No. 12-207

In the Supreme Court of the United States

STATE OF MARYLAND, PETITIONER

v.

ALONZO JAY KING, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL B. DEWOLFE
Public Defender
STEPHEN B. MERCER
Chief Attorney, Forensics Division
OFFICE OF THE PUBLIC DEFENDER
6 Saint Paul Street, Suite 1400
Baltimore, MD 21202

KANNON K. SHANMUGAM
Counsel of Record
JAMES M. MCDONALD
DAVID M. HORNIAK
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

QUESTION PRESENTED

Whether the Fourth Amendment permits the warrantless collection and analysis of DNA from a person who has been arrested for, but not convicted of, a criminal offense, solely for use in investigating other offenses for which there is no individualized suspicion.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Miscellaneous—continued:

In the Supreme Court of the United States

No. 12-207

STATE OF MARYLAND, PETITIONER

v.

ALONZO JAY KING, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Maryland Court of Appeals (Pet. App. 1a-85a) is reported at 42 A.3d 549. The court's order denying reconsideration and a stay of the mandate (Pet. App. 87b) is unreported.

JURISDICTION

The judgment of the Maryland Court of Appeals was entered on April 24, 2012. A motion for reconsideration was denied on May 18, 2012 (Pet. App. 87b). The petition for a writ of certiorari was filed on August 14, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

1. On April 10, 2009, respondent was arrested in Wicomico County, Maryland, and charged in state court with first- and second-degree assault. The charge of first-degree assault was later dropped; after respondent entered a plea pursuant to *North Carolina* v. *Alford*, 400 U.S. 25 (1970), he was convicted of second-degree assault, a misdemeanor offense. Pet. App. 4a & n.3.

Upon respondent's arrest, the state collected a sample of his DNA pursuant to the Maryland DNA Collection Act (Act), Md. Code Ann., Pub. Safety §§ 2-501 to 2-514. Although the Act had previously provided for the collection of DNA only from individuals who had been convicted of felonies or burglaries, the Maryland General Assembly temporarily expanded it in 2008 to cover individuals who had been charged with, but not yet convicted of, certain specified offenses—including, as is relevant here, first-degree assault. *Id.* § 2-504(a)(3); 2008 Md. Laws 337. The collection of DNA samples from covered individuals is mandatory; with regard to individuals who have been charged but not convicted, the Act provides that the state is to collect the sample at the time of the charge. Md. Code Ann., Pub. Safety § 2-504(b)(1).

The Act further provides that, "[t]o the extent fiscal resources are available," DNA samples "shall be * * * tested" for several purposes, including "as part of an official investigation into a crime"; "to analyze and type the genetic markers contained in or derived from the [sample]"; and "for research and administrative purposes," such as "develop[ing] a population data base after personal identifying information is removed" and "support[ing] identification research and protocol development of forensic DNA analysis methods." Md. Code Ann., Pub. Safety § 2-505(a). As to individuals who have been charged but not convicted, the Act authorizes the

state to store DNA samples while charges remain pending. *Id.* §§ 2-506(b), 2-511.

As is relevant here, the Act also authorizes the state to prepare and store "DNA records" (also known as DNA profiles), which can be compared with similar profiles in national and state databases. Md. Code Ann., Pub. Safety §§ 2-502(d), 2-504(d)(1), 2-506(a). Those databases contain DNA profiles from forensic evidence collected at crime scenes, as well as profiles of convicted and arrested individuals. See, *e.g.*, Federal Bureau of Investigation, *CODIS Brochure* (last visited Oct. 12, 2012) <tinyurl.com/codisbrochure>.

State personnel collected a sample of respondent's DNA by means of a swab of the inside of his cheek. The Forensic Sciences Division of the Maryland State Police processed respondent's DNA sample; a private vendor then analyzed the sample and prepared a DNA profile. After the DNA profile was uploaded into the state database, it was matched to a profile from forensic evidence of a 2003 sexual assault in Wicomico County. Pet. App. 4a-6a.

2. Based solely on that match, the state sought, and a Wicomico County grand jury returned, an indictment charging respondent with various offenses arising from the sexual assault, including first-degree rape. Because the Act provides that a match "may be used only as probable cause and is not admissible at trial," Md. Code Ann., Pub. Safety § 2-510, the state obtained a search warrant and collected a second DNA sample, which also produced a match. Pet. App. 7a.

Respondent moved to suppress evidence of the DNA match on the ground that the initial collection and analysis of his DNA violated the Fourth Amendment. Pet. App. 7a-8a. The trial court denied respondent's motion, summarily reasoning that "[i]t is well settled that pris-

oners do not enjoy the same Fourth Amendment protections against unconstitutional searches and seizures as the general population." C.A. App. 5. Based on stipulated facts, with respondent preserving his right to appeal on the Fourth Amendment issue, the trial court found respondent guilty of first-degree rape. Pet. App. 10a. The court sentenced him to life imprisonment. *Ibid.*

3. The Maryland Court of Appeals reversed. Pet. App. 1a-85a. It held, by a 5-2 vote, that the warrantless collection and analysis of respondent's DNA pursuant to the Maryland DNA Collection Act violated the Fourth Amendment. *Ibid.*

a. As a preliminary matter, the Maryland Court of Appeals reasoned that, under the Fourth Amendment, "[a] seizure or search will be upheld even if there is a reasonable expectation of privacy when the government has a 'special need.'" Pet. App. 14a. The court noted, however, that the state had "do[ne] little more than mention the special needs exception in the present case." *Ibid.* That was "for good reason," according to the court, because the "narrow confines" of that doctrine "do not embrace the case at bar." *Ibid.*

The court then proceeded to consider whether the collection and analysis of respondent's DNA were reasonable under the "totality of the circumstances" balancing test set forth by this Court in analyzing the Fourth Amendment rights of parolees and probationers. Pet. App. 14-17a (citing *Samson* v. *California*, 547 U.S. 843 (2006), and *United States* v. *Knights*, 534 U.S. 112 (2001)). After a lengthy analysis of the existing case law, the court explained that, under the "totality of the circumstances" balancing test, it was required to "weigh[] [respondent's] expectation of privacy on the one hand and the state's interests on the other, keeping in mind that the 'touchstone' of Fourth Amendment analysis is

reasonableness." *Id.* at 58a. The court added that "[o]ur analysis is influenced * * * by the precept that the government must overcome a presumption that warrantless, suspicionless searches are per se unreasonable." *Ibid.* And the court noted that, because respondent had been charged with, but not convicted of, a crime at the time his DNA was collected and analyzed, "[his] expectation of privacy is greater than that of a convicted felon, parolee, or probationer, and the [s]tate's interests are more attenuated reciprocally." *Id.* at 59a.

First addressing respondent's expectation of privacy, the Maryland Court of Appeals noted that "[respondent], as an arrestee, had an expectation of privacy to be free from warrantless searches of his biological material and all of the information contained within that material." Pet. App. 60a. The court observed that "DNA samples contain a massive amount of deeply personal information." *Id.* at 59a (internal quotation marks and citation omitted). The court then concluded that, to the extent the Act imposed restrictions on the use of the DNA sample, that fact "does not change the nature of the search." *Ibid.* The court explained that "upholding the statute simply because of restrictions on the use of the material would be analogous to allowing the government to seize private medical records without a warrant, but restrict their use only to the portion of the records that serve to identify the patient." *Id.* at 60a.

In a related vein, the court refused to "embrace wholly" the analogy between taking DNA samples and fingerprinting advanced by the state. Pet. App. 60a. At the outset, the court noted that the collection of respondent's DNA involved a physical intrusion, albeit a "minimal" one. *Ibid.* The court then observed that "[t]he information derived from a fingerprint is related only to physical characteristics and can be used to identify a person, but

no more." *Id.* at 61a. By contrast, "[a] DNA sample * * * contains within it unarguably much more than a person's identity." *Ibid.* "Although the [Act] restricts the DNA profile to identifying information only," the court continued, "we cannot turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the [s]tate." *Ibid.*

In determining that respondent's expectation of privacy was substantial, the court described the distinction between convicted and arrested individuals as "critical to our analysis." Pet. App. 62a. The court reasoned that, "[a]lthough arrestees do not have all the expectations of privacy enjoyed by the general public, the presumption of innocence bestows on them greater protections than convicted felons, parolees, or probationers." *Ibid.* The court added that the right to privacy implicated by DNA collection and analysis "should not be abrogated by the mere charging with a criminal offense," because "the arrestee's presumption of innocence remains." *Id.* at 62a-63a. And the court noted that the Act itself recognized that distinction, by providing for expungement of the DNA sample and profile where a qualifying charge does not result in a conviction. *Id.* at 62a.

Turning to the state's interests, the Maryland Court of Appeals reasoned that, because respondent had already been "accurately" identified by the time his DNA sample was analyzed several months after his arrest, "the only [s]tate interest served by the collection of his DNA" was "[s]olving cold cases." Pet. App. 64a-65a, 66a. Although the court recognized that interest as a legitimate one, it determined that "a warrantless, suspicionless search cannot be upheld by a 'generalized interest' in solving crimes." *Id.* at 65a. At the same time, the court conceded that its analysis might be different in a case in which the arrestee "presented false identification

when arrested or had altered his fingerprints or appearance in any way that might increase the [s]tate's legitimate interest in requiring an additional form of identification to be certain who it had arrested." *Id.* at 66a.

In analyzing the state's interests, the court emphasized that "DNA collection can wait until a person has been convicted, thus avoiding all of the threats to privacy discussed in this opinion." Pet. App. 67a. The court reasoned that, because "DNA profiles do not change over time (as far as science 'knows' at present)," "there is no reasonable argument that unsolved past or future crimes will go unresolved necessarily." *Ibid.* The court added that, in many cases in which DNA-related evidence is required for conviction, "there will be * * * substantial other evidence to provide probable cause for a search warrant" for that evidence. *Ibid.*

Based on its conclusion that the initial collection and analysis of respondent's DNA were invalid, the Maryland Court of Appeals suppressed the evidence of the subsequent DNA match under the "fruit of the poisonous tree" doctrine. Pet. App. 70a-71a.

b. Judge Barbera, joined by Judge Wilner, dissented. Pet. App. 72a-85a. At the outset, Judge Barbera conceded that the swab of respondent's cheek was a search for Fourth Amendment purposes. *Id.* at 73a. She nevertheless dissented on the ground that the majority had "overinflat[ed] an arrestee's interest in privacy and underestimat[ed] the [s]tate's interest in collecting arrestee DNA." *Ibid.*

In Judge Barbera's view, "[respondent's] privacy expectation at the time of the cheek swab was far more like a convicted felon, probationer, and parolee than an uncharged individual." Pet. App. 76a. Judge Barbera cited the ability of the police to conduct a search incident to arrest and another search incident to admission into the

jail population, *ibid.*; the relatively minimal intrusion from the cheek swab, *id.* at 77a; and the state's self-imposed limitations on the use of information contained in the DNA sample, *id.* at 79a-80a. Relying on those limitations, she concluded that DNA analysis is "in the end[] no different" from fingerprinting, because "the numbers of a DNA profile are identical to the ridges of a fingerprint." *Id.* at 81a-82a.

Judge Barbera then contended that the state had substantial interests in collecting and analyzing respondent's DNA. Pet. App. 83a-85a. She reasoned that "law enforcement's interest in identity extends to knowing whether a person has been involved in crime," *id.* at 84a, and that the state was not required to use the least intrusive means of identification, *id.* at 84a-85a. On that basis, Judge Barbera concluded that the government's interest in "identifying perpetrators of crime" outweighed the "significantly diminished expectation of privacy attendant to taking a [cheek] swab of an arrestee." *Ibid.*

c. The state filed a motion for reconsideration and a stay of the mandate, which was denied without recorded dissent. Pet. App. 87b.

4. The state then filed an application in this Court for a stay of the mandate. The Chief Justice granted the application. Pet. App. 89b-92b. The Chief Justice first determined that there was a reasonable probability of certiorari because the decision below conflicted with decisions of two federal courts of appeals and the Virginia Supreme Court. *Id.* at 90b. While noting that respondent had made "sound points" about the limited impact of the decision below, the Chief Justice ultimately concluded that the state had made the requisite showing of irreparable harm. *Id.* at 91b-92b.

ARGUMENT

This case raises a number of indisputably substantial issues concerning the privacy implications of the government's collection and analysis of DNA—issues that the Court has yet to confront. At the same time, this is the paradigmatic situation in which further percolation is warranted. Only one federal court of appeals and one other state court of last resort have squarely addressed the specific question presented here: namely, whether the Fourth Amendment permits the warrantless collection and analysis of DNA from a person who has been arrested for, but not convicted of, a criminal offense. Cases presenting that question are currently percolating in lower courts across the country. The science and technology behind DNA analysis continue to evolve rapidly, and the legal landscape is also shifting as officials develop new uses of DNA analysis and refine the governing laws in an effort to strike an appropriate balance between law-enforcement and privacy interests. In addition, for numerous statute- and case-specific reasons, this case is a particularly poor vehicle for the Court's review.

As the Court recently cautioned, "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." *City of Ontario* v. *Quon*, 130 S. Ct. 2619, 2629 (2010). The Court should await further legal and scientific developments before addressing the difficult issues presented by the application of traditional Fourth Amendment principles to the emerging technology of DNA collection and analysis. The petition for a writ of certiorari should be denied.

A. Petitioner Fails To Identify A Conflict That Warrants The Court's Review At This Time

Petitioner only briefly contends (Pet. 8-11) that the Maryland Court of Appeals' decision implicates a conflict among the lower courts. That is for good reason. At best, petitioner identifies a nascent and shallow conflict that the decision below creates with decisions of one federal court of appeals and another state court of last resort. This Court should permit further percolation before intervening to resolve any conflict.

1. a. On the federal level, only the Third Circuit has definitively addressed the constitutionality of the warrantless collection and analysis of DNA from a person who has been arrested for, but not convicted of, a criminal offense. In *United States* v. *Mitchell*, 652 F.3d 387 (2011), cert. denied, 132 S. Ct. 1741 (2012), the en banc Third Circuit upheld, by an 8-6 vote, the collection and analysis of DNA pursuant to the federal DNA statute, 42 U.S.C. 14135a. Like the Maryland Court of Appeals, the Third Circuit applied the "totality of the circumstances" balancing test set forth by this Court in analyzing the Fourth Amendment rights of parolees and probationers. See *Mitchell*, 652 F.3d at 403. The Third Circuit, however, reached a different result in balancing the defendant's expectation of privacy and the state's interests. The court first determined that "arrestees and pretrial detainees have a diminished expectation of privacy in their identity." *Id.* at 413. The court then determined that "DNA collection furthers the [g]overnment's interest in accurately identifying arrestees and pretrial detainees." *Id.* at 414. Based on those determinations, the court concluded that the federal DNA statute was constitutional, both facially and as applied to the particular defendant. *Id.* at 415-416.

Notably, the Third Circuit relied on the government's policy of "using only 'junk DNA' in creating the DNA profile, which does not contain any individual genetic information." 652 F.3d at 408. The court reasoned that, "[s]hould technological advancements change the value of 'junk DNA,' reconsideration of our Fourth Amendment analysis may be appropriate." *Ibid.*

Judge Rendell, joined by Chief Judge McKee and Judges Barry, Greenaway, Vanaskie, and Ambro, dissented in relevant part. She contended that "the majority g[a]ve[] short shrift to an arrestee's and pretrial detainee's expectation of privacy in his DNA * * * and overstate[d] the significance of the [g]overment's interest in collecting evidence to solve crimes." 652 F.3d at 416. And she asserted that "the searches and seizure of one's DNA permitted by [the federal DNA statute] implicate privacy interests far more expansive than mere identity." *Ibid.* Judge Rendell concluded that the "blanket mandate" of the federal statute "contradict[ed] basic and essential Fourth Amendment principles." *Id.* at 431.

On the state level, the only other court of last resort to have squarely considered the constitutionality of the warrantless collection and analysis of an arrestee's DNA is the Virginia Supreme Court. That court upheld the collection and analysis of DNA from an arrestee, but on different grounds from those later invoked by the Third Circuit. See *Anderson* v. *Commonwealth*, 650 S.E.2d 702 (Va. 2007), cert. denied, 553 U.S. 1054 (2008). Rather than engaging in "totality of the circumstances" balancing, the Virginia Supreme Court relied entirely on the analogy between the taking of DNA samples and fingerprinting. *Id.* at 705. Specifically, the court reasoned that "[a] DNA sample of the accused taken upon arrest, while more revealing, is no different in character than acquiring fingerprints upon arrest." *Ibid.* Because "[f]inger-

printing an arrested suspect has long been considered a part of the routine booking process," the court concluded, "the taking of a DNA sample * * * is permissible as a part of routine booking procedures." *Id.* at 706.

In granting petitioner's application for a stay in this case, the Chief Justice also cited the decision of a panel of the Ninth Circuit in *Haskell* v. *Harris*, 669 F.3d 1049 (2012). See Pet. App. 90b. After petitioner filed its stay application, however, the Ninth Circuit granted rehearing en banc in *Haskell*, rendering the panel's decision non-precedential. See 686 F.3d 1121 (2012). As matters currently stand, therefore, the Maryland Court of Appeals' decision at most creates a 2-1 conflict on the specific question presented here.[1]

b. The relative dearth of case law on the constitutionality of the collection and analysis of an arrestee's DNA is unsurprising, because that practice is a relatively recent one. Although the federal government and all fifty States have laws authorizing the collection and analysis of DNA from *convicted* individuals, the first law authorizing DNA collection and analysis from *arrested* individuals did not take effect until 1999. See Julie Samuels et al., *Collecting DNA From Arrestees: Implementation*

---

[1] The other decisions cited by petitioner either (1) have been withdrawn, see *United States* v. *Pool*, 621 F.3d 1213 (9th Cir. 2010), vacated as moot, 659 F.3d 761 (2011); (2) come from federal district courts or intermediate state courts, see *United States* v. *Fricosu*, 844 F. Supp. 2d 1201 (D. Colo. 2012); *United States* v. *Purdy*, Crim. No. 05-204, 2005 WL 3465721 (D. Neb. Dec. 19, 2005); *People* v. *Buza*, 129 Cal. Rptr. 3d 753 (Ct. App.), cert. granted, 262 P.3d 854 (Cal. 2011); *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. Ct. App. 2006); or (3) involve a materially different aspect of a DNA statute, see *Mario W.* v. *Kaipio*, 281 P.3d 476 (Ariz. 2012) (invalidating analysis of DNA from juveniles charged with certain offenses).

Lessons, Nat'l Inst. Just. J., June 2012, at 19 (Samuels); Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 Wake Forest L. Rev. 767, 775 (1999). The federal government and twenty-eight States now have laws applicable to arrestees; most of the state laws postdate the enactment of the federal law in 2005, see Samuels 19, and Maryland's temporary expansion to arrestees was enacted only in 2008, see p. 2, *supra*.

As the limited body of existing case law illustrates, the development of the legal framework governing Fourth Amendment challenges to DNA collection and analysis is still in its infancy. As the Fourth Circuit noted just weeks ago in a related context, "[t]he general issue of a person's reasonable expectation of privacy in his DNA is a developing and unsettled area of the law, one that has not yet been addressed by the Supreme Court." *United States* v. *Davis*, 690 F.3d 226, 240 (2012). The lower courts are only starting to come to grips with such foundational questions as what constitutes the applicable search or seizure triggering the protection of the Fourth Amendment, compare *Mitchell*, 652 F.3d at 406-407 (concluding that the collection and analysis of DNA constitute "two separate 'searches'"), with Pet. 26 (contending that "[t]here is one search"), and what analytical framework should govern DNA-related claims by arrestees, compare *Mitchell*, 652 F.3d at 403 (applying the "totality of the circumstances" balancing test), with *Anderson*, 650 S.E.2d at 706 (upholding DNA collection "as a part of routine booking procedures"), and Pet. 13 n.5 (suggesting that "there are still other theories of Fourth Amendment jurisprudence that could be applied").

Because the law in this area is so undeveloped, moreover, new arguments are still gaining traction. The Fourth Circuit's decision in *Davis*—which issued after

the petition for certiorari in this case was filed—provides a recent example. In that case, the Fourth Circuit held that the extraction and analysis of DNA from a *victim* violated the Fourth Amendment, but that suppression of the resulting evidence was unwarranted under the "good faith" exception of *United States* v. *Leon*, 468 U.S. 897 (1984). See *Davis*, 690 F.3d at 240-257. In so holding, the Fourth Circuit expressly distinguished the decision below, noting that the Maryland Court of Appeals "did not address at all the application of the good faith exception, nor is there any indication in the opinion that it was asked to do so." *Id.* at 250 n.29. Even beyond the shallowness of the claimed conflict, therefore, this Court would benefit from further maturation in the law before granting review on the question presented here.

c. The Court can be confident that additional opportunities will arise in short order to consider the constitutionality of the collection and analysis of DNA from arrestees. Of the cases in the asserted conflict, two of the three were decided within the last fifteen months. And there are at least two cases currently pending in a federal court of appeals or state court of last resort presenting the same question—both involving challenges to the application of California's DNA statute. In *Haskell*, *supra*, the en banc Ninth Circuit held oral argument on September 19; *Buza*, *supra*, is fully briefed and awaiting oral argument in the California Supreme Court. Further percolation is thus not only warranted, but already occurring.

2. The developments in the case law have taken place against the backdrop of similarly rapid developments in the science and technology of DNA analysis. In particular, recent discoveries suggest that the amount of personal information contained in a DNA profile is much greater than previously believed.

In defending the collection and analysis of respondent's DNA, petitioner contends that the "non-coding loci" it uses to prepare DNA profiles "do not correspond to any biological traits or phenotypical characteristics," such that "[t]he end result" is "useful only as an identifier" and "reveals nothing else about th[e] person." Pet. 16. That premise formed a central justification for the enactment of the federal DNA statute, see, *e.g.*, H.R. Rep. No. 900, 106th Cong., 2d Sess., Pt. I, at 9, 27 (2000), and it has been relied upon by courts that have upheld the collection and analysis of DNA from arrestees, see, *e.g.*, *Mitchell*, 652 F.3d at 408.

Even before the decision in this case, the scientific community had hotly debated the significance of "non-coding loci." See, *e.g.*, Elizabeth E. Joh, *Reclaiming 'Abandoned' DNA: The Fourth Amendment and Genetic Privacy*, 100 Nw. U. L. Rev. 857, 870 & n.74 (2006). In a series of groundbreaking papers published after the petition for certiorari was filed, however, scientists have shown that "non-coding loci"—colloquially known as "junk DNA"—"turn out to play critical roles in controlling how cells, organs and other tissues behave." Gina Kolata, *Bits of Mystery DNA, Far From 'Junk,' Play Crucial Role*, N.Y. Times, Sept. 6, 2012, at A1. That widely reported discovery was "considered a major medical and scientific breakthrough," with "enormous implications for human health." *Ibid.*

The evolving scientific understanding of the information contained in DNA—particularly in "non-coding loci" such as those used in preparing DNA profiles—provides a further reason for permitting further percolation before granting review on the question presented here. Awaiting further developments not only will aid the Court in its consideration of the question presented here, but may well help to resolve any conflict in the lower

courts on that question. In *Mitchell*, for example, the Third Circuit expressly acknowledged that "technological advancements" in the understanding of "junk DNA" could justify reconsideration of its holding that the Fourth Amendment permits the collection and analysis of DNA from arrestees. 652 F.3d at 408.

3. In addition to the developments in the case law and science, the legal landscape is also shifting as officials adopt new uses of DNA analysis and refine the governing laws. For example, law-enforcement officials are increasingly using DNA analysis not just to link an arrestee to other offenses, but to engage in "familial searching," whereby partial DNA matches involving an arrestee can be used to link the arrestee's *family members* to other offenses. See *Haskell*, 669 F.3d at 1079 (Fletcher, J., dissenting). Although the current version of the Maryland law prohibits familial searching of the state DNA database, see Md. Code Ann., Pub. Safety § 2-506(d), the laws of other jurisdictions permit the practice. See Federal Bureau of Investigation, *Familial Searching* (last visited Oct. 12, 2012) <tinyurl.com/familialdnasearching> (noting that, as of June 2011, California, Colorado, Texas, and Virginia performed familial searching).

Notwithstanding the recent discoveries concerning the significance of "non-coding loci," moreover, the Federal Bureau of Investigation (FBI) is currently in the process of implementing a proposal to expand the number of loci used to create the DNA profiles in the nationwide database system used by federal and state law enforcement. See Federal Bureau of Investigation, *Planned Process and Timeline for Implementation of Additional CODIS Core Loci* (last visited Oct. 12, 2012) <tinyurl.com/newloci>. Going forward, therefore, it is unclear which loci will be used to prepare DNA pro-

files—a fact that, depending on the information contained in those loci, may bear on the appropriate constitutional analysis.

At the same time, States are continuing to debate whether to adopt new DNA statutes or to refine existing ones. See DNAResource.com, *2011 DNA Database Legislation* (Jan. 21, 2012) <tinyurl.com/dnalegislation> (listing pending bills). Even among the existing laws, moreover, there are material variations as to their scope. Thirteen States collect DNA from all felony arrestees, while fifteen States collect DNA only from arrestees for certain enumerated felonies; seventeen States authorize DNA collection and analysis immediately upon arrest, while eleven States require arraignment or a judicial determination of probable cause before that process is initiated or completed; and twenty-one States require the arrestee to request expungement of the DNA sample and profile in the event the arrestee is not convicted, while seven States place that burden on the State. See Samuels 20-21, 23. In considering a challenge to California's DNA statute, members of the en banc Ninth Circuit recently suggested that at least some of those differences may be relevant to the constitutional analysis. See, *e.g.*, Oral Arg. at 5:52-8:43, *Haskell*, *supra* (No. 10-15152) (9th Cir. Sept. 19, 2012) <tinyurl.com/haskellargument>.[2]

At a minimum, the variations in existing laws underscore the need for further development in the case law before this Court intervenes. For now, the Court's review, on a difficult constitutional question involving an emerging technology, would be premature.

---

[2] Notably, no other State has filed an amicus brief supporting the petition for certiorari.

B. This Case Is A Poor Vehicle For Resolution Of Any Conflict

A number of vehicle issues unique to this case further counsel against the Court's review.

1. To begin with, the Maryland Court of Appeals did not, as petitioner contends, "str[ike] down Maryland's DNA Collection Act as applied to arrestees." Pet. 7. Instead, the court invalidated the Act *only as applied to petitioner*. See, *e.g.*, Pet. App. 70a. In so doing, the court relied on the fact that respondent had already been "accurately" identified by the time his DNA sample was analyzed—with the result that "the only State interest served by the collection of his DNA" was "[s]olving cold cases." *Id.* at 64a-65a, 66a. The court therefore left open the possibility that, in at least some cases in which DNA analysis was necessary for identification purposes in connection with the crime for which the arrestee had been charged, the collection and analysis of an arrestee's DNA pursuant to the Act would be valid. *Id.* at 67a.

For that reason and others, leaving the decision below in place would have only a limited impact on law enforcement in Maryland. In its stay application (at 16-17), petitioner contended that the collection and analysis of DNA from arrestees had resulted in fifty-eight prosecutions in Maryland, and a smaller number of prosecutions in other States, over the first three years that the temporary expansion of the Act to arrestees had been in effect. That number creates a misleading impression, however, because the Maryland Court of Appeals made clear that its decision would not affect the collection and analysis of DNA from individuals who are ultimately convicted of a criminal offense. Pet. App. 58a. And as noted above, the court also made clear that it was not prohibiting the collection and analysis of DNA from all arrestees. *Id.* at 67a. The Maryland Court of Appeals'

decision would therefore prevent the collection and analysis of DNA only from individuals who are charged with, but not ultimately convicted of, a criminal offense—and only in a subset of those cases, to boot.

The practical consequences of the Maryland Court of Appeals' decision are further limited because the expansion of the Maryland DNA Collection Act to arrestees is due to expire on December 31, 2013. The Maryland General Assembly has taken no action to make that expansion permanent or otherwise extend its applicability. And it is purely speculative to "assume the General Assembly w[ill] vote to extend and reauthorize the provision" in its upcoming 2013 legislative session. Br. of Md. Legislators 8. At least as matters currently stand, therefore, the decision below will affect only those individuals who are charged with (but not ultimately convicted of) a qualifying criminal offense in Maryland before December 31, 2013. Conversely, should this Court grant review, it would be doing so in full knowledge of the possibility that the underlying statute could become obsolete within a matter of months.[3]

2. In addition, this case is a poor vehicle for the Court's review because petitioner failed to develop the full panoply of potential arguments in support of the constitutionality of DNA collection and analysis and the admissibility of the fruits of that analysis. In particular, as the Fourth Circuit noted in *Davis*, petitioner did not argue below that the suppression of the evidence of the

[3] Amici legislators further contend (Br. 8-9) that the decision below affirmatively *disables* the Maryland General Assembly from reauthorizing the expansion to arrestees. That is incorrect. Because the Maryland Court of Appeals did not facially invalidate the Act, the General Assembly could validly reauthorize the expansion, leaving the Act in effect as to its constitutional applications.

DNA match was unwarranted under the "good faith" exception to the exclusionary rule. See 690 F.3d at 250 n.29. As the Maryland Court of Appeals noted, moreover, petitioner "d[id] little more than mention the special needs [doctrine]," Pet. App. 14a, which some courts have adopted as the appropriate analytical framework for DNA-related claims. See, *e.g.*, *United States* v. *Amerson*, 483 F.3d 73, 78 (2d Cir.) (claim by probationer), cert. denied, 552 U.S. 1042 (2007). Even if those arguments have not been forfeited altogether, the Court should await a case in which they were more fully developed and addressed below.

Finally, this case is an especially poor vehicle because of the lack of an extensive evidentiary record concerning the competing interests and the science and technology behind DNA analysis. The record, for example, contains no evidence of the number of hits that result from the collection and analysis of DNA from arrestees; no evidence of the rate at which those hits occur; and no evidence of the number of hits that involve arrestees who are not ultimately convicted of the offense of arrest. Cf. *Samson*, 547 U.S. at 853 (relying on the "empirical evidence presented" in evaluating the state's interests). Should the Court grant review in this case, it would have to rely on the parties and amici to develop the relevant factual record before this Court in the first instance. It would be preferable for the Court to await a case that already possesses such an evidentiary record. And for all of the reasons stated above, it would be prudent for the Court to wait to grant review on the question presented here until the relevant legal and factual environment is more settled. In short, the question presented may warrant the Court's attention one day—but it does not require it now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL B. DEWOLFE
Public Defender
STEPHEN B. MERCER
Chief Attorney, Forensics Division
OFFICE OF THE PUBLIC DEFENDER
6 Saint Paul Street, Suite 1400
Baltimore, MD 21202

KANNON K. SHANMUGAM
JAMES M. MCDONALD
DAVID M. HORNIAK
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

OCTOBER 2012