No. _____

IN THE
Supreme Court of the United States

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STATE OF MARYLAND,
Petitioner,

v.

ALONZO JAY KING, JR.,
Respondent.

_____

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fourth Amendment allow the States to collect and analyze DNA from people arrested and charged with serious crimes?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties below.

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TABLE OF AUTHORITIES

Cases:

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Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland reversing the judgment of the Circuit Court for Wicomico County, Maryland, is reproduced in Appendix A. (App. 1a-85a). The order granting certiorari review before judgment in the Court of Special Appeals of Maryland on direct appeal is reproduced in Appendix B. (App. 86b). The order of the Court of Appeals of Maryland denying the State's Motion for Reconsideration is reproduced in Appendix B. (App. 87b).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland was filed on April 24, 2012. The order of the Court of Appeals denying the State's motion for reconsideration was filed on May 18, 2012. Therefore, the jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 23, 2003, Vonette W. was raped and robbed in her home by a masked intruder wielding a handgun. A forensic examination of the victim uncovered semen from the rapist. Analysis of that material yielded an identifying DNA profile of the rapist, but that profile did not match any known DNA profile in state or federal databases.

Alonzo Jay King was arrested in April of 2009, in Wicomico County, Maryland, and charged with first- and second-degree assault stemming from an unrelated incident. First-degree assault is a qualifying crime of violence under Maryland's DNA Collection Act, Md. Code Ann., Pub. Safety §2-504 (LexisNexis 2011 Repl. Vol.), and, therefore, King was required to submit to a buccal swab of his cheek for use in DNA testing within the guidelines of the Act. The DNA test of the buccal swab yielded an identifying DNA profile, and that profile was submitted to the Combined DNA Index System (CODIS) for comparison to any unknown DNA samples on file. This comparison yielded a match

between King's DNA and the previously unknown DNA recovered from the rape of Vonette W. That match formed the basis of a warrant for a second buccal swab of King, which was tested with the same results. Based on the DNA match, King was charged with the 2003 rape and robbery.

King moved to suppress the DNA evidence prior to his trial, arguing, among other things, that Maryland's DNA Collection Act violated the Fourth Amendment. His suppression motion was denied. King then agreed to waive his right to a jury trial and to be tried on an agreed statement of facts. On July 27, 2010, he was convicted of first-degree rape. He appealed his conviction to the Court of Special Appeals of Maryland, again raising a Fourth Amendment challenge to the DNA Collection Act. The appeal was removed to the Court of Appeals of Maryland on the court's own motion. (App. 86b).

In its decision below, the Court of Appeals acknowledged that it had "previously [ ] upheld the constitutionality of the Act, as applied to convicted felons," but observed that it was now being called upon to consider an extension of the statute that concerned "rights given to, and withdrawn from, citizens who have been arrested." (App. 3a).

Relying on *United States v. Knights*, 534 U.S. 112 (2001), and *Samson v. California*, 547 U.S. 843 (2006), for a "totality of the circumstances balancing test," (App. 3a), the Court of Appeals concluded that King had a "sufficiently weighty and reasonable expectation of privacy against warrantless, suspicionless searches that [was] not outweighed by the State's purported interest in assuring proper identification of him as to

the crimes for which he was charged at the time." (*Id.*) The court found that because the State had already "identified King accurately and confidently through photographs and fingerprints," it had "no legitimate need for a DNA sample in order to be confident who it arrested or to convict him on the first- or second-degree assault charges." (*Id.*)

In the court's estimation, "at the heart of this debate" is the "presumption of innocence cloaking arrestees and whether legitimate government interests outweigh the rights of a person who has not been adjudicated guilty of the charged crime." (App. 29a). With this apparent assumption in mind, the court suggested that an arrestee is "somewhere closer along the continuum to a person who is not charged with a crime than he or she is to someone convicted of a crime." (App. 29a). The court then found that the State had to shoulder "the burden of overcoming the arrestee's presumption of innocence and his expectation to be free from biological searches before he is convicted of a qualifying crime." (App. 58a).

The court also employed the presumption of innocence as a means of distinguishing its earlier decision in *State v. Raines*, 383 Md. 1, 857 A.2d 19 (2004), in which the court had upheld the DNA Collection Act as applied to convicted felons. According to the court, the presumption of innocence tilted the scale in King's favor in this case: "If application of the balancing test resulted in a close call when considering convicted felons," the court observed, "then the balance must surely tip in favor of our closely-held belief in the presumption of innocence here." (App. 59a).

The court "d[id] not embrace wholly the analogy

between fingerprints and DNA samples." (App. 60a). The court accepted that a buccal swab constituted a "minimal" physical intrusion, but nevertheless found that intrusion "distinct," for Fourth Amendment purposes, from a fingerprint. (*Id*.). The court did so because, although the statute has built-in safeguards against misuse of information, the court "could not turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State." (App. 61a).

Judge Mary Ellen Barbera, joined by Judge Alan E. Wilner, dissented on the ground that the majority "overinflat[ed] an arrestee's interest in privacy and underestimat[ed] the State's interest in collecting arrestee DNA." (App. 73a).

With respect to an arrestee's privacy interest, the dissenting opinion noted that individuals lawfully arrested have a greatly diminished expectation of privacy and that the law already permits significant intrusions on an arrestee's privacy, including a full head-to-toe search incident to arrest, and a strip search and body cavity inspection upon entering the local jail. (App. 76a). The dissent emphasized that the buccal swab was a *de minimis* intrusion, and far less invasive than a blood draw. (App. 77a). Further, the dissent identified the privacy interest at stake, not as wholesale genetic information, but rather as limited to "identification information revealed by the 13 loci." (App. 82a). That privacy interest, the dissent said, was quite limited, if it existed at all.

The dissent also criticized the majority's grudging assessment of the State's strong law-enforcement interests at stake. Judge Barbera rejected the

majority's claim that the government should rely on traditional and less intrusive methods of identification, and thus has no need for DNA collection. She noted that the State had a strong interest in using the most reliable form of identification, and deemed the majority's position "'a Luddite approach' to Fourth Amendment interpretation." (App. 84a, quoting *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012), *en banc review granted*, ___ F.3d ___, 2012 U.S. App. LEXIS 15378 (order dated July 25, 2012)).With respect to the majority's rejection of the fingerprint analogy, Judge Barbera stated she "could not disagree more." (App. 79a). She noted that the law restricts testing to identification only, and added that the statute "categorically prohibits the plundering of 'the vast genetic treasure map' that is incidentally made available by DNA collection." (*Id*.).

The State asked the Court of Appeals to stay its mandate and reconsider the decision; that motion was denied on May 18, 2012. (App. 87b). The State then sought a stay from this Court, which was granted by the Chief Justice in his capacity as Circuit Justice for the Fourth Circuit. (App. 89b-92b). This petition follows.

REASONS FOR GRANTING THE WRIT

This is a case about whether the Fourth Amendment allows public safety officials to collect identifying DNA information from people who have been lawfully arrested and charged with serious crimes. This is not a case in which the State wrongfully disseminated, or otherwise made use of, a suspect's wholesale genetic information. Indeed, the State did not even cast its high-tech eyes on any true

gene, medically sensitive or otherwise.

Nonetheless, the Court of Appeals of Maryland operated from the premise that the State was looting a "vast genetic treasure" when it obtained a DNA profile from a person in its custody, and based upon that false conception of the issue at stake, struck down Maryland's DNA Collection Act as applied to arrestees. In so doing, the court exacerbated an existing split in the lower courts on this topic.

The Court of Appeals purported to apply a "totality of the circumstances" analysis, but it considered the wrong interests through the wrong lens in weighing King's privacy interest, while dismissing or ignoring the State's interests in reliably identifying people in its custody and solving crimes. Moreover, the court needlessly interjected a flawed "two-search" theory of the Fourth Amendment that, while seemingly not instrumental to its holding, portends dire consequences for all forms of forensic testing. These errors are not unique to the Court of Appeals of Maryland; they typify the factual, legal, and analytical mistakes made by the other courts that have blocked the collection of DNA on Fourth Amendment grounds.

This case presents an important issue because the split in the lower courts adversely affects public-safety efforts nationwide. As the Chief Justice recognized in granting the State's request for a stay, "the decision below has direct effects beyond Maryland: Because the DNA samples Maryland collects may otherwise be eligible for the FBI's national DNA database, the decision renders the database less effective for other States and the Federal Government." (App. 91b). This case truly presents a question vital to the nation as a

whole, and this Court should therefore grant the certiorari writ to review the judgment below.

I. There Is A Split Among The Lower Courts Regarding The Constitutionality Of DNA Collection From Arrestees.

This Court has recognized the tremendous value of DNA evidence in the criminal justice system, and at the same time has recognized the effectiveness, and desirability, of state legislation in establishing rules for its use:

> DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices. The Federal Government and the States have recognized this, and have developed special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure – usually but not always through legislation.

DA's Office v. Osborne, 557 U.S. 52, 55-56 (2009) (rejecting an "approach [that] would take the development of rules and procedures in this area out of the hands of legislatures and state courts").

Consistent with the Court's observation, 27 States and the Federal Government have DNA collection statutes that mandate the collection of DNA profiles from people arrested for, but not yet convicted of, various qualifying offenses. The Maryland statute at issue in this case was amended in 2008 to include arrestees, 2008 Md. Laws Ch. 337, and mandates

collection from people charged with burglary, crimes of violence, or attempts to commit burglary or crimes of violence. Md. Code Ann., Pub. Safety Art. §2-504(a)(3) (LexisNexis 2011 Repl. Vol.).

Unlike the court challenges to DNA collection from convicted persons, which have been unanimously rejected, court challenges to DNA collection from arrestees have resulted in a patchwork quilt of decisions, reaching different conclusions based on different grounds. The decision of the Court of Appeals conflicts with that of the Third Circuit Court of Appeals, *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012); the Ninth Circuit Court of Appeals, *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012), *en banc review granted*, ___ F.3d ___, 2012 U.S. App. LEXIS 15378 (order dated July 25, 2012)[1]; and the Supreme Court of Virginia. *Anderson v. Commonwealth*, 274 Va. 469, 650 S.E.2d 702 (Va. 2007), *cert. denied*, 553 U.S. 1054 (2008).

The Arizona Supreme Court has struck down that State's arrestee collection law, at least as applied to juveniles, on Fourth Amendment grounds. *Mario W. v. Kaipo*, 2012 Ariz. LEXIS 153 (Ariz. 2012). Arrestee collection has also been struck down in Minnesota. *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. Ct. App.

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[1] The Ninth Circuit has upheld the federal version of the DNA collection statute in *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010). As with *Haskell*, that opinion was withdrawn for *en banc* review, but was later dismissed as moot before the en banc hearing was held. 659 F.3d 761 (9th Cir. 2011). The federal statute was also upheld by *United States v. Fricosu*, 2012 U.S. Dist. LEXIS 22654 (D. Colo. 2012).

2006).[2]

While consistently couched in terms of Fourth Amendment jurisprudence, the reasoning of the courts striking down or upholding the law has varied. In *Mitchell* and *Mario W.*, as well as in this case, the courts applied a "two-search" analysis, treating the collection of the sample and the analysis of the sample as two distinct Fourth Amendment events. In *Mitchell*, the court concluded that both "searches" were permissible. In this case, the court determined that neither search was permissible. In *Mario W.*, the court determined that the collection was allowed, but the analysis was not.

This disarray in the lower courts requires clarification by this Court. States that are contemplating expanding their DNA collection statutes to include arrestees must know if the Fourth Amendment allows it.[3] And States that use DNA from arrestees in prosecutions must know whether that

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[2] An intermediate appellate court in California has also found that DNA collection from arrestees violates the Fourth Amendment; this decision has been depublished pending review by the California Supreme Court. *People v. Buza*, 197 Cal. App. 4th 1424, 129 Cal. Rptr. 3d 753 (Cal. Ct. App. 2011), *cert. granted*, 132 Cal. Rptr. 3d 616, 262 P.3d 854 (Cal. 2011). The United States District Court for Nebraska also found that state's arrestee collection law violated the Fourth Amendment. *United States v. Purdy*, 2005 U.S. Dist. LEXIS 40433 (D.Neb. 2005).

[3] In 2011, state legislatures in 11 states considered bills proposing the addition of arrestee provisions to their existing DNA collection statutes. *See* DNAResource.com, "2011 DNA Database Legislation," http://www.cqstatetrack.com/texis/viewrpt/main.html?event=495bdbf6ba (last visited August 9, 2012).

DNA was lawfully acquired – and, indeed, whether there is any meaningful distinction, from a Fourth Amendment perspective, between a DNA "hit" obtained from a post-conviction sample and a DNA "hit" obtained from a post-arrest sample. This Court should grant certiorari review to resolve the split and to set forth the correct analytical framework for considering any future challenges to the collection and analysis of DNA.

II. The Split In Lower Courts Disrupts Law Enforcement Efforts Nationwide.

The usefulness of DNA profiles as a public safety tool is greatly enhanced by the existence of a nationwide database of DNA profiles created by Congress in 1994 with the passage of the DNA Identification Act, 42 U.S.C. §14132. The database, known as the Combined DNA Index System, or CODIS, allows for the comparison of profiles across the nation and helps identify suspects otherwise known only by the biological profiles they have left behind. As a result of the disparate approaches and holdings of the lower courts regarding the collection of DNA samples from arrestees, the seamless, multi-state DNA database system that was intended to be a powerful and accurate tool for identifying suspects and exonerating the innocent has been impaired.

The Court of Appeals ruled that taking DNA profiles from lawfully arrested people violates the Fourth Amendment to the United States Constitution. This decision significantly impedes the State's ability to identify and prosecute criminals. Moreover, the differing results reached by various lower courts considering this issue have interfered with the

operation of national, multi-state forensic DNA databases. Because the use of DNA from arrestees affects law enforcement operations across state lines, the schism between those States that allow arrestee DNA samples and those that do not creates confusion in prosecutions far outside the jurisdiction of those courts which have struck down DNA collection laws on Fourth Amendment grounds. Profiles previously submitted to CODIS in some states may no longer be used for comparison purposes in other states. Detailed and highly structured legislative schemes for improving the efficiency and efficacy of law enforcement and pretrial detention are dismantled. Moreover, when a state court refuses to allow the collection or submission of lawfully acquired DNA samples, all states suffer, because the database is smaller than it otherwise would be.

It is for these reasons that this Court should grant review in this case. Twenty-seven states and the federal government have adopted statutes which allow for the collection of identifying DNA profiles from arrestees, and more are likely to follow. State and federal courts have reached different, and irreconcilable, conclusions regarding the propriety of these statutes under the Fourth Amendment. This haphazard, state-by-state interpretation of the Fourth Amendment requires guidance from this Court.[4]

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[4] The fact that the Maryland statute in question will, if no further action is taken by the state legislature, expire as of January 1, 2014, provides no basis for denying review. Given the strong expressions of support from state elected officials in the wake of the Court of Appeals' decision, there is no reason to (continued...)

III. The Court Of Appeals' Ruling Misapplied This Court's Fourth Amendment Jurisprudence.

In determining whether Maryland's DNA Collection Act complied with the Fourth Amendment, the Court of Appeals applied the "totality of the circumstances" balancing test used by this Court in *United States v. Knights*, 534 U.S. 112 (2001) and *Samson v. California*, 547 U.S. 843 (2006).[5] The court's

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[4](...continued)
believe that the law would be allowed to "sunset;" earlier sunset provisions written into the law were removed before the law could expire. Morever, even in the unlikely event that the law were allowed to expire, that would not render this case moot, and lawmakers in Maryland and all other states would still require some guidance as to what form of legislation might take its place. Lastly, the Fourth Amendment issues raised by this case are critical not just in Maryland, but nationwide.

[5] The *Knights*/*Samson* approach is not necessarily the only approach applicable to an arrestee-collection case such as this. As discussed in *United States v. Robinson*, 414 U.S. 218 (1973), a search of a suspect's person incident to a lawful arrest are "not only an exception to the warrant requirement of the Fourth Amendment, but [] also a 'reasonable' search under that amendment." *Id*. at 235. *See also Weeks v. United States*, 232 U.S. 383, 392 (1914) (recognizing well-established right of police to "search the person of the accused when legally arrested[.]"). Considered as a search incident to King's arrest, the collection and analysis of identifying information from a buccal swab would also pass constitutional muster. And, indeed, there are still other theories of Fourth Amendment jurisprudence that could be applied. *See*, *e.g.*, David H. Kaye, *A Fourth Amendment Theory for Arrestee DNA and Other Biometric Databases*, University of Pennsylvania Journal of Constitutional Law, Vol. 15 (in press) (arguing for categorical "biometric identification" exception encompassing, among other things, fingerprint and DNA (continued...)

application of that test was, however, deeply flawed. Neither its determination of King's privacy interest nor its assessment of the State's interests survives scrutiny.

A. The court incorrectly identified and weighed the privacy rights of arrestees.

The court erred from the start by determining that King's privacy interest embraced his genetic information writ large. This, in turn, allowed the court to draw a false distinction between DNA sampling and traditional fingerprinting. Compounding that error, the court appears to have assumed, without critical analysis, that the Fifth Amendment trial right to a presumption of innocence applies to a pretrial Fourth Amendment analysis of a search. As a result, its conclusion that the collection of DNA heavily impinged on an arrestee's right of privacy was incorrect.

1. The court mistakenly determined that an arrestee's privacy interest was in overall genetic privacy when, in fact, the State does not analyze any genetically meaningful information.

At issue in this case is what information is actually analyzed by the State, not what information could, in theory, be obtained by anyone with access to King's cells. There are both regulatory and statutory barriers to the misuse of DNA information. Collection and storage of DNA information is limited to "DNA records that directly relate to the identification of individuals[,]" Md. Code Ann., Pub. Safety §2-505, and

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[5](...continued)
identification).

access to DNA information is narrowly circumscribed. *Id*., §2-508. Moreover, it is a crime – punishable by up to five years' incarceration and a $5,000 fine – to improperly disclose or obtain DNA information. *Id*., §2-512. 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). Other courts have – in assessing statutes with far fewer restrictions – refused to speculate as to the possible harms of potential *ultra vires* misuse of biometric information.[6]

Because the State's interest is only in identity, the State does not analyze true genes of the people it arrests.[7] It analyzes specific non-coding areas of

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[6] "It should be added that all United States attorneys and marshals are instructed by the Attorney General not to make public photographs, Bertillon measurements or finger prints prior to trial, except when a prisoner becomes a fugitive from justice, and are required to destroy or to surrender to the defendant all such records after acquittal or when the prisoner is finally discharged without conviction. There is therefore as careful provision as may be made to prevent the misuse of the records and there is no charge of any threatened improper use in the present case." *United States v. Kelly*, 55 F.2d 67, 70 (2d Cir. 1932).

[7] In addition to the statutory and regulatory bars, there are practical reasons why the State has neither the ability nor the desire to gather and analyze genetic data from suspects. First, the state forensic laboratory simply does not possess the profiling kits necessary to capture information about other loci. Second, because the profiles in the databases show only a small group of pre-approved, non-coding loci, the State would be unable to compare

(continued...)

chromosomes that are used for identification purposes. These non-coding loci, by definition, do not correspond to any biological traits or phenotypical characteristics; they are not "genes" in the true sense of that word. *See* Sara H. Katsanis and Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, Journal of Forensic Science (in press) (concluding that loci used for forensic identification do not convey any sensitive or biomedically relevant information). The forensic laboratory does not have the capacity to analyze any other DNA taken from the sample cells, CODIS does not accept any information outside its pre-approved profile fields, and both the law and the relevant regulations expressly forbid any other use of the DNA. *See* Md. Code Regs. 29.05.01.06 (2012) (restricting use of samples).

The end result of the collection and analysis of these loci is a string of numbers unique to that particular individual. This sequence of numbers is useful only as an identifier; it reveals nothing else about that person. While the State necessarily has to take entire cells from arrestees to access the non-coding loci it uses to identify individuals, the only information it actually obtains and uses from those cells is this string of numbers that reveals nothing

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[7](...continued)
any improper information to profiles in the databases even if it possessed that information. Third, the State has absolutely no interest in learning if an unknown suspect has a genetic propensity for diabetes; it simply wants to identify him or her, and that goal is in no way advanced by gleaning genetic data that is useless from a forensic identification standpoint.

about individual genetic traits.[8]

This Court has made it clear that in judging whether a statute passes constitutional muster, the statute's presumptive correctness and a proper consideration of the role of the courts require that the court not "go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Thus, in *Whalen v. Roe*, 429 U.S. 589, 601 (1977), this Court refused to find that a right to privacy was violated because of the potential that a state agent might violate the restrictions on use and disclosure of information gathered pursuant to statute.

Any fair Fourth Amendment analysis of DNA collection statutes must restrict itself to the actual statutes as written and enforced, and not in wild, baseless speculation about the potential for deliberate or negligent non-statutory uses of the information gathered. In assessing the nature of King's privacy interest, therefore, the lower court should have considered only his interest in his biological identity.[9]

2. An arrestee has no, or minimal, interest in concealing his identity.

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[8] A standard DNA profile does indicate whether the donor has a Y-chromosome or not, thus revealing the donor's gender.

[9] The term "biological identity" is somewhat imprecise, but more accurate than "genetic identity" since the identifying sequence of numbers derived from a biological sample reveals nothing about a subject's genes.

The only information being obtained from King by the analysis of his buccal swab goes to his biological identity, and arrestees have no objectively reasonable expectation of privacy in their identities. It is well established that neither the Fourth nor the Fifth Amendment prohibits the State from asking the name and birth date of people it has arrested, or from taking their fingerprints and photographs.

This Court has made it plain that there is no Fourth Amendment right to anonymity. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 186-87 (2004) (finding that law requiring individual subjected to *Terry* stop to identify himself did not violate Fourth Amendment); *United States v. Dionisio*, 410 U.S. 1 (1973) (upholding right of grand jury to require witnesses to provide voice exemplars). Nor is there a Fourth Amendment right to hide physical evidence of one's involvement in a crime after being arrested. *Cupp v. Murphy*, 412 U.S. 291, 295-96 (1973). It is for these reasons that no court has barred fingerprinting or photographing arrestees. *See*, *e.g.*, *United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932) (allowing routine fingerprinting of arrestees).

Indeed, the Court of Appeals previously agreed with the fingerprint analogy. In *Raines*, 383 Md. at 18 n.11, 857 A.2d at 29, n.11, the court – upholding the Maryland DNA Collection Act as applied to convicted people – noted that "[t]he Act merely serves to identify the perpetrator similar to the way investigators have used fingerprints for many years." The *Raines* court noted with favor a similar ruling in the Fourth Circuit Court of Appeals, upholding Virginia's DNA Collection Act against a Fourth Amendment challenge: "As with

fingerprinting, therefore, we find that the Fourth Amendment does not require an additional finding of individualized suspicion before blood can be taken from incarcerated felons for the purpose of identifying them." *Jones v. Murray*, 962 F.2d 302, 306-07 (4th Cir. 1992); *see also* David H. Kaye, *Who Needs Special Needs? On the Constitutionality of Collecting DNA and Other Biometric Data from Arrestees*, 34 J.L. Med. & Ethics 188, 193 (2006).

The Court of Appeals erred, therefore, when it found that King had a reasonable expectation of privacy in his biological identity simply because that identity was expressed in terms of a sequence of numbers as opposed to a fingerprint, photograph, birth date, or name. (App. 61a). The State was entitled to determine King's identity in any reasonable fashion. While he may have hoped that his identity would remain hidden, King had no reasonable expectation of withholding his identity from the State after his arrest – even though the State, having obtained it, might then learn that he was involved in other crimes. *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) ("[A] 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered.").

3. The court gave undue weight to an arrestee's privacy interest by mistakenly applying the presumption of innocence, which is a trial right exclusively.

When weighing King's privacy interests, not only did the Court of Appeals identify the wrong privacy interest, it then improperly determined that the "presumption of innocence" magnified King's

expectation of privacy. (App. 58a) (State "bears the burden of overcoming the arrestee's presumption of innocence and his expectation to be free from biological searches").

But the Fifth Amendment trial right to a presumption of innocence has nothing to do with the Fourth Amendment pretrial right to be free from unreasonable searches and seizures. In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court held that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Id*. at 533; *see also United States v. Dillard*, 214 F.3d 88, 102 (2d Cir. 2000) (rejecting application of "presumption of innocence" to pretrial bail determinations), *cert. denied*, 532 U.S. 907 (2001). As this Court has recently noted, once lawfully in State custody, a criminal suspect simply does not retain the same privacy interest as a non-arrested person. *Florence v. Bd. of Chosen Freeholders*, 132 S.Ct. 1510 (2012) (allowing invasive searches of people arrested for even minor offenses). Thus, the presumption of innocence that protected King at his trial should have no effect on the determination of whether, as a person lawfully under arrest for a crime of violence, he had an objectively reasonable expectation to keep his DNA profile private. The State is not required to overcome the "presumption of innocence" before it may search an arrestee.

B. The court improperly ignored or dismissed the State's interests.

The Court of Appeals also erred in the second part

of its *Knights*/*Samson* analysis. The court incorrectly found that the State's interest in identifying people it had arrested was reduced simply because the arrestee had not yet been convicted. The court did not consider at all the State's interest in learning if the people it had arrested were involved in other crimes. And the court improperly substituted its judgment for that of the legislature in deciding that identifying arrestees by their photographs or fingerprints was sufficient to meet the State's needs.

1. The State has an interest in precisely identifying people in its custody through the most reliable means.

King, like many people charged with crimes of violence, remained in state custody pending trial. The State clearly has an interest in knowing the identities of the people in its custody. King could give a false name, he could even change his appearance, but the unique number sequence derived from his DNA remains constant. The lower court appeared to distinguish the State's interest in knowing who was in its custody or under its supervision post-trial from its interest in knowing who was in its custody or under its supervision pretrial, (App. 65a) ("There is no interest in prison safety or administration present."). That is simply false. King was an inmate in the Wicomico County Detention Center from the time he was arrested until he was sentenced to the Maryland Division of Correction after his rape conviction.

Similarly, the State has an interest in accurately determining whether King had a history of criminal behavior. By obtaining King's DNA profile, the State could (and did) check to see whether the person with

that DNA profile was associated with any other crimes – and in so doing, discovered that the person with that DNA profile was the primary suspect in a six-year-old rape case. This information about other criminal involvement provides the State with guidance on what bail (if any) should be set pending trial, what level of pretrial supervision should be ordered, whether King was wanted in other states, and even where King should be housed while incarcerated.[10]

The State's interest in learning the biological identity of arrestees is not reduced because the arrestees have not yet been convicted. While it is true that the State's interest in collecting DNA information from arrestees differs, in some respects, from its interest in collecting DNA information from convicted people, for the most part the interests are the same. The lower court decreed, without analysis, that "the expectation of privacy of an arrestee renders the government's purported interests in DNA collection reduced greatly. . . . King's expectation of privacy is greater than that of a convicted felon . . . and the State's interests are more attenuated reciprocally." (App. 59a). Not only is this statement incorrect, but it makes the illogical assertion that the State's interests are wholly dependent upon the arrestee's expectations, and vice-versa. Of course it is possible both for the arrestee to have a significant privacy interest AND for

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[10] The fact that DNA evidence of an arrestee's involvement in another crime might not come to light until after the initial bail decision has been made does not eliminate it from consideration. A person awaiting trial might not have "made bail" before the DNA match is discovered; a person released on pre-trial supervision may be brought back into custody.

the State to have its own significant interests in conducting the search, just as it is possible for the arrestee to have no meaningful privacy interest and the State to have no meaningful interest in conducting the search. The two interests are not dependent upon one another; the strength of one does not increase at the expense of the other.

2. The State has an interest in solving unsolved crimes as expeditiously as possible.

Additionally, of course, the State has an interest in solving crimes. The minimally invasive search of a person already in police custody to obtain nothing more than identifying information constitutes a *de minimis* intrusion, but the value of the information obtained is significant – the State can, at the very least, narrow its field of suspects and save investigative resources, it can solve crimes faster, it can identify suspects with greater accuracy, and it can reduce the risk of setting a dangerous criminal free due to its failure to identify him as such.

3. The court interfered with a legislative judgment in deciding that other existing means of identification, like traditional fingerprinting, were "sufficient."

Lastly, the court erroneously discounted the State's interest in identifying arrestees through their DNA by improperly substituting its judgment for that of the legislature in determining which forms of arrestee identification were sufficient for public-safety purposes. (App. 66a-67a). Whether the State could, in theory, identify people in other ways is simply irrelevant. "State legislation which has some effect on

individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part." *Whalen*, *supra*, 429 U.S. at 597. The legislature of Maryland, like that of the United States and 26 other States, has determined that DNA profiles should be obtained as a part of the booking process for certain arrestees. That an arrestee may also be identified in other ways has nothing to do with the Fourth Amendment analysis.

Even if the existence of alternative means of identification were relevant to the analysis, the Court of Appeals was incorrect in its assumption that fingerprint or photographic identification is an equal substitute. In King's case, for example, the victim did not recognize her assailant and he left no usable fingerprints behind; his identifying "calling card" was the DNA he left at the scene of the crime. Moreover, the determination of identity through DNA is the most scientifically accurate method of identification available to the State. *See* National Research Council, *Strengthening Forensic Science In The United States*, National Academies Press at 139 (2009) (comparing the subjectivity of fingerprint comparison to the objective standards of DNA comparison). King's identity was known to the rape investigators only as a sequence of numbers. Obtaining his identity in a different format – as a series of friction ridges on a fingerprint card – after he was arrested did not meet the State's legitimate identification needs.

What the State did with King's identity once it was lawfully obtained was not a Fourth Amendment factor at all. Certainly part of the value of having King's identity in the form of a CODIS-compatible DNA

profile arose from the State's ability to then submit that profile for comparison in CODIS. But the comparison of King's profile to samples already stored in databases was not a Fourth Amendment "event," any more than comparing his identification in any other form implicated the Fourth Amendment. There are no Fourth Amendment issues in checking King's name and birth date for outstanding warrants, or in comparing his photograph to "wanted" posters, or in submitting his scanned and digitized fingerprints to the Integrated Automated Fingerprint Identification System (IAFIS) for comparison, and similarly, there are no Fourth Amendment barriers to submitting a DNA profile for comparison. Not only was the lower court incorrect in substituting its judgment for that of the legislature on this point, it was incorrect in deciding that fingerprints, photographs, and DNA profiles were mutually fungible.

C. The court's "two-search" theory prevents law enforcement from examining evidence already in its lawful possession — such as crime-scene evidence — without first obtaining a warrant based on probable cause.

Another error, and another basis for review, relates to the Court of Appeals' invocation of a "two-search" theory. The court stated that, "[a]s other courts have concluded, we look at any DNA collection effort as 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, a step required to produce the DNA profile." (App. 58a). The court was correct in observing that "other courts" have done the same thing. It was

incorrect in following suit.

There is one search. The search begins with the swab of the cheek and ends with the production of the numbers that constitute King's DNA profile. Describing this as two searches creates massive, and unsolvable, conceptual and practical problems. By referring to the examination of the cells as a new search, courts necessarily create a need for police to make new showings of probable cause each time they seek to examine evidence already properly in their possession. Thus, police would have to obtain a warrant to derive a DNA profile from the swabs taken from a rape victim. They would have to make a showing of probable cause before test-firing a weapon taken from a person arrested on an outstanding warrant. The police would have to obtain a warrant to examine objects found on the street, or turned over to them by third parties.

This "two search" theory has been articulated by other courts. Applying it, one court has held that both searches are constitutional, one court has held that the collection but not the testing is constitutional, and the Court of Appeals held in the decision below that both searches are *un*constitutional. *See Mitchell*, 652 F.3d at 406; *Mario W.*, 2012 Ariz. LEXIS 153 at *12-13; App. 58a. The fact that three different courts purporting to apply the same jurisprudential theory produce three different results is, by itself, an indication that the theory is flawed. The fact that the theory has, essentially, no precedent or valid supporting authority and that none of the courts has addressed the repercussions of that theory outside of the narrow scope of arrestee DNA profiles further

supports this Court's grant of certiorari review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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