[319] Samples can be mislabeled.[320] DNA results can also be misinterpreted.[321] Although DNA testing allows for familial testing, having family

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[315] *See* Murphy, *supra* note 195, at 193 ("Specifically, the Justices in the majority believe in the possibility of scientific certainty, and either ignore the possibility of error or view the risks as inconsequential.").

[316] Brief of 14 Scholars of Forensic Evidence as Amici Curiae Supporting Respondent, *supra* note 256, at 28.

[317] *See generally* Alex Lowe et al., *The Propensity of Individuals to Deposit DNA and Secondary Transfer of Low Level DNA from Individuals to Inert Surfaces*, 129 FORENSIC SCI. INT'L 25 (2002). This scientific study, conducted by the authors, observed the transfer of DNA amongst people and objects, including "the transfer of DNA from one individual (A) to another (B) and subsequently to an object," albeit "under specific laboratory conditions." *Id.* at 25.

[318] William C. Thompson, *Forensic DNA Evidence: The Myth of Infallibility*, *in* GENETIC EXPLANATIONS: SENSE AND NONSENSE 227, 229-30 (Sheldon Krimsky & Jeremy Gruber eds., 2013).

[319] *See* Brief of 14 Scholars of Forensic Evidence as Amici Curiae Supporting Respondent, *supra* note 256, at 28 (citing BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 100-102 (2011)) ("At least three individuals subsequently exonerated by post-conviction DNA tests were first wrongly convicted based on faulty DNA testing or analysis.").

[320] Thompson, *supra* note 318, at 230-31.

[321] *Id.* at 231-33.

members in DNA databases can increase the chance of error.[322] DNA evidence obtained from a crime scene can be degraded by "light, heat, or moisture."[323] The DNA evidence may also contain a mixture of DNA from multiple individuals.[324] While DNA testing can be a useful crime-solving tool, it is far from perfect.

III. THE DNA TESTING OF ARRESTEES IS PERMISSIBLE IF THE ARRESTING OFFICER OBTAINS A WARRANT SUPPORTED BY PROBABLE CAUSE BEFORE CONDUCTING THE DNA TEST.

A quick and easy way to avoid all of the problems with conducting a warrantless DNA test of an arrestee is to obtain a warrant supported by probable cause. This is no different than what a law enforcement officer would do in order to search an arrestee's house.[325] Probable cause consists of a reasonable amount of suspicion that is supported by circumstances or evidence to infer that the arrestee is probably the person sought for a crime.[326] If the officer witnessed the crime, then the officer should have minimal difficulty in proving probable cause. If a person is arrested for merely matching a suspect's generic description, then it may be a little more difficult. Regardless of the difficulty, obtaining a warrant supported by probable cause will protect the privacy interests of the arrestee while enabling the quick facilitation of the law enforcement officer's request for DNA sampling.

The DNA sample should be used only to prove the guilt of the arrestee for the crime in question. For example, the benefit of obtaining a DNA sample from a rape suspect is obvious. However, that same benefit does not apply to a petty larceny case. If a DNA

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[322] *See* Brief of 14 Scholars of Forensic Evidence as Amici Curiae Supporting Respondent, *supra* note 256, at 34.

[323] Erin Murphy, *Legal and Ethical Issues in Forensic DNA Phenotyping* 3 (N.Y.U. Sch. of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 13-46, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2288204##/.

[324] Brief of 14 Scholars of Forensic Evidence as Amici Curiae Supporting Respondent, *supra* note 256, at 35.

[325] *See* Payton v. New York, 445 U.S. 573, 586 (1980) ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable.").

[326] Beck v. Ohio, 379 U.S. 89, 91 (1964).

sample is not relevant in connecting the arrestee to the crime for which the arrestee was arrested, then the DNA sample should not be taken. There is a significant benefit to using DNA samples from arrestees to solve crimes unconnected to the arrest. However, this is merely investigative police work. Solving these crimes is not enough to justify violating an arrestee's privacy. It is very possible that preventing the DNA testing of arrestees when that evidence is unnecessary may inhibit the resolution of unsolved crimes, and it is easy to sympathize with law enforcement officers whose jobs will therefore become more difficult. However, it is imperative that a person's state constitutional right to avoid unreasonable searches and seizures is protected. The rights of innocent arrestees should be especially safeguarded, even at the expense of hindering the solving of cold cases.

CONCLUSION

Our states must maintain the privacy rights guaranteed to each citizen by the Fourth Amendment of the United States Constitution. While the Supreme Court has limited those rights in the case of DNA testing arrestees, each state has the opportunity to reaffirm those rights under its own state constitution. State courts should not hesitate to extend their unreasonable search and seizure provisions to cover the DNA testing of arrestees. While investigating cold cases is without a doubt an important objective, it is still normal, everyday police work. Ordinary police work does not overcome the right each citizen has to avoid warrantless searches. Before obtaining an arrestee's DNA, the law enforcement agency must obtain a warrant supported by probable cause. Accordingly, the citizen's expectation of privacy will be protected, while still allowing the state to further its objectives as an investigative agency.

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APPENDIX

STATE-BY-STATE SURVEY OF ARRESTEE DNA TESTING STATUTES

This appendix summarizes the statutes of all fifty states as of January 29, 2014, and it includes information relating to (1) the crimes that warrant the DNA tests, (2) whether juveniles were subject to testing, (3) expungement procedures, and (4) any other information that appeared unique. The reader should be wary of relying too heavily on this appendix, as the laws are constantly changing. Several of the states that do not currently have DNA laws addressing arrestees have proposed legislation, undoubtedly emboldened by the *King* decision. Of the states that do not have pending legislation, many of them have proposed similar legislation in the past.

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and Wisconsin all provide for DNA testing of people arrested for at least some crimes. Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Minnesota, New Jersey, Utah, and Wisconsin all require some form of juvenile arrestee testing. All of these states have specific provisions for expunging the DNA samples and profiles, except for Ohio, with Colorado, Maryland, Missouri, North Carolina, South Carolina, Tennessee, Texas, Utah, Vermont, and Virginia providing for some form of expungement that requires no effort from the arrestee. Of the states that do not require the DNA testing of arrestees, Georgia, Hawaii, Indiana, Kentucky, Massachusetts, Mississippi, New York, Oklahoma, Pennsylvania, Rhode Island, Washington, West Virginia, and Wyoming have pending legislation that would require the DNA testing of arrestees.

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possible. The author also wishes to thank his fellow Academic Legal Writing classmates, the very capable editors of the *Mississippi Law Journal*, and his family and friends for their support.

Illinois, Minnesota, North Carolina, Tennessee, Texas, Vermont, and Virginia mandate that law enforcement agencies meet certain requirements before obtaining a DNA sample, which may include having a warrant for the arrest, procuring a judicial determination that the arrest was based on probable cause, or obtaining an indictment, depending on the state. Maryland, Nevada, New Mexico, and Wisconsin mandate that law enforcement agencies meet certain requirements before analyzing a DNA sample, which may include having a warrant for the arrest, procuring a judicial determination that the arrest was based on probable cause, or obtaining an indictment, depending on the state.

Alabama does not allow the DNA testing of an arrestee unless the arrestee voluntarily consents. Connecticut's DNA statute only applies to arrestees who have been previously convicted of a felony. North Carolina does not allow the use of information obtained from a DNA sample or profile in any proceeding if that information was obtained from the sample or profile after the sample or profile should have been expunged. Idaho has proposed legislation that no DNA samples can be obtained without a warrant for the testing supported by probable cause. While Nebraska does not provide for the DNA testing of arrestees, it does prohibit DNA testing in criminal investigations without probable cause, a court order, or voluntary consent.

ALABAMA

Criminal Offense: Any person arrested for a felony or sexual offense must submit a DNA sample either at the time of arrest or while being fingerprinted during booking. ALA. CODE § 36-18-25(c)(1) (2013).

Juveniles: Juveniles are subject to the same requirements. ALA. CODE § 36-18-25(c)(2) (2013).

Expungement: A person can request expungement if their conviction is reversed. ALA. CODE § 36-18-26 (2013). There does not appear to be a statute that addresses the process of getting a sample expunged if charges are dismissed or dropped.

Voluntary Consent: All arrestees have to voluntarily consent to DNA testing. If an arrestee refuses, that fact cannot be

used against him or her in court. ALA. CODE § 36-18-25(c)(3) (2013).

ALASKA

Criminal Offense: Any person arrested for a felony, homicide, assault, reckless endangerment, kidnapping, custodial interference, human trafficking, sexual offenses, robbery, extortion, coercion, or felonies as a result of car accidents must submit a DNA sample. This includes attempt and solicitation. ALASKA STAT. § 44.41.035(b)(6) (2010).

Juveniles: It does not appear that juvenile arrestees are subject to DNA testing.

Expungement: A person may request expungement if the written request is accompanied by a certified copy of the court order stating that the person was released without being charged, the indictment was dismissed, or the person was acquitted. ALASKA STAT. § 44.41.035(i)(2) (2010).

ARIZONA

Criminal Offense: Any person arrested for indecent exposure, public sexual indecency, sexual abuse, sexual conduct with a minor, sexual assault, child molestation, bestiality, sexual abuse of a child, first or second degree burglary, prostitution, incest, homicide, aggravated assault resulting in serious injury or involving use of a deadly weapon, any dangerous crime against children, arson of an occupied structure, armed robbery, kidnapping, or child prostitution and taken to jail must provide a DNA sample. ARIZ. REV. STAT. ANN. § 13-610(K) (2010 & Supp. 2013). Any person charged with a felony or misdemeanor of these crimes and summoned to appear in court must provide a DNA sample. ARIZ. REV. STAT. ANN. § 13-610(L) (2010 & Supp. 2013).

Juveniles: For the crimes above, a juvenile must give a sample if charged and summoned to an advisory hearing. ARIZ. REV. STAT. ANN. § 8-238(A) (Supp. 2010). The statute was held unconstitutional under the Fourth Amendment in *Mario W. v. Kaipio*, 281 P.3d 476 (Ariz. 2012), but the ruling was abrogated by *Maryland v. King,* 133 S. Ct. 1958 (2013).

Expungement: A person may request expungement by petitioning the court if criminal charges are not filed, if the charges are dismissed, or if the person is acquitted. ARIZ. REV. STAT. ANN. § 13-610(M) (2010 & Supp. 2013).

ARKANSAS

Criminal Offense: A person arrested for capital murder, first-degree murder, kidnapping, rape, or first- or second-degree sexual assault must submit a DNA sample. ARK. CODE ANN. § 12-12-1006(a)(2) (Supp. 2013).

Juveniles: DNA testing only applies to a person under 18 years of age if that person is charged as an adult. ARK. CODE ANN. § 12-12-1006(l) (Supp. 2013).

Expungement: A person may request expungement by obtaining a court order for expungement if the person is acquitted, the charges are dismissed, the prosecution is dropped, the person completes a pre-prosecution diversion program or the requirements for a condition discharge, the person is convicted of a Class B or C misdemeanor instead of a felony, or the person is not charged within one year of the date of arrest. ARK. CODE ANN. § 12-12-1019 (2009).

CALIFORNIA

Criminal Offense: "[A]ny adult person arrested or charged with any felony offense" must provide a DNA sample. CAL. PENAL CODE § 296(a)(2)(C) (West 2008). This statute was held unconstitutional in *People v. Buza*, 129 Cal. Rptr. 3d 753 (Cal. Ct. App. 2011), but the ruling was abrogated by the *King* decision.

Juveniles: It does not appear that juvenile arrestees are subject to DNA testing.

Expungement: A person may submit a written request to the trial court for expungement if no charges were filed within the statute of limitations, the charges were dismissed, or the person was acquitted. The court may grant or deny the request, and the denial of a request is non-appealable. CAL. PENAL CODE § 299(b) (West 2008).

COLORADO

Criminal Offense: Any person arrested for a felony offense must submit a DNA sample at booking. If not arrested, then the sample must be submitted upon the first appearance in court. COLO. REV. STAT. § 16-23-103 (2010).

Juveniles: It does not appear that juvenile arrestees are subject to DNA testing.

Expungement: The laboratory will automatically expunge the DNA sample and profile if it does not receive confirmation of a felony charge within a year after receiving the sample. COLO. REV. STAT. § 16-23-104 (2010). A person may request expungement by submitting a written request to the state if the charges are dismissed, the person is acquitted, felony charges are not filed within ninety days of arrest, or the person is convicted for an offense other than a felony. COLO. REV. STAT. § 16-23-105 (2013).

CONNECTICUT

Criminal Offense: Any person who was previously convicted of a felony and is arrested on a serious felony charge of murder, first or second degree manslaughter, criminally negligent operation of a vehicle that results in death, first or second degree assault, first-degree sexual assault, first degree aggravated sexual assault, sexual assault in a spousal or cohabiting relationship, third degree sexual assault with a firearm, first or second degree kidnapping, first degree unlawful restraint, home invasion, first or second-degree burglary, third-degree burglary with a firearm, first or second degree arson, first, second, or third degree robbery, assault of public safety, emergency medical, or public transit personnel, rioting or inciting to riot at a correctional institution, or first degree stalking must submit a DNA sample. CONN. GEN. STAT. ANN. § 54-102g (West Supp. 2011).

Juveniles: It is unclear if juvenile arrestees are subject to DNA testing.

Expungement: A person may request expungement by submitting a certified copy of the court order dismissing the charge, acquitting the person, or dropping the charge. CONN. GEN. STAT. ANN. § 54-102l (West Supp. 2011).

DELAWARE

None

FLORIDA

Criminal Offense: A person arrested for any felony must submit a DNA sample at booking. However, the state laboratory is only required to accept samples from persons arrested for certain crimes when the state legislature has funded the DNA testing for those crimes, which are homicide, assault, battery, culpable negligence, sexual battery, lewdness, indecent exposure, burglary, trespass, theft, and robbery as of 2014. Funding for the testing of all felony arrestees will be in place by 2019. FLA. STAT. ANN. § 943.325(3) (West Supp. 2013).

Juveniles: The DNA testing requirements apply to juveniles.

Expungement: A person may request expungement by submitting a certified copy of the court order stating that the charges were dismissed, the person was acquitted, or that no charge was filed within the statute of limitations. FLA. STAT. ANN. § 943.325(16) (West Supp. 2013).

GEORGIA

None (proposed legislation)

HAWAII

None (proposed legislation)

IDAHO

None, but there is currently proposed legislation providing that, "[a]bsent a warrant authorizing DNA collection based upon probable cause, no person shall be required to provide a DNA sample unless the person has been convicted of . . . [a] felony." S.B. 1240, 66nd Leg., 2d Reg. Sess. (Idaho 2014).

ILLINOIS

Criminal Offense: Any person arrested for first degree murder, home invasion, predatory criminal sexual assault of a

child, aggravated criminal sexual assault, or criminal sexual assault must submit a DNA sample once a judge finds that there was probable cause for the arrest. 730 ILL. COMP. STAT. ANN. 5/5-4-3(a-3.2) (West 2007 & Supp. 2013).

Juveniles: It does not appear that juvenile arrestees are subject to DNA testing.

Expungement: A person may request expungement by submitting a certified copy of the court order stating that the charge was dismissed, the person was acquitted, or the charge was not filed within the statute of limitations. 730 ILL. COMP. STAT. ANN. 5/5-4-3(f-1) (West 2007 & Supp. 2013).

INDIANA

None (proposed legislation)

IOWA

None

KANSAS

Criminal Offense: Any person arrested for or charged with committing or attempting to commit any felony, criminal sodomy, lewd and lascivious behavior, cruelty to animals, criminal restraint of a person less than 18 years old, adultery with a person less than 18 years old, promoting the sale of sexual relations involving someone less than 18 years old, buying sexual relations with someone less than 18 years old, sexual battery, or aggravated sexual battery must submit a DNA sample at booking. KAN. STAT. ANN. § 21-2511(e)(2) (Supp. 2011).

Juveniles: The DNA testing requirements apply to juveniles.

Expungement: A person may request expungement if there was no probable cause for the arrest or charge, the charge was dismissed, or the person was acquitted. KAN. STAT. ANN. § 21-2511(e)(4)-(5) (Supp. 2011). The application for expungement must include a certified copy of the final court order of the dismissal or acquittal. KAN. ADMIN. REGS. § 10-21-4(c) (2009), *available at* http://www.kssos.org/pubs/pubs_kar.aspx.

KENTUCKY

None (proposed legislation)

LOUISIANA

Criminal Offense: Any person "arrested for a felony or other specified offense", including battery of a police officer, school teacher, school or recreation athletic contest official, or correctional facility employee, simple battery, battery of a child welfare or adult protective service worker, domestic abuse battery, assault, aggravated assault, unlawful use of a laser on a police officer, simple assault, stalking, identity theft, misdemeanor carnal knowledge of a juvenile, prohibited sexual conduct between educator and student, prostitution, soliciting for prostitutes, inciting prostitution, massage involving sexual conduct, letting premises for prostitution, contributing to the delinquency of juveniles, hate crimes, peeping tom, or inciting to riot must submit a DNA sample at booking. This includes "attempt, conspiracy, criminal solicitation, or accessory after the fact." LA. REV. STAT. ANN. § 15:609(A) (2012). "Other specified offense" is defined at LA. REV. STAT. ANN. § 15:603(10) (2012).

Juveniles: The DNA testing requirements apply to juveniles.

Expungement: A person may request expungement by written request along with a certified copy of the court order for expungement if the arrest did not result in conviction or a plea agreement resulting in conviction. LA. REV. STAT. ANN. § 15:614 (2012).

MAINE

None

MARYLAND

Criminal Offense: Any person charged with committing or attempting to commit abduction, first degree arson, kidnapping, voluntary manslaughter, maiming, murder, rape, robbery, carjacking, first or second degree sexual offenses, using a handgun while committing a felony or other crime of violence, first degree child abuse, sexual abuse of a minor if the victim is under 13 years

old and the offender is an adult, first degree assault, assault with intent to murder, rape, rob, or commit a sexual offense in the first or second degree, or burglary must submit a DNA sample at booking. MD. CODE ANN., PUB. SAFETY § 2-504(a)(3)(i) (LexisNexis 2011). The sample cannot "be tested or placed in the statewide DNA data base system prior to the first scheduled arraignment date unless requested or consented to by the individual." If a court determines that the charge is not supported by probable cause, the sample must be destroyed immediately. MD. CODE ANN., PUB. SAFETY § 2-504(d) (LexisNexis 2011).

Juveniles: It does not appear that juvenile arrestees are subject to DNA testing.

Expungement: The DNA sample and record will be expunged automatically from the state DNA database if the person is not convicted. MD. CODE ANN., PUB. SAFETY § 2-511(a) (LexisNexis 2011).

MASSACHUSETTS

None (Proposed legislation)

MICHIGAN

Criminal Offense: A person arrested for a felony of assault, first or second degree murder, manslaughter, kidnapping, prisoner taking another as a hostage, leading, taking, carrying away, decoying, or enticing away a child under 14 years old, mayhem, first, second, third, or fourth degree criminal sexual conduct, carjacking, or robbery must submit a DNA sample. MICH. COMP. LAWS ANN. § 750.520m(1)(a) (West Supp. 2013).

Juveniles: MICH. COMP. LAWS ANN. § 712A.18k (West 2012) covers the DNA testing of minors and does not mention arrestees.

Expungement: A person may request expungement by submitting a written request accompanied by a certified copy of a final court order stating that the charge was dismissed, the person was acquitted, or the charge was not filed. MICH. COMP. LAWS ANN. § 28.176(11) (West 2012).

MINNESOTA

Criminal Offense: Any "person[] who ha[s] appeared in court and ha[s] had a judicial probable cause determination on a charge of committing" murder, manslaughter, assault, robbery, aggravated robbery, kidnapping, false imprisonment, criminal sexual conduct, incest, burglary, or indecent exposure must submit a DNA sample. MINN. STAT. ANN. § 299C.105(1)(a)(1) (West 2007), *invalidated* by In re Welfare of C.T.L., 722 N.W.2d 484 (Minn. Ct. App. 2006), *abrogated by* Maryland v. King, 133 S. Ct. 1958 (2013).

Juveniles: Any "juvenile[] who ha[s] appeared in court and ha[s] had a judicial probable cause determination on a charge of committing" murder, manslaughter, assault, robbery, aggravated robbery, kidnapping, false imprisonment, criminal sexual conduct, incest, burglary, or indecent exposure must submit a DNA sample. MINN. STAT. ANN. § 299C.105(1)(a)(3) (West 2007), *invalidated* by In re Welfare of C.T.L., 722 N.W.2d 484 (Minn. Ct. App. 2006), *abrogated by* Maryland v. King, 133 S. Ct. 1958 (2013).

Expungement: A person may request expungement if acquitted or the charges are dismissed. MINN. STAT. ANN. § 299C.105(3)(a) (West 2007), *invalidated* by In re Welfare of C.T.L., 722 N.W.2d 484 (Minn. Ct. App. 2006), *abrogated by* Maryland v. King, 133 S. Ct. 1958 (2013).

MISSISSIPPI

None (proposed legislation)

MISSOURI

Criminal Offense: Any person 17 years of age or older arrested for first or second degree burglary, felony offenses against the person, felony sexual offenses, felony prostitution, felony offenses against the family, or felony pornography must submit a DNA sample during booking. MO. REV. STAT. § 650.055(1)(2) (Supp. 2013).

Juveniles: It does not appear that juvenile arrestees are subject to DNA testing.

Expungement: The DNA sample and record are expunged automatically if the prosecutor declines to prosecute. MO. REV.

STAT. § 650.055(10) (Supp. 2013). They are also expunged automatically if the charges are dropped or dismissed, there is no probable cause to support the arrest, or the arrestee is acquitted. MO. REV. STAT. § 650.055(11) (Supp. 2013).

MONTANA

None

NEBRASKA

None, but NEB. REV. STAT. § 29-4126(1)-(3) (Supp. 2006) instructs that no DNA sample may be obtained in connection with a criminal investigation "without probable cause, a court order, or voluntary consent. . . . Any DNA sample obtained in violation of [this statute] is not admissible in any proceeding for any purpose whatsoever."

NEVADA

Criminal Offense: Any person arrested for a felony must submit DNA sample at booking. If the arrest was made pursuant to a warrant, then the DNA will be analyzed. If not, then upon a court finding that probable cause existed for the arrest, the DNA will be analyzed. Otherwise, it will be destroyed. Act of May 28, 2013, ch. 252, 2013 Nev. Stat. 1055, 1056-61.

Juveniles: It is unclear if juvenile arrestees are subject to DNA testing.

Expungement: A person may request expungement by submitting a request in writing accompanied by a certified copy of the court order stating that the charge was dismissed, the person completed a pre-prosecution diversion program, satisfied the requirements of a conditional discharge, or was acquitted, an agreement was entered into where the person received a charge other than a felony, or no charge was filed within three years of the date of arrest. Act of May 28, 2013, ch. 252, 2013 Nev. Stat. 1055, 1056-61.

NEW HAMPSHIRE

None

NEW JERSEY

Criminal Offense: Any person arrested for committing or attempting to commit sexual assault, aggravated sexual assault, criminal sexual contact, aggravated criminal sexual contact, murder, manslaughter, second degree aggravated assault, kidnapping, luring or enticing a child, or engaging in sexual conduct which would impair or debauch the morals of a child must submit a DNA sample prior to being released from custody. N.J. STAT. ANN. § 53:1-20.20 (West Supp. 2013).

Juveniles: The DNA testing requirements apply to juveniles as well.

Expungement: A person may request expungement by submitting an application along with a certified copy of the court order ordering expungement if the charges are dismissed or the person is acquitted. N.J. STAT. ANN. § 53:1-20.25 (West Supp. 2013).

NEW MEXICO

Criminal Offense: Any person 18 years or older arrested for committing a felony must provide a sample at booking. N.M. STAT. ANN. § 29-3-10(A) (West 2011). The "sample [will] not be analyzed and [will] be destroyed unless . . . the arrest was made upon an arrest warrant for a felony; the defendant . . . appeared before a judge or magistrate who made a finding that there was probable cause for the arrest; or the defendant posted bond or was released prior to appearing before a judge or magistrate and then failed to appear for a scheduled hearing." N.M. STAT. ANN. § 29-3-10(B) (West 2011).

Juveniles: It does not appear that juvenile arrestees are subject to DNA testing.

Expungement: A person may request expungement by submitting a written request along with a certified copy of the court order stating that the arrest did "not result[] in a felony charge within one year [of the date] of arrest," the charge was dismissed or dropped, the person completed a "pre-prosecution diversion program" or satisfied the conditions of a "conditional discharge," the charge resulted in a misdemeanor conviction, or the person was acquitted. N.M. STAT. ANN. § 29-16-10 (West 2011).

NEW YORK

None (proposed legislation)

NORTH CAROLINA

Criminal Offense: Any person arrested for first or second degree murder, manslaughter, rape or other sex offenses, assault with a deadly weapon, assault inflicting serious bodily injury, assault on a firefighter, emergency medical technician, medical responder, emergency department nurse, or emergency department physician, kidnapping, abduction, human trafficking, first or second degree burglary, breaking out of dwelling house burglary, breaking or entering a place of worship, burglary with explosives, arson, armed robbery, any offense that would require the person to register as a sex offender, cyberstalking, or stalking must submit a DNA sample when arrested or at booking. This includes attempt, solicitation of another to commit, conspiracy to commit, or aiding and abetting another to commit any of the crimes. N.C. GEN. STAT. ANN. § 15A-266.3A(a), (f), (g) (West Supp. 2013). "However, if the person [was] arrested without a warrant . . . the DNA sample [must] not be taken until" a court determines that the arrest was supported by probable cause. N.C. GEN. STAT. ANN. § 15A-266.3A(b) (West Supp. 2013).

Juveniles: It does not appear that juvenile arrestees are subject to DNA testing.

Expungement: The sample and record will be removed if the charge is dismissed, the person is acquitted, the defendant is convicted of a lesser misdemeanor offense that is not included in the above list, no charge is filed within the statute of limitations, or no conviction occurs within three years since the date of arrest and no active prosecution is occurring. N.C. GEN. STAT. ANN. § 15A-266.3A(h)(1) (West Supp. 2013). The prosecutor will handle the expungement with no effort from the defendant, although the defendant can petition with a court order anyway. N.C. GEN. STAT. ANN. § 15A-266.3A(j), (l) (West Supp. 2013).

Use of Sample After Expungement: If the DNA sample and record should have already been expunged, "[a]ny identification, warrant, probable cause to arrest, or arrest based upon a database match of the [person]'s DNA sample . . . [is]

invalid and inadmissible in the prosecution of the [person] for any criminal offense." N.C. GEN. STAT. ANN. § 15A-266.3A(m) (West Supp. 2013).

NORTH DAKOTA

Criminal Offense: Any person "eighteen years of age or over who is arrested or summoned to appear before a magistrate for the commission of a felony" must supply a DNA sample upon arrest, booking, or appearance in court. N.D. CENT. CODE § 31-13-03(1) (Supp. 2013).

Juveniles: It does not appear that juvenile arrestees are subject to DNA testing.

Expungement: A person may request expungement by submitting a certified court order stating that the charge was dismissed, the person was acquitted, no felony charge was filed within one year, the charge resulted in a misdemeanor conviction, or the charge did not otherwise result in a felony conviction. N.D. CENT. CODE § 31-13-07(1) (Supp. 2013).

OHIO

Criminal Offense: Any person 18 years or older arrested for a felony offense must provide a DNA sample at booking. OHIO REV. CODE ANN. § 2901.07(B)(1)(a) (LexisNexis Supp. 2013). If the person is not arrested, then the DNA sample must be taken when appearing before a court or magistrate in response to a summons. OHIO REV. CODE ANN. § 2901.07(B)(1)(b) (LexisNexis Supp. 2013).

Juveniles: It does not appear that juvenile arrestees are subject to DNA testing.

Expungement: Ohio does not appear to have any expungement procedures. However, in *State v. Emerson*, 981 N.E.2d 787, 794 (Ohio 2012), the court ruled that Ohio was "not prohibited from retaining in CODIS the DNA profile of a person acquitted of a crime and using the DNA profile in a subsequent criminal investigation."

OKLAHOMA

None (proposed legislation)

OREGON

None

PENNSYLVANIA

None (proposed legislation)

RHODE ISLAND

None (proposed legislation)

SOUTH CAROLINA

Criminal Offense: A person who is arrested, issued a summons, or indicted for a felony, an offense that is punishable by a sentence of five years or more, or for eavesdropping, peeping, or stalking must submit a DNA sample at booking. S.C. CODE ANN. § 23-3-620(A) (Supp. 2009).

Juveniles: It does not appear that juvenile arrestees are subject to DNA testing.

Expungement: The prosecutor will handle the expungement if the charges are dropped, dismissed, or reduced to below the charges enumerated above or the person is acquitted. However, the defendant may petition with certified copy of the court order if he or she desires. S.C. CODE ANN. § 23-3-660 (Supp. 2009).

SOUTH DAKOTA

Criminal Offense: Any person 18 years or older arrested for any felony offense, murder, manslaughter, rape, aggravated assault, riot, robbery, first degree burglary, arson, kidnapping, or any sex offense must provide a sample upon booking. This includes attempt, conspiracy, or a solicitation to commit any of the above crimes. S.D. CODIFIED LAWS § 23-5A-5.2 (Supp. 2013).

Juveniles: It does not appear that juvenile arrestees are subject to DNA testing.

Expungement: A person may request expungement by submitting a court order stating that there was no felony charge within one year of arrest, the charge was dismissed or reduced to a misdemeanor not listed above, the person was acquitted, or the

charge did not otherwise result in a felony conviction. S.D. CODIFIED LAWS § 23-5A-28 (Supp. 2013).

TENNESSEE

Criminal Offense: A person arrested for first or second degree murder, aggravated kidnapping, especially aggravated kidnapping, aggravated assault, aggravated child abuse, robbery, aggravated robbery, especially aggravated robbery, aggravated burglary, especially aggravated burglary, carjacking, sexual battery, aggravated sexual battery, statutory rape by an authority figure, aggravated statutory rape, rape, aggravated rape, aggravated arson, aggravated vehicular homicide, criminally negligent homicide, reckless homicide, vehicular homicide, or voluntary manslaughter must provide a DNA sample after a determination is made by a magistrate or grand jury that probable cause exists for the arrest. This includes attempt, solicitation, conspiracy, criminal responsibility, facilitating the commission, or being an accessory after the fact of all the offenses listed above. TENN. CODE ANN. § 40-35-321(e)(1), (3) (Supp. 2013).

Juveniles: It does not appear that juvenile arrestees are subject to DNA testing.

Expungement: The clerk of the court will alert the state laboratory of the final disposition of the criminal charge. If the charge is dismissed or the person is acquitted, then the lab will destroy the sample and record. TENN. CODE ANN. § 40-35-321(e)(2) (Supp. 2013).

TEXAS

Criminal Offense: Any person who is indicted or waives indictment for a felony of aggravated kidnapping with intent to inflict bodily injury or sexual abuse, indecency with a child, sexual assault, aggravated sexual assault, prohibited sexual conduct, first degree burglary, compelling prostitution, sexual performance by a child, possession or promotion of child pornography, continuous sexual abuse of a young child or children, or continuous trafficking of persons, and any person who is arrested for any of the above felonies after having been previously convicted of or placed on deferred adjudication for an offense

described above or for second degree burglary must provide a DNA sample. TEX. GOV'T CODE ANN. § 411.1471(a)-(b) (West 2012).

Juveniles: It is unclear if juvenile arrestees are subject to DNA testing.

Expungement: The court will order the state to destroy the sample and record upon acquittal or dismissal. TEX. GOV'T CODE ANN. § 411.1471(e) (West 2012).

UTAH

Criminal Offense: Any person who is arrested for aggravated arson, knowingly causing a catastrophe, arson, criminal mischief, assault by prisoner, disarming a police officer, aggravated assault, mayhem, stalking, threat of terrorism, child abuse, commission of domestic violence in the presence of a child, abuse or neglect of a child with a disability, abuse, neglect, or exploitation of a vulnerable adult, endangerment of a child or vulnerable adult, criminal homicide, kidnapping, aggravated kidnapping, rape, object rape, forcible sodomy, sodomy on a child, forcible sexual abuse, aggravated sexual abuse or sexual abuse of a child, aggravated sexual assault, sexual exploitation of a minor or vulnerable adult, aggravated burglary, burglary of a dwelling, aggravated robbery, robbery, theft by extortion, tampering with a witness, retaliation against a witness, victim, or informant, tampering with a juror, extortion to dismiss a criminal proceeding if by any threat or by use of force theft by extortion has been committed, possession, use, removal, or unlawful delivery of explosive, chemical, or incendiary devices, purchase or possession of a dangerous weapon or handgun by a restricted person, unlawful discharge of a firearm, aggravated exploitation of prostitution, bus hijacking, discharging firearms, hurling missiles, any felony violation of a criminal statute of any other state, the United States, or any district, possession, or territory of the United States which would constitute a violent felony if committed in Utah, sale or use of body parts, failure to stop at an accident that resulted in death, driving with any amount of a controlled substance in a person's body and causing serious bodily injury or death, a felony violation of enticing a minor over the internet, a felony violation of propelling a substance or object at a correctional or peace officer, aggravated human trafficking,

aggravated human smuggling, a felony violation of unlawful sexual activity with a minor, a felony violation of sexual abuse of a minor, unlawful sexual contact with a 16- or 17-year-old, sale of a child, aggravated escape, a felony violation of assault on an elected official, influencing, impeding, or retaliating against a judge or member of the Board of Pardons and Parole, advocating criminal syndicalism or sabotage, assembly for advocating criminal syndicalism or sabotage, a felony violation of sexual battery, a felony violation of lewdness involving a child, a felony violation of abuse or desecration of a dead human body, manufacture, possession, sale, or use of a weapon of mass destruction, manufacture, possession, sale, or use of a hoax weapon of mass destruction, possession of a concealed firearm in the commission of a violent felony, assault with the intent to commit bus hijacking with a dangerous weapon, commercial obstruction, a felony violation of failure to register as a sex or kidnap offender, repeat violation of a protective order, or violation of condition for release after arrest for domestic violence must submit a DNA sample. This includes attempt, solicitation, or conspiracy to commit any of the above offenses punishable as a felony. UTAH CODE ANN. § 53-10-403 (LexisNexis Supp. 2013). The DNA sample cannot be processed unless the court binds the person over for trial following a preliminary hearing for the charge, the person waives the preliminary hearing, or a grand jury returns an indictment for the charge. UTAH CODE ANN. § 53-10-404.5(4) (LexisNexis Supp. 2013).

Juveniles: The DNA testing requirements appear to apply to minors 14-years-old or older.

Expungement: If criminal charges are not filed within ninety days after booking, then the sample and record must be destroyed. UTAH CODE ANN. § 53-10-406(1)(i) (LexisNexis 2010). A person may request expungement by submitting to the court a motion for a court order to destroy the DNA and record if the charge was dismissed or the person was acquitted. UTAH CODE ANN. § 53-10-406(6) (LexisNexis 2010).

VERMONT

Criminal Offense: Any person whom the court has determined at arraignment that there is probable cause that the

person has committed a felony must submit a DNA sample. VT. STAT. ANN. tit. 20, § 1933(a)(2) (2011).

Juveniles: It is unclear if juvenile arrestees are subject to DNA testing.

Expungement: The court will instruct the state to destroy the sample and record if the charge is dismissed or downgraded to a misdemeanor upon a plea agreement, the person is acquitted, or if the person is convicted of a lesser offense that is a misdemeanor other than domestic assault or a sex offense that requires registration. VT. STAT. ANN. tit. 20, § 1940 (2011).

VIRGINIA

Criminal Offense: Any person arrested for committing first or second degree murder, voluntary manslaughter, mob-related felonies, kidnapping, abduction, malicious felonious assault, malicious bodily wounding, robbery, carjacking, criminal sexual assault, arson, capital murder, burglary, entering a dwelling house with intent to commit murder, rape, robbery, arson, or larceny, entering a dwelling house with intent to commit larceny, assault and battery, or other felony, or breaking and entering a dwelling house with intent to commit another misdemeanor must submit a DNA sample after a grand jury or magistrate determines that probable cause existed for the arrest. This includes attempt, conspiracy, a violation as a principal in the second degree of the above crimes, or accessory before the fact. VA. CODE ANN. § 19.2-310.2:1 (2008).

Juveniles: VA. CODE ANN. § 16.1-299.1 (2010) covers the DNA testing of minors and does not mention arrestees.

Expungement: The clerk of the court will alert the state laboratory of the final disposition of the criminal charge. If the charge is dismissed or the person is acquitted, then the lab will destroy the sample and record. VA. CODE ANN. § 19.2-310.2:1 (2008).

WASHINGTON

None (proposed legislation)

WEST VIRGINIA

None (proposed legislation)

WISCONSIN

Criminal Offense: Any person arrested for a felony must submit a DNA sample at booking. WIS. STAT. ANN. § 165.76(1)(gm) (2014) (West, Westlaw through 2013) (eff. Apr. 1, 2015). The sample will be analyzed only if the arrest was made pursuant to a warrant, the court finds that there as probable cause that the felony was committed, the person fails to appear at the initial appearance or preliminary examination, the person waives the preliminary examination, or the individual fails to appear for a delinquency proceeding. WIS. STAT. ANN. § 165.84(7)(am) (2014) (West, Westlaw through 2013) (eff. Apr. 1, 2015).

Juveniles: Any juvenile arrested for an offense that would be a felony if committed by an adult must submit a sample at booking. WIS. STAT. ANN. § 165.76(1)(gm) (2014) (West, Westlaw through 2013) (eff. Apr. 1, 2015). The sample will be analyzed only if the arrest was made pursuant to a warrant, the court finds that there as probable cause that the felony was committed, the person fails to appear at the initial appearance or preliminary examination, the person waives the preliminary examination, or the individual fails to appear for a delinquency proceeding. WIS. STAT. ANN. § 165.84(7)(am) (2014) (West, Westlaw through 2013) (eff. Apr. 1, 2015).

Expungement: A person may request expungement by submitting a written request along with a certified copy of the court order stating that the charge was dismissed, the person was acquitted, or the person was not charged within one year. WIS. STAT. ANN. § 165.77(4)(am)-(bm) (2014) (West, Westlaw through 2013) (eff. Apr. 1, 2015).

WYOMING

None (proposed legislation)