No. 12A48

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND
Petitioner

v.

ALONZO JAY KING, JR.
Respondent

PETITIONER'S APPLICATION FOR
STAY OF JUDGMENT AND MANDATE
AND APPENDIX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Page

Constitutional Provisions

Statutes

Miscellaneous

Page

To the Honorable John G. Roberts, Jr., Chief Justice of the United States, Circuit Justice for the Fourth Circuit:

The Petitioner, State of Maryland, by and through its Attorney General, Douglas F. Gansler, hereby requests this Honorable Court to stay the mandate and decision of the Maryland Court of Appeals in *King v. State*, 425 Md. 550, 42 A.3d 549 (filed April 24, 2012; *Petition for Reconsideration and Stay of the Mandate denied*, May 19, 2012). In this case, the Court of Appeals held that a state law mandating the collection of DNA swabs from people charged with crimes of violence violated the Fourth Amendment to the United States Constitution. The State of Maryland intends to petition this Court for writ of certiorari. In the interim, however, the decision has resulted in the loss of a valuable crime-fighting tool relied upon by Maryland, and moreover has interfered with the efforts of other states to use DNA evidence to prosecute crimes within their own borders.

A. Introduction

Virtually every state and federal jurisdiction submits DNA profiles to the Combined DNA Index System (CODIS), created by Congress in 1994 with the passage of the DNA Identification Act, 42 U.S.C. 14132. Every jurisdiction similarly relies upon CODIS to identify individuals and solve crimes. Because of its scientific accuracy, inherent neutrality, and broad utility in identifying individuals, the DNA profile has been referred to as the "gold standard" of forensic evidence. *See* Joseph Peterson and Anna Leggett, "The Evolution of Forensic Science: Progress Amid the Pitfalls," 36 Stetson L. Rev. 621, 654 (2007) ("The scientific integrity and reliability of DNA testing have helped DNA replace fingerprinting

and made DNA evidence the new 'gold standard' of forensic evidence.") The identification of individuals by using 13 specific loci on select chromosomes is but the most recent example of law enforcement agencies using biometric identification data to solve crimes. The forensic use of fingerprints, for example, has been accepted in this country for a century. *See People v. Jennings*, 96 N.E. 1077, 1081-82 (Ill. 1911).

Toward that end, the federal government and every state has enacted some type of DNA collection statute, mandating the collection of DNA from certain individuals. All states require the collection of DNA from individuals convicted of qualifying crimes. Additionally, the federal government and 26 states have passed statutes requiring the collection of DNA from individuals arrested and charged with certain qualifying offenses.

Maryland has upheld the constitutionality of DNA collection from convicted persons, as has every other state and federal circuit to consider the question. *See State v. Raines*, 857 A.2d 19 (Md. 2004). However, in the case now pending, the Maryland Court of Appeals has reached the opposite conclusion regarding the collection of DNA from people charged with, but not yet convicted of, qualifying crimes of violence. The court's reasons for finding that the collection of biometric identification information from people charged with serious crimes violates the Fourth Amendment do not withstand scrutiny. Moreover, the court's decision has jeopardized the state's ability to identify criminal suspects and solve crimes. Because of Maryland's participation in CODIS, the decision has also adversely affected the ability of other states to prosecute crimes within their own borders.

There is, quite simply, no coherent Fourth Amendment basis for distinguishing the collection of DNA as a forensic identifier from the collection of fingerprints, or Bertillon measurements, or any other form of unique biometric information. The Fourth Amendment does not convey a right of anonymity after arrest. It does not prevent Maryland from conducting routine, minimally invasive booking procedures designed to further legitimate custodial and law enforcement tasks. The Fourth Amendment does not require the state to use a different, or less useful, form of biometric identification simply because a court thinks it would be sufficient. There is no Fourth Amendment jurisprudence from this Court which holds that analyzing evidence lawfully in the state's custody constitutes a "second search" requiring a separate showing of probable cause. Nor does the Fourth Amendment forbid states from using evidence lawfully in their possession to solve crimes. The Court of Appeals found to the contrary on all of these points, and therefore its decision was wrong.

Because of the importance of the issue, the divisions in the lower courts, and the ongoing confusion regarding the proper application of the Fourth Amendment in this context, there is a strong likelihood of this Court granting certiorari. Moreover, because the collection and use of biometric identification data from arrestees has a long and well-established history of constitutional acceptability, and the arguments against identifying criminal suspects through their DNA do not stand up to close inspection, there is a strong likelihood that the Court of Appeals' ruling will be overturned. In the interim, however, a stay is necessary to limit the ongoing harm caused by the state court's erroneous interpretation of the Fourth

Amendment. As noted above, the arrestee profiles that Maryland has contributed to the CODIS database are now blocked from comparison, harming the ability of other states to identify suspects and solve crimes. Ongoing prosecutions in Maryland and other states are clouded as the admissibility of conclusive DNA comparisons originating from Maryland have now been called into question. New arrestees are no longer being identified by their DNA profiles, thereby hampering the state's ability to determine if the people it has in its custody are associated with other crimes. And while King himself is currently being held on the state's detainer, a stay of the judgment and mandate from this Court will ensure that the legal status quo is maintained so that this Court has the opportunity to review this important legal issue.

B. Factual and Legal Background

1. DNA collection in Maryland.

Since the first American courts began admitting DNA evidence in the 1980s, law enforcement agencies throughout the country have come to rely more and more heavily on DNA identification as a crime-solving tool. There are now no law enforcement agencies in the nation which do not routinely collect, analyze, and use DNA information in the course of solving crimes and identifying individuals. With the passage of the DNA Identification Act in 1994, Congress formally created a multistate DNA database now known as CODIS, which allows local, state, and federal law enforcement agencies to compare DNA profiles in order to attach names and faces to criminal suspects identified through DNA.

Recognizing the reality that many people convicted of serious crimes have, in fact, committed other serious crimes in the past and/or may commit new crimes in the future, the federal government and every state has adopted legislation compelling the collection of DNA information from people convicted of qualifying offenses. Maryland joined those states with the passage of its first DNA Collection Act in 1994, which mandated the collection of DNA samples from anyone convicted of a qualifying crime of violence after October 1, 1994, as well as the collection of samples from anyone previously convicted of a qualifying crime prior to that date who was still in state custody as of October 1, 1994. The Maryland Court of Appeals ultimately ruled that the collection and use of DNA identification data pursuant to the Act did not violate the Fourth Amendment. *Raines*, *supra*. Virtually every court to have considered the question has, at this point, found similar state and federal statutes to pass constitutional muster, and the DNA profiles collected from qualifying convicts by states and the federal government formed the initial core of the CODIS databases.

In 2008, Governor Martin O'Malley asked that the Legislature amend the Maryland DNA Collection Act to allow the state to collect samples from those arrested for certain qualifying offenses. These amendments were introduced as Maryland Senate Bill 211/2008, which was passed by the Legislature and signed into law by the Governor after prolonged debate and numerous amendments. *See* 2008 Md. Laws Ch. 337. These changes to the law allowed for the collection of DNA samples from people charged with various crimes of violence or attempts to commit those crimes, or with burglary or attempted burglary. Md.

Code Ann., Pub. Safety Art. §2-504(a)(3) (2011 Repl. Vol.). A sample is not analyzed until a magistrate has verified that the charges are supported by probable cause. §2-504(d). The sample is expunged automatically from the database if the criminal action does not result in a conviction, if the conviction is reversed without retrial, or if a pardon is granted. §2-511. The statute includes various restrictions on the type of information gathered from DNA samples, and imposes criminal penalties for the misuse of DNA information. *See, e.g.*, §2-505 (allowing DNA collection and storage only for "identification"); §2-512 (imposing criminal sanctions for misuse of DNA data).

DNA profiles collected pursuant to these newer provisions of the statute are, for forensic purposes, handled in the same manner as profiles collected under the earlier provisions. They are loaded into a database and compared against "unknown" samples submitted by law enforcement agencies throughout the country. If an arrestee profile matches a crime scene profile submitted in another case, the name and location of the arrestee is provided to the agency which submitted the crime scene profile. The database match is not used as evidence in a criminal trial; instead, the fact of the match provides probable cause for a law enforcement agency to collect another DNA sample from the arrestee, which is again translated into a numerical DNA profile that is compared to the crime scene sample. It is this second match that is used at trial. §2-510.

2. King's case.

In 2009, Alonzo Jay King, Jr., was charged with a rape that occurred in 2003. The

evidence against King consisted largely of a match between DNA recovered from the rape victim and DNA recovered from King when he was arrested for an unrelated first-degree assault. The DNA taken from King in 2009 was collected by police pursuant to Maryland's DNA Collection Act.

King moved to suppress the use of the DNA on Fourth Amendment grounds. That motion was denied, and he was convicted of, *inter alia*, first-degree rape. He appealed his conviction, and Maryland's Court of Appeals took jurisdiction over his appeal before it was argued in the state's intermediate appellate court. *King v. State*, 422 Md. 353 (2011). After hearing argument, a divided Court of Appeals ruled that the DNA Collection Act, as applied to arrestees, violated the Fourth Amendment's prohibition against unreasonable searches and seizures. *King*, *supra*, slip op. at 59.[1]

In overturning King's conviction, the court ruled that "any DNA collection effort [constitutes] two discrete and separate searches. The first search is the actual swab of the inside of King's mouth and the second is the analysis of the DNA sample thus obtained[.]" Slip op. at 49. The court acknowledged that a person charged with a crime has a diminished expectation of privacy, but held that an arrestee's expectation of privacy was greater than that of a convicted person. *Id.* at 52. The court further announced that King had an "expectation

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[1] The majority expressly noted that it was sustaining King's "as-applied" challenge to the statute, but in fact the holding excludes virtually every possible application of the law to arrestees. The only time the Court of Appeals would allow the collection of DNA from an arrestee is in instances where it is not possible to identify him or her through any other means – a circumstance that would not require the application of the DNA Collection Act in the first place. Slip op. at 58 n.35. The court's opinion was a de facto "unconstitutional on its face" ruling.

to be free from biological searches before he is convicted of a qualifying crime." *Id.* at 49. The *King* majority dismissed the fact that the statute prohibits any use of DNA information outside of its capacity to identify the individual donor, and interpreted King's "expectation of privacy" to include not only the identifying information the State actually analyzed and used from his buccal cells, but also "all of the information contained within that material." *Id.* at 50. Operating from this premise – that the search in question included genetic information which the state did not test for and which it was forbidden by the law to process or disseminate – the court rejected the analogy to fingerprint identification which its prior precedents suggested. *Id.* at 50-51. Moreover, the court held, whatever interest the state had in identifying King could be satisfied by the use of photographs and fingerprints taken as part of the booking process. *Id.* at 55.

The court further held that the state's interest in identifying King and his connection to other crimes was "lesser," *id.* at 51, and "attenuated," *id.* at 49, than in cases where the person in question had already been convicted of a crime. It found that – notwithstanding the fact that King, like many people charged with violent felonies, was held in jail pending the resolution of his assault charges – the state's interest in identifying the people in pre-trial custody was less than its interest in identifying the people in its custody after a conviction, *id.* at 54, and rejected the argument that "identification" includes not merely a person's name, but his or her connection to other crimes under investigation. *Id.* at 54. Therefore, it held, the search was not "reasonable" under the totality of the circumstances. *Id.* at 2.

The State filed a motion asking the Court of Appeals to reconsider its decision or, in the alternative, to stay its mandate; that motion was denied on May 19, 2012.

C. Reasons for Granting the Stay

This case meets this Court's criteria for a stay – a reasonable probability that certiorari will be granted, a fair possibility that the Court of Appeals' decision will be reversed, and a likelihood of immediate and irreparable harm in the absence of a stay. *Conkright v. Frommert*, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers). The decision rests entirely upon federal Fourth Amendment grounds. *Fare v. Michael C.*, 439 U.S. 1310, 1311 (1978) (Rehnquist, J., in chambers) (stay of state court ruling requires showing that decision was based on federal grounds). Any "balancing of equities" is strongly – indeed, overwhelmingly – in the state's favor. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) ("balancing of equities" called for in "close cases").

1. There is a reasonable probability that certiorari will be granted.

At issue is Maryland's DNA Collection Act, codified as Md. Code Ann., Pub. Safety Art. §2-501 *et seq.*, and specifically those provisions of the act which authorize the collection of DNA swabs from individuals charged with first-degree burglary and certain violent crimes. As the Court of Appeals acknowledged, "[f]ederal and state courts are divided . . . on the constitutionality of requiring mere arrestees to submit to DNA sample collection." Slip op. at 24. In this case, the decision of the Maryland Court of Appeals deepens a significant split in state and federal authorities regarding statutes mandating the collection of DNA

samples from arrested people.

This split must be resolved. DNA has been used to solve crimes in the United States for approximately 25 years. Statutes requiring the collection of DNA from arrestees have existed for nearly a decade. As discussed in more detail below, because DNA database comparisons are nationwide in scope, the conflicting decisions of the various courts, and the inconsistent rationales behind them, have ramifications far beyond the specific jurisdictions of the courts issuing the opinions. The arrestee profiles Maryland submitted to CODIS are now called into question. Maryland's ability to rely on arrestee profiles collected in states or federal districts where the practice has been specifically affirmed is similarly compromised. Legislatures contemplating the passage of similar statutes face an array of conflicting opinions on what is allowed under the Fourth Amendment.

This case presents an ideal vehicle for this Court to address an issue that has divided the lower courts, where further divisions in different states and federal circuits will only add to the confusion.[2] The Court can clarify whether a minimally invasive search to gather

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[2] As of this writing, statutes regarding the collection and use of DNA profiles from qualified arrestees have been upheld against Fourth Amendment challenges by the Third Circuit Court of Appeals, *United States v. Mitchell*, 652 F.3d 387 (3rd Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012); the Ninth Circuit Court of Appeals, *Haskell v. Brown*, 669 F.3d 1049 (9th Cir. 2012); the United States District Court for Colorado, *United States v. Fricosu*, 2012 U.S. Dist. LEXIS 22654 (D. Colo. 2012); and the Supreme Court of Virginia. *Anderson v. Commonwealth*, 650 S.E.2d 703 (Va. 2007), *cert. denied*, 553 U.S. 1054 (2008). The Ninth Circuit Court of Appeals upheld a similar federal statute in *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010), but that opinion was vacated for *en banc* review, then dismissed as moot.

Similar statutes have been struck down on Fourth Amendment grounds by the United States District Court for Nebraska, *United States v. Purdy*, 2005 U.S. Dist. LEXIS 40433 (D. Neb. 2005); an intermediate appellate court in California, *People v. Buza*, 129 Cal. Rptr. 3d 753 (Cal. Ct. App.

identifying information from a person lawfully arrested is "unreasonable" under the Fourth Amendment. Further, the Court must address the inconsistent and unworkable application of the "two search" theory referenced in the Court of Appeals' decision. Thus far, several courts have employed this theory in the context of arrestee DNA profiles, and through it they have reached three different results. In *Mitchell v. United States*, 652 F.3d 387, 406 (2011), *cert. denied*, 132 S.Ct. 1741 (2012), the court determined that both searches passed Fourth Amendment muster. As noted, the Maryland Court of Appeals has, in this case, concluded that both searches are unconstitutional. Slip op. at 49. The Arizona Supreme Court has held that the first search is permitted under the Fourth Amendment, but that the subsequent analysis of the cells is prohibited. *Mario W. v. Kaipio*, 2012 Ariz. LEXIS 153 at *12-*13 (Ariz. 2012) (filed June 127, 2012). The "two search" theory is misguided and inconsistently applied, and should be resolved.

The nationwide scope and well-recognized utility of DNA databases, as well as the ever-growing number of jurisdictions seeking to add arrestee samples to those databases, requires nationwide guidance. Courts, law enforcement professionals, and state legislatures are in urgent need of a definitive ruling on the constitutionality of DNA collection.

2011), *cert. granted*, 262 P.3d 854 (Cal. 2011); the intermediate appellate court in Minnesota, *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. App. 2006); and, most recently, the Supreme Court of Arizona. *Mario W. v. Kaipio*, 2012 LEXIS 153 (Ariz. 2012) (filed June 27, 2012).

While the issue has not yet reached a court of record, trial courts in Vermont have also begun to refuse to allow DNA profiles of arrestees. *See State of Vermont v. Medina*, Vermont Superior Court, Addison Unit, Civil Division, Docket No. 658-10-11 (filed March 1, 2012), and *State of Vermont v. Hewitt, et al.*, Vermont Superior Court, Rutland Unit, Criminal Division, Docket No. 1131-8-11 (filed March 15, 2012).

2. There is a fair possibility that the Court of Appeals' decision will be overturned.

When considered by this Court, there is a strong likelihood that the Court of Appeals' decision will be overturned. The use of forensic samples to identify arrested persons, and the comparison of the identifying information in those samples to pre-existing databases to see if the same individual has been associated with other crimes, has long been accepted in all other contexts. The taking of fingerprints and photographs from suspects is a staple of law enforcement, and those photographs and fingerprints are used to attempt to solve other crimes as a matter of routine. This Court has quite recently held, moreover, that an arrested person's Fourth Amendment rights are not co-equal with an unarrested person's. *Florence v. Bd. of Chosen Freeholders of Burlington, NJ*, 132 S.Ct. 1510 (2012).

Additionally, there is no reasonable, principled distinction to be made between taking and using fingerprints for identification purposes and taking and using DNA identifiers for identification purposes. The analysis of DNA information and its subsequent use by the state is sharply limited by statute, making any "parade of horribles" argument concerning possible alternative uses and future analyses for different purposes without merit. The taking of DNA samples by law enforcement agencies, and their subsequent analysis and use in solving hitherto-unsolved crimes, does not entail an illegitimate "seizure" simply because DNA is a more detailed and more accurate means of identifying individuals and solving crimes than a fingerprint or a photograph.

Moreover, the fear of potential misuse of DNA information does not dictate any other

outcome. As is the case in every state, Maryland has rigid regulatory and statutory barriers to the misuse of DNA information. *See* Md. Code Ann., Pub. Safety Art. §2-504 (mandating regulations governing use and access to DNA information); §2-505 (limiting collection and storage to "DNA records that directly relate to the identification of individuals" and forbidding any uses outside those listed in statute); §2-508 (limiting access to DNA profiles). Under §2-512, it is a crime – punishable by up to five years' incarceration and a $5,000 fine – to improperly disclose or obtain DNA information. This Court has found, in other contexts, that such restrictions are sufficient to remove from consideration the speculative harm of misuse of personal data. *See, e.g., NASA v. Nelson*, 131 S.Ct. 746, 761-762 (2011) (laws and regulations limiting public disclosure of private data sufficient to protect against fears of improper dissemination). In *United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932), the appellate court found that concerns about the improper dissemination of fingerprint information did not warrant consideration because of the existence of safeguards which were far less explicit and detailed than those found in the Maryland statute.

Nor is there any constitutional basis for redefining "identification" in such a way as to preclude the state from determining if the same individual was involved in other crimes. The end result of the DNA analysis authorized by this statute is the creation of a string of numbers unique to the individual in question. Because the donor's identity is expressed in terms of this string of numbers, rather than by a name, or a photograph, or an impression of friction ridges from a fingerprint, law enforcement authorities are able to compare the

donor's identity to that of people who have left biological residue at crime scenes. The Court of Appeals' decision means that "identity" as defined by a fingerprint or a photograph may be used to solve other crimes, but where "identity" is defined by a series of non-coding hypervariable alleles, the state violates the Fourth Amendment.[3]

The touchstone of the Fourth Amendment is reasonableness, and under any consideration of reasonableness, the minimal intrusion of a buccal swab on an arrested person is far outweighed by the significant and varied state interests at stake. Maryland has a significant interest in knowing who is in its custody. It has an interest in knowing if that person has committed any additional crimes other than the charges which led to the person's arrest. The state has an important interest in solving crimes, and in exonerating the innocent. These interests are significantly advanced by the statute in question, which essentially adds "swabbing the cheek" to the list of procedures performed when a qualified person is arrested.

Once the cells from the swab are lawfully in the possession of law enforcement, there is no additional Fourth Amendment requirement to be met to examine those cells, or conduct scientific tests upon them. *See, e.g., United States v. Jacobsen*, 466 U.S. 109, 123 (1984) (without a warrant, police may conduct chemical analysis on white powder which lawfully came into their possession). Thus, in addition to its incorrect assessment of "reasonableness," the Maryland decision compounds the error with its application of a "two search" theory. Slip

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[3] Indeed, there is a national database – the Integrated Automated Fingerprint Identification System, or IAFIS – for making fingerprint comparisons which is, for Fourth Amendment purposes, indistinguishable from the CODIS and NDIS DNA profile databases. *See* http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis (last visited 6/25/2012).

op. at 49. The Court of Appeals – echoing a conceptual framework used by several other courts – considered the analysis of the cells taken from King to be a second "search" that must pass a second test of reasonableness and probable cause. This is not merely error. It is an unworkable distortion of Fourth Amendment law which could have ramifications outside the DNA context.

There is only one Fourth Amendment event occurring here – the taking of a unique biometric identifier from the cheek of an arrestee. The fact that the process involves a cheek swab followed by a chemical process is irrelevant. Fingerprints, after all, are transformed in a lengthy and labor-intensive process from the inky smudges on a card to the computerized and categorized images actually used to identify criminal suspects, yet it has never been suggested that the scanning, marking, and digitizing of fingerprints constitutes a second search. There is no reason to treat the use of an electropherogram to assign numerical values to cell components any differently from the use of a stereo microscope to identify loops, whorls, and arches in a computerized image of a fingerprint. It would be unworkable to require additional warrants or showings of probable cause to examine lawfully seized evidence. Whether biological material comes into the possession of law enforcement because it has been abandoned at a crime scene, voluntarily surrendered upon request, found lying upon the street, or taken incident to a lawful arrest, the police do not need to make a second showing of probable cause each time they wish to examine the evidence they have legitimately obtained. This Court held as much in *Jacobsen*, *supra*. That point must be

clarified in DNA cases – laboratory analysis of lawfully seized items is not a second "search" requiring independent Fourth Amendment justification.

The current decision, finding that swabbing is not allowed by the Fourth Amendment, is not supported by any legal precedent, or the facts of this case, or logic. It is grossly inconsistent with this Court's precedent and it repeats a growing and potentially crippling legal error regarding a "second search." Should certiorari be granted, there is a very strong likelihood that the Petitioner will prevail.

3. There is a likelihood of irreparable harm if a stay is not granted.

There is real, ongoing, irreparable harm as a result of this decision. Maryland has stopped collecting DNA from people charged with violent felonies and the National DNA Index System (NDIS) has stopped comparing unknown samples in other states to Maryland arrestee profiles. King himself has demanded immediate release from incarceration. Law enforcement efforts in other states have been compromised by the unwarranted pall the Court of Appeals has cast over arrestee profiles taken in Maryland. The effects of this decision must be stayed to avoid continuing, ongoing interference in the efforts of Maryland and other states to fight crime.

(a) Maryland is unable to identify criminal suspects in unsolved cases because of the Court's ruling.

Maryland began collecting DNA samples from the specified class of arrestees in 2009. From the period 2009-2011, matches from arrestee swabs have resulted in 58 criminal prosecutions. Maryland State Police Forensic Sciences Division, *2011 Statewide DNA*

Database Report at 8 (2012). These 58 individuals have been charged with a variety of serious felonies. *Id.* at 9. Therefore, if the Court of Appeals' decision is not stayed, in the 90 days between the Court of Appeals' decision and the filing of the Petition for Writ of Certiorari, one could expect that five suspects will have evaded prosecution. If certiorari is granted and this Court upholds the Maryland law, approximately 20 suspects – linked to their crimes by DNA evidence – may have gone undetected and unprosecuted in the interim.

"[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). "[S]tatutes are presumptively constitutional and, absent compelling equities on the other side . . . should remain in effect pending a final decision on the merits by this Court." *Id.* at 1352. Here, the state can demonstrate not merely the general harm that comes from having the will of the legislature thwarted, but very concrete and specific harms arising from the judicial abnegation of this statute.

(b) Other states that relied upon DNA "hits" from Maryland arrestee swabs have had their prosecutions halted or compromised.

From 2009 to 2011, Maryland has submitted 33,575 arrestee profiles to CODIS. *Statewide DNA Database Report* at 7. In the wake of this decision, these Maryland arrestee profiles (as well as those submitted in 2012 prior to the opinion) are no longer compared to unknown profiles submitted from other states. Therefore, prosecutors outside of Maryland are being denied opportunities to solve crimes within their own borders due to the Court of

Appeals' ruling. Since Maryland began obtaining DNA samples from arrestees in 2009, 28 previously unnamed DNA donors in other states have been identified from Maryland arrestee swabs, resulting in criminal prosecutions in 8 different states. All such opportunities to identify criminal suspects have been halted as a result of the Court of Appeals' ruling. Moreover, existing prosecutions based on Maryland arrestee DNA profiles have been thrown into disarray. While prosecutors within the State and outside of Maryland may have alternative legal arguments to make in order to defend the continued use of profiles obtained before the *King* opinion was issued, the decision has cast a cloud over all such prosecutions.

4. The balancing of equities leans heavily toward the State.

There are no "compelling equities" demanding that the arrestee provisions of the DNA Collection Act be suspended. Indeed, just the opposite. The Court of Appeals' decision actively prevents Maryland and other states from identifying and prosecuting those who would otherwise be quite clearly and specifically identified as suspects through conclusive DNA comparisons. For the reasons set forth above, the alleged Fourth Amendment harm to these criminal suspects simply does not exist. To the extent that King and others similarly situated do not wish their involvement in other crimes to be known, they are espousing a right which is neither reasonable nor legitimate. "A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.'" *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). So, too, fare the "equities" of the rapist who hopes that his identity as such will

remain hidden even after he has lawfully come into police custody.

As for King specifically, he is currently being held on the State's detainer pending this Court's ruling on the forthcoming petition for writ of certiorari. Accordingly, whether the stay is granted or not, King likely will remain in State custody. However, a stay will have the effect of ensuring that the status quo remains until such time as this Court can consider this important issue.

Moreover, King's interest in being released does not weigh heavily in his favor. First, as noted above, the likelihood of the State's success on the merits is strong, and therefore the fact that King will remain in State custody pending consideration by this Court will not inflict any injury upon him. Second, King does not dispute his factual guilt. This is not an instance where an allegedly coerced confession or improper procedure may have led to the incarceration of an innocent man; King makes no claim that the purported Fourth Amendment violation somehow affected the results of the DNA test itself. Third, King is already in custody pending retrial and there is a reasonable chance that he will continue to be held until this Court rules on the state's petition for certiorari. A stay is necessary to ensure that this status quo is maintained until a decision on the merits is reached. *See Fare*, *supra*, 439 U.S. at 1311 (considering risk of mootness when balancing equities).

This Court should grant the requested stay in this case, preventing King's untimely release from prison and allowing Maryland and other states to resume limited use of this valuable crime-fighting tool.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND *
Petitioner

* No. _____

v.

*

ALONZO JAY KING, JR.
Respondent *

* * * * *

ORDER

Having considered the Application for Stay of Judgment and Mandate filed by the State of Maryland, and any opposition thereto, it is this _____ day of _____, 2012, hereby ORDERED that:

The Judgment and Mandate of the Court of Appeals of Maryland in *King v. State*, Case No. 689, Sept. Term, 2011, 425 Md. 550, 42 A.3d 549 (filed April 24, 2012), is hereby STAYED until further notice from this Court.

_____

The Hon. John G. Roberts, Jr.
Chief Justice of the United States and
Circuit Justice for the Fourth Circuit