

No. 12-207

In the Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

ALONZO J. KING, JR.,

Respondent.

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

**BRIEF OF MARYLAND CHIEFS OF POLICE
ASSOCIATION, INC., MARYLAND SHERIFFS'
ASSOCIATION, INC., AND POLICE CHIEFS'
ASSOCIATION OF PRINCE GEORGE'S
COUNTY, MARYLAND, INC. AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICI CURIAE*¹

The Maryland Chiefs of Police Association, Inc. (“MCPA”), Maryland Sheriffs’ Association (“MSA”), and Police Chiefs’ Association of Prince George’s County (Maryland) (“PCAPG”) write in support of the Petitioner, State of Maryland, and in support of its Petition for Certiorari.

These *amici* are professional associations with a membership of more than 350 chiefs of police, sheriffs, other law enforcement members, directors of private security entities, and interested parties in related professions. Within their collective membership, most of the 130 law enforcement agencies in Maryland are represented. The MSA also represents the State’s elected sheriffs who, in addition to standard law enforcement services, are also responsible for maintaining county detention centers and correctional facilities.

These associations serve law enforcement management and front line officers alike by providing opportunities for training, networking, strategic planning, and mutual support to better serve and protect the citizens of Maryland.

¹ The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Amici intend to address the Court on behalf of the law enforcement community and urge that Maryland's petition be granted. The collection of DNA from citizens who have been arrested for certain enumerated crimes is a critical and effective modern tool that assists law enforcement in solving crimes, identifying perpetrators, and eliminating errors. These law enforcement goals constitute a vital State interest that the Maryland Court of Appeals failed to adequately recognize.

Amici are in a position to assist the Court in this case because the outcome of the case will affect not only all law enforcement agencies in Maryland, but also across the country; its import will not be limited to the parties to this case. *Amici* represent a large segment of the Maryland law enforcement population and are representative of the national law enforcement landscape.

INTRODUCTION AND SUMMARY OF ARGUMENT

Each law enforcement officer, from those on the front line to chiefs of police, takes an oath to uphold the United States Constitution and the constitution and laws of the various states. In support of this oath and to serve the public safety needs of their communities, officers are tasked with conducting investigations that have a dual goal: to exonerate the innocent and to arrest the guilty. DNA evidence makes a substantial contribution toward achieving this dual goal.

Moreover, public safety agencies and correctional facilities have a strong interest in obtaining the true identity of those in custody for safety and management purposes. In Maryland, pretrial detainees and arrestees may be held in local correctional facilities for up to several months before trial, and proper management of these persons requires firm identification of who they are and what backgrounds they have.

The prompt identification of arrestees allows law enforcement to narrow the focus of criminal investigations and effectively solve cases, new and old, more quickly. DNA collection and testing supports this efficiency of process, protects innocent citizens, and shields officers from potential civil liability for wrongful arrests.

ARGUMENT

This case, as outlined in the State of Maryland's Petition for Certiorari, presents an ideal opportunity for the Court to address and resolve the issue of the constitutionality of the collection of DNA evidence from people who have been arrested but not yet convicted. Approximately twenty-six other states have enacted or are considering DNA collection legislation similar to Maryland's, and lower courts are divided as to the constitutionality of these procedures. These courts and legislative bodies need the guidance of this Court to resolve this confusion; the Court must address the issue, sooner rather than later.

The law enforcement community strongly supports the collection and use of DNA evidence to service multiple legitimate public safety goals. These goals far overshadow the intrusion into a citizen's privacy interest required to obtain DNA evidence. The Court should grant the Petition in order to reverse the Maryland Court of Appeals and establish that this identification and investigative process is a reasonable search under the Fourth Amendment, and thus constitutional.

By granting the Petition, this Court can correct the error of the Maryland Court of Appeals, establish that the Maryland DNA collection statute is constitutional, and set guidelines for other legislatures, law enforcement entities, and courts.

While the *amici* support and agree with all of the arguments put forth by Maryland, this brief calls the Court's attention to the substantial State law enforcement and correctional interests that the court below failed to recognize. Once recognized, these interests clearly outweigh any privacy interest held by persons who are arrested and subjected to a minimally invasive search.

1. *The Court should grant the Petition in order to establish that the "search incident to arrest" exception to the warrant requirement applies to the taking of DNA samples from those arrested.*

In reviewing this case, the Court will have the opportunity to establish that the "search incident to

arrest” exception to the warrant requirement that originated with *Chimel v. California*, 395 U.S. 752 (1969) applies to the relatively non-intrusive collection of “personally identifying markers² that can generate a list of probable perpetrators of serious crimes.” D.H. Kaye, *The Constitutionality of DNA Sampling On Arrest*, 10 Cornell J.L. & Pub. Pol’y 455, 508 (2001).

If, on the other hand, the Court were to require law enforcement officers to obtain warrants before taking DNA samples, even if only for those relating to offenses other than the one that triggered arrest, it would defeat the very purpose of DNA databases, which are an intelligence tool as much as they are a device for linking a known suspect with a known offense. *Id.* at 501. The risk of officers making pretextual arrests intended to secure a DNA profile is already statutorily limited because evidence resulting from a match in the database is subject to exclusion if there was no probable cause to arrest in the first instance. *Id.* See also Md. Code Ann., Pub. Safety § 2-511 (West Supp. 2011). Requiring a warrant adds no protection for the arrestee, but significantly limits law enforcement’s ability to fully utilize the DNA process established by the state legislature.

² The DNA technology developed and in use in Maryland identifies individuals by a sequence of 13 hyper-variable DNA loci values that are comparable to unique fingerprint identification features in that they reveal no personal information about the suspect, but provide an identification unique to the individual.

Moreover, the “true identity” exception to the warrant requirement that pertains to fingerprinting should also apply to DNA genotyping. *See* Petition at 18-19, 21-23.

This DNA identification procedure has yielded significant public safety results since the enactment of Maryland’s DNA arrestee law. Between January 1, 2009, and July 26, 2012, DNA comparisons of samples taken from arrestees created 193 “hits” and lead to 69 arrests of serious offenders. *DNA Statistics*, Governor’s Office of Crime Control & Prevention, <http://www.goccp.maryland.gov/dna/statistics.php> (last updated July 26, 2012). The identification of these criminals was only possible because State law allowed for the taking of the initial sample upon arrest.

2. *The Court should grant the Petition in recognition of the challenges faced by correctional officials in maintaining safety and security in institutions.*

Detention facilities such as those operated by Maryland sheriffs and local correctional officials have a strong interest in identifying those held in their custody, even those held for a limited period of time. This Court recently recognized that “[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals.” *Florence v. Board of Chosen Freeholders of the County of Burlington*, ___ U.S. ___, 132 S. Ct. 1510, 1520 (2012). Moreover, the Court noted that “[t]he difficulties of operating a detention center must not

be underestimated by the courts,” *id.* at 1515, and that “[j]ails can be even more dangerous than prisons because officials there know so little about the people they admit at the outset.” *Id.* at 1521.

Maryland sheriffs and local correctional officials operate these facilities and are responsible for housing pretrial detainees. Maryland’s District Court Commissioner system tends to result in more temporary commitments to local detention centers than releases on bond. *See* Md. Code Ann., Cts. & Jud. Proc., § 2-607 (2011). Indeed, in the period spanning July 2011 through June 2012, a total of 5175 arrested persons were held in local jails for less than 90 days, and more than 2700 were held for more than 90 days before trial. *See* Office of Grants, Policy, and Statistics, Maryland Department of Public Safety and Correctional Services, *Annual Summary of Monthly Jail Statistics for FY 2012* (2012). (Reproduced in Appendix.)

Even though pretrial detainees may have a somewhat greater expectation of privacy than convicted persons serving sentences, the detention facility has the same interest in identification with respect to both groups. Detention officials are charged with “maintaining institutional security and preserving internal order and discipline . . . [which] may require limitation or retraction of retained constitutional rights of both convicted and pretrial detainees.” *Bell v. Wolfish*, 441 U.S. 520, 546 (1979).

The Third Circuit has recognized that collecting identifying information “applies with equal

force to arrestees and pretrial detainees.” *United States v. Mitchell*, 652 F.3d 387, 413 (3d Cir. 2011). Moreover, a person’s identity is not just “who that person is” but also includes “what that person has done.” *Id.* at 414 (quoting *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1199 (N.D. Cal. 2009)). DNA collection serves this interest better than fingerprinting because of the “greater precision of DNA sampling and matching methods.” *Id.* at 413.

As DNA matching technology advances and becomes more expeditious, the value of its use will further enhance the ability of correctional officials to properly segregate prisoners and recommend for release or other programs those who would otherwise qualify.

The Court should grant the Petition and recognize this important State interest in protecting the safety of its employees and those in its custody, an interest that clearly satisfies the reasonableness demands of the Fourth Amendment.

3. *The Court should grant the Petition in order to give deference to law enforcement’s interests in solving crimes.*

Law enforcement has a strong interest in preventing dead-end investigations, wrongful accusations, and clearing potential suspects. Kevin Lapp & Joy Radice, *A Better Balancing: Reconsidering Pre-Conviction DNA Extraction from Federal Arrestees*, 90 N.C. L. Rev. 157A, 165 (2012).

State legislatures have found that DNA samples and databases are important tools in criminal investigations, in the exclusion of individuals who are the subject of criminal investigations or prosecutions, and in detecting recidivist acts. The various states have enacted DNA collection laws to enhance the ability of federal, state, and local criminal justice and law enforcement agencies in the identification and detection of individuals in criminal investigations, the identification and location of missing and unidentified persons, and the identification and management of individuals kept in custody, either in the short or long-term. *See, e.g.* Fla. Stat. Ann. § 943.325(1)(a) (2012). *See also* *DA's Office v. Osborne*, 557 U.S. 52, 55 (2009) (noting that DNA testing “has the potential to significantly improve both the criminal justice system and police investigative practices.”)

In turn, this more efficient law enforcement process conserves resources and makes for safer communities. These goals would be thwarted if the ruling of the Maryland Court of Appeals is left intact. As well-analyzed by the State in its Petition, the “two search” theory espoused by that court would significantly hamper the police in conducting investigations. Petition at 25-27.

Moreover, the Court of Appeals’ entire search analysis runs counter to *Schmerber v. California*, 384 U.S. 757 (1966), a case in which this Court approved the non-consensual drawing of a suspect’s blood sample as appropriate incident to his arrest for

driving under the influence. In *Schmerber*, the Court recognized that both the extraction and “the test chosen to measure petitioner’s blood-alcohol level” were reasonable. *Id.* at 771. The Court considered seizure of the sample and the analysis thereof to be a single, reasonable evidentiary process that satisfied the requirements of the Fourth Amendment. The Court should find that DNA sampling and testing, which are less intrusive than blood sampling, are likewise constitutional as one seamless seizure and search.

4. *The State has a strong interest in instilling public confidence in the police and deterring crime.*

There is a strong governmental and societal interest in helping crime victims cope with what has happened to them and the possible life-altering effects it may have. The government has a “monumental” interest in “bring[ing] closure to countless victims of crime who long have languished in the knowledge that perpetrators remain at large.” John D. Biancamano, Note, *The Evolving Nature of DNA Collection Statutes and their Fourth Amendment Justifications*, 70 Ohio St. L.J. 619, 636 (2009) (quoting *United States v. Kincade*, 379 F.3d 813, 838-39 (9th Cir. 2004) (en banc)).

The interest in bringing closure to victims applies with equal vigor to pretrial arrestees as it does to convicted felons on supervised release. Supporting and assisting the victims of crimes further aids law enforcement in its community

relations and criminal prosecutions. Prompt and effective criminal investigation enhances the public's confidence in its police agencies and leads to more effective policing.

Since the enactment of Maryland's DNA collection statute authorizing the collection of samples from both convicted felons and those arrested for burglary and violent crimes, the Governor's Office of Crime Control and Prevention has kept records of the law's effect. Among the recent headlines documented on its website and related to DNA evidence are these:

- *DNA Match in 2003 Silver Spring, Md. Rape Case*, The Washington Post, June 18, 2012
- *Man Sentenced in Killing of 91-year old*, ABC2News, May 4, 2012
- *Hagerstown Man Found Guilty in 2004 Rape*, Frederick News-Post, March 30, 2012
- *Convicted Rapist Found Guilty of Separate Rape in Rockville after 33 Years*, The Gazette, March 23, 2012
- *DNA Hit Leads to 30-year Sentence in 2008 Ocean City Rape*, The Daily Times, March 14, 2012
- *DNA Hit Brings Charges to 1984 La Plata Rape Case*, The Maryland Independent, March 9, 2012
- *Convicted Md. Rapist Admits to More Attacks*, The Washington Post, Feb. 27, 2012

- *DNA Sample Connects Car to Bike Accident, Anne Arundel Police Say*, The Washington Post, Jan. 19, 2012
- *DNA Leads Police to Arrest Man in Rape of 13-year old in 2005*, The Calvert Recorder, Jan. 13, 2012

News, Events & Press Releases, Governor's Office of Crime Control & Prevention, <http://www.goccp.maryland.gov/dna/news.php> (last visited Aug. 22, 2012).

There can be no doubt that the news of successful investigations and prosecutions serves the State's interest in deterring crime. Further, deterrence efforts and public confidence are undermined when criminals like Mr. King, who was convicted of a violent rape, are allowed to walk free.³ *King v. State*, 425 Md. 550 (2012).

5. *DNA evidence successfully exonerates persons who are wrongly arrested or convicted.*

Last, the collection and use of DNA evidence has lead to numerous pre- and post-conviction exonerations of individuals who were not responsible for the crimes charged. Law enforcement has a

³ The Court of Appeals' decision has received significant public attention in the State of Maryland. A recent front page article from the *Baltimore Sun* highlighted the potential impact of the decision on innocent victims. In one case, a man convicted of the rape of a 13-year-old girl in 2010 could be set free in light of the Court of Appeals' decision. Yvonne Wenger, *DNA Call Could Undo Rape Case*, Baltimore Sun, June 10, 2012, at 1.

strong interest in preventing wrongful convictions. Indeed, the International Association of Chiefs of Police (“IACP”) has identified the problem of wrongful convictions as one of its signature issues to address. Walter A. McNeil, *President’s Message: Our Recommitment to Addressing Wrongful Convictions*, The Police Chief, June 2012, at 6. Key to the IACP’s efforts is “the increased use of DNA evidence and increased DNA laboratory resources to aid in the exoneration of those wrongfully convicted . . .” *Id.*

Law enforcement officers recognize that their “ethical obligation of exonerating the innocent is equally matched by the obligation of arresting the guilty.” Michael D. Ranalli, *Wrongful Convictions and Officer Safety: Shifting the Focus to the Process*, The Police Chief, Jan. 2012, at 26. DNA evidence aids law enforcement in this effort, preventing investigations from going “in the wrong direction, [allowing] the true perpetrator to remain[] free to prey on new victims.” *Id.* at 28.

Again, turning to the headlines, it is obvious that DNA evidence contributes significantly to the proper institution of justice. On June 30, 2012, the *Washington Post* reported that DNA results exonerated two Prince George’s County teenagers who had been charged with rape. Investigators indicated that the charges had been based “on the faulty word of an acquaintance of theirs,” an accusation that in years past could have lead to a wrongful conviction and imprisonment. Matt

Zapotosky, *DNA Results Exonerate Two Teens in Rape Case*, Wash. Post, June 30, 2012, at B3.

DNA exoneration unfortunately came much later for another Maryland man who served fifteen years in prison before being cleared. His case was reported by the *Washington Post* on October 31, 2010, and posted on the website of the Governor's Office of Crime Control and Prevention. Dan Morse, *After 15 Years in Prison, Montgomery Man is Cleared of Murder*, Wash. Post, Oct. 31, 2010, at C4. See also *News, Events & Press Releases*, Governor's Office of Crime Control & Prevention, <http://www.goccp.maryland.gov/dna/news.php> (last visited Aug. 22, 2012).

The exoneration of individuals enhances officer safety and protects law enforcement officers from civil liability. Extensive and expensive litigation ensues when the wrongfully arrested or convicted sue officers for constitutional and common law claims. The government has a strong interest in preventing potential liability for itself and its employees.

The Court should grant certiorari in this case in order to establish that statutes authorizing the collection and use of DNA evidence should be evaluated under a totality of the circumstances test balancing an individual's expectation of privacy against the government interest in effective law enforcement, the administration of justice and public safety.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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ANNUAL SUMMARY OF MONTHLY JAIL STATISTICS FOR FY 2012
MONTHLY AVERAGES FOR MALES AND FEMALES FOR JULY 2011 - JUNE 2012
BY JURISDICTION AND TRAFFIC TOTALS

JURISDICTION	TRAFFIC IN DE TAKE PART URES		POPULATION LAST AVG DAY DAILY POP POP		INCARCERATION STATUS										
					PRETRIAL		LOCAL SENTENCE								
					LT 90	91+	PSI	LT	91-	181-	365	366	OVER	DOC	OTH
					DAYS	DAYS		90	180	364	DAYS	D-18	18		-ER
								DAYS	DAYS	DAYS		MO	MO		
ALLEGANY	148	148	153	145	70	23	1	25	16	9	1	1	1	7	0
ANNE															
ARUNDEL	763	776	826	817	381	117	1	74	30	39	60	112	10	4	0
BALTO. CITY	2,357	2,354	3,514	3,320	1,629	1,305	90	0	0	0	0	0	0	489	0
BALTIMORE	1,272	1,274	1,398	1,387	662	163	38	95	77	47	93	187	0	27	10
CALVERT	318	312	232	241	73	28	0	17	17	8	18	51	3	2	15
CAROLINE	125	126	108	108	36	11	0	10	11	7	12	20	0	2	1
CARROLL	145	149	231	231	73	39	0	11	10	8	20	60	0	6	4
CECIL	275	270	271	271	113	32	3	33	25	12	23	20	8	3	0
CHARLES	321	331	415	418	112	44	0	51	43	11	30	75	3	12	36
DORCHESTER	141	97	170	171	49	30	0	10	13	12	7	21	0	1	24
FREDERICK	318	322	391	397	289	46	0	41	34	74	2	73	9	8	3
GARRETT	97	97	59	62	16	4	3	8	7	3	5	9	2	1	0
HARFORD	548	544	400	396	118	34	1	96	57	27	23	36	0	8	0
HOWARD	299	299	322	320	108	40	1	18	12	8	22	30	1	3	81
KENT	46	47	69	70	14	6	0	7	5	3	8	8	1	1	14
MONTGOMERY	683	685	958	980	286	123	38	53	24	121	14	207	52	17	23
PR. GEORGE'S	1,233	1,232	1,303	1,313	622	501	0	19	11	10	40	56	1	43	0
QUEEN ANNE'S	86	85	85	86	28	7	1	9	6	3	10	10	2	3	6
ST. MARY'S	195	191	246	242	68	24	1	18	23	9	21	65	14	3	0
SOMERSET	63	59	98	101	14	15	1	9	11	13	15	11	11	0	0
TALBOT	85	87	88	85	23	16	0	8	5	1	7	14	0	1	13
WASHINGTON	225	225	383	401	178	51	5	20	14	17	35	45	4	10	2
WICOMICO	289	295	424	461	142	20	0	118	24	27	48	15	4	16	13
WORCESTER	198	198	198	200	71	24	7	17	12	6	22	34	2	6	0
TOTAL*	122,751	122,370	12,342	12,223	5,175	2,703	191	767	487	475	536	1,160	128	673	245

ANNUAL SUMMARY OF MONTHLY JAIL STATISTICS FOR FY 2012
MONTHLY AVERAGES FOR MALES AND FEMALES FOR JULY 2011 - JUNE 2012
BY JURISDICTION AND TRAFFIC TOTALS

JURISDICTION	PROGRAMS					ACTIVITY				THE ACCURACY OF DATA SUBMITTED BY JURISDICTIONS CANNOT BE GUARANTEED. ZERO VALUE AVERAGES MAY REPRESENT SMALL POPULATIONS. *TOTALS REPRESENT ANNUAL TRAFFIC ACTIVITY AND MONTHLY AVERAGES FOR POPULATIONS, STATUS, PROGRAMS AND ACTIVITY. DUE TO ROUNDING ERROR COMBINED MALE/FEMALE AVERAGES MAY NOT EQUAL THE SUM OF THEIR RESPECTIVE AVERAGES.
	WORK REL		HOME DET		WEEK END	MENT	SUI- COM	WALK CIDE	ES- -OFF	
	LAST	AVG	LAST	AVG						
	DAY	DAILY	DAY	DAILY						
POP	POP	POP	POP	POP						
ALLEGANY	32	32	4	4	8	0	0	0	0	
ANNE										
ARUNDEL	20	20	40	41	81	3	0	0	0	
BALTO. CITY	0	0	30	31	29	13	0	0	0	
BALTIMORE	55	59	39	41	33	4	0	1	0	
CALVERT	12	13	3	4	16	0	0	0	0	
CAROLINE	3	3	2	2	10	0	0	0	0	
CARROLL	13	13	5	6	7	0	0	1	0	
CECIL	32	29	0	0	19	0	0	0	0	
CHARLES	35	36	0	0	19	8	0	0	0	
DORCHESTER	3	3	1	1	6	0	0	0	0	
FREDERICK	63	63	4	4	1	1	0	0	0	
GARRETT	2	1	2	2	5	0	0	0	0	
HARFORD	23	24	0	0	43	3	0	0	0	
HOWARD	28	26	0	0	11	4	0	0	0	
KENT	3	2	1	0	2	0	0	0	0	
MONTGOMERY	155	157	0	0	4	8	0	1	0	
PR. GEORGE'S	0	0	124	125	10	0	0	0	0	
QUEEN ANNE'S	2	2	2	3	7	2	0	0	0	
ST. MARY'S	27	27	8	7	12	0	0	0	0	
SOMERSET	4	6	1	1	4	0	0	0	0	
TALBOT	6	6	2	2	3	0	0	0	0	
WASHINGTON	11	11	12	13	15	0	0	0	0	
WICOMICO	47	36	1	1	28	8	0	0	0	
WORCESTER	17	17	0	0	2	0	0	0	0	
TOTAL*	593	586	281	288	375	54	0	3	0	