No. 12-207

IN THE
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

ALONZO JAY KING, JR.,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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King concedes that there are sharp divisions in the lower courts on the collection of DNA evidence from arrestees. King further seems to agree that the issue this case presents is critical, and that the Fourth Amendment implications of DNA collection should be addressed by this Court. These are all compelling reasons for granting certiorari. The reasons presented for denying certiorari in this case, by contrast, do not withstand scrutiny.

In his Brief In Opposition, King suggests that the disarray in the lower courts is a sign that the issue should await "further percolation," (Brief In Opposition at 10), that DNA comparison is an "emerging technology," (Brief In Opposition at 17), and that the Maryland Court of Appeals' decision applies only to a "subset" of arrestees under the statute. (Brief In Opposition at 19). All three contentions are mistaken, and none refutes the reasons given by the State for granting certiorari in this case.

I. "Percolation" is part of the problem.

In the past seven years, ten courts – five state and five federal – have issued published opinions regarding the constitutionality of DNA collection from arrestees. All have considered the practice on straightforward Fourth Amendment grounds. While the ten decisions have involved different statutes with different provisions, none of the decisions (with the limited exception of Arizona's) has depended upon provisions unique to any particular statute. Of these ten opinions, five have upheld the collection of DNA from arrestees,

and five have found it to be unconstitutional.[1]

Ten cases in seven years, in a variety of state and federal courts, resulting in an even split in outcomes, is not "percolation." It is disarray. And as the Chief Justice noted when granting a stay of the Court of Appeals' decision in this case, every time a state is precluded from contributing information into the database, all users of the database suffer. *Maryland v. King*, 2012 U.S. LEXIS 5018 (2012), slip op. at 3. Because of the interconnected nature of the DNA identification system, this is a subject area where every individual state or federal court decision has ramifications outside of that jurisdiction.

Additional delay will only create additional confusion. Criminal suspects, prosecutors, and the lower courts require clarity and uniformity in the application of the Fourth Amendment to the use of DNA for identification purposes.

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[1] Collection was found constitutional in *United States v. Mitchell*, 652 F.3d 387 (3rd Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012); *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012), *en banc review granted*, 686 F.3d 1121 (argued Sept. 19, 2012); *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010); *United States v. Fricosu*, 2012 U.S. Dist. LEXIS 22654 (D. Colo. 2012); and *Anderson v. Commonwealth*, 274 Va. 469, 650 S.E.2d 702 (Va. 2007), *cert. denied*, 553 U.S. 1054 (2008). In addition to this case, arrestee collection has been struck down, in whole or in part, in *Mario W. v. Kaipio*, 281 P.3d 476 (Ariz. 2012); *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); *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. App. 2006); and *United States v. Purdy*, 2005 U.S. Dist. LEXIS 40433 (D. Neb. 2005).

II. The identification of criminal suspects is not "emerging technology," nor is the forensic use of DNA.

The technique at the heart of this case is the use of immutable physical characteristics to identify people who have been arrested, and then using that identifying information to solve crimes. This technique has existed, in less precise, more subjective forms, at least since the introduction of the Bertillon system in the late 19th century. Courts in the United States have allowed the use of fingerprint identification for over a century. *See People v. Jennings*, 96 N.E. 1077, 1081-82 (1911) (allowing admission of fingerprint evidence to identify individual). The collection and use of biometric identification data has never been seriously questioned prior to the DNA era. *See United States v. Kelly*, 55 F.2d 67, 70 (2d Cir. 1932) (rejecting claim that collection of fingerprints after arrest was unlawful).

The basic theory and technology for deriving unique identifiers from a person's DNA have existed at least since 1975. Richard J. Reece, *Analysis of Genes and Genomes* 100 (2004). In 1985, DNA evidence first was used to identify a criminal suspect in the United Kingdom. Office of Technology Assessment, *Genetic Witness: Forensic Uses of DNA Testing* 8 (1990). Courts in the U.S. began addressing the forensic use of DNA identification shortly thereafter. *See Andrews v. State*, 533 So.2d 841 (Fla. App. Ct. 1988); *People v. Wesley*, 533 N.Y.S.2d 643 (County Court of Albany, 1988); *Cobey v. State*, 559 A.2d 391, 398 (Md. Ct. Spec. App. 1989). Congress formed the CODIS database in 1994.

Thus, the forensic application of DNA science has been in common use longer than GPS devices (see *United States v. Jones*, 132 S. Ct. 945 (2012)), the internet (see *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003)), and cell phones (see *Bartnicki v. Vopper*, 532 U.S. 514 (2001). It is in no sense "emerging."

King argues that the lack of an "extensive evidentiary record" makes this case a poor vehicle for review. (Brief in Opposition at 20). None of the "missing" evidence he cites, however, is relevant to Fourth Amendment analysis, and moreover the statistics he describes are matters of public record. The process by which King's DNA was collected, analyzed, and compared is routine and very common. Similarly, King throws out the "good faith exception" discussion in the recent case of *United States v. Davis*, 690 F.3d 226 (4th Cir. 2012), as a basis for denying certiorari in this case. (Brief in Opposition at 14). *Davis* addressed a much different issue – the collection of DNA evidence not undertaken pursuant to a statute or a warrant. There is no reason why this Court need consider or discuss the "good faith" exception in the context of King's case. It is simply irrelevant here.

King also cites a New York Times article about a research project known as ENCODE as evidence that DNA identification constitutes an "emerging technology." (Brief in Opposition at 15). ENCODE is an ongoing endeavor and many of its preliminary findings were already known to the scientific community before the project was given greater exposure in the national media. As King notes, the ENCODE publicity occurred after Maryland's petition was filed in this case;

nonetheless, an article cited in that Petition for the proposition that the 13 CODIS loci did not reveal any phenotypical information had already incorporated the ENCODE findings before reaching that conclusion. Sara H. Katsanis and Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 57 J. Forensic Sci. ___ (in press, published online Aug. 24 2012). *See also* Karen Kreeger, Sara H. Katsanis, and Jennifer K. Wagner, *Reconciling ENCODE and CODIS*, Penn Medicine News, Sept. 18, 2012 (http://news.pennmedicine.org/blog/2012/09/reconciling-encode-and-codis.html).

Certainly the boundaries of human knowledge and understanding are expanding every day. However, that will always be the case. Twenty-seven states and the federal government have adopted laws regarding the collection of DNA from arrestees. Regardless of future advances in molecular biology, the use of DNA for identification purposes has existed for some time and will continue to exist for the foreseeable future. States have been collecting DNA from arrestees since 1999. Nearly 14 years later, the constitutionality of these statutes should be clarified.

III. The scope of the Maryland decision is quite broad.

King claims that the decision of the Court of Appeals affects only "a subset" of arrestees and that the holding applied to King only. (Brief in Opposition at 19). However, the "subset" of arrestees affected by this decision consists of every qualified arrestee that Maryland has ever taken into custody since the law was enacted, and every qualified arrestee that Maryland is likely to take into custody in the

foreseeable future. A "subset" consisting of 100 percent of all past and future arrestees may be a subset, but it is a very inclusive subset.

The Court of Appeals' decision claimed to be only "as applied," but the number of individuals to which the ruling would NOT apply appears to be limited to two, and those two are fictional. The Court held that the State could use DNA testing to identify an arrestee if that suspect had no face and no fingerprints, and made reference to the 1997 science fiction film "Face/Off" as an example of such a thing.[2] *King v. State*, 425 Md. 550, 601 n.35 (2012). To date, Maryland has no record of having arrested a faceless, fingerprintless person for a qualifying felony, and therefore the distinction between the "as applied" ruling and a "facial" ruling is essentially nonexistent.

The fact is that the Court of Appeals' decision eviscerates a duly enacted law. Under the ruling, public safety officials in Maryland will be prevented from carrying out the primary function of the statute – obtaining identifying DNA information from all qualified arrestees. Moreover, because that identifying information could not be shared with the national database, other States – some of which have adopted different views on the constitutionality of DNA collection – will be unable to use that identifying information to solve crimes and/or exonerate suspects.

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[2] In the film, characters portrayed by John Travolta and Nicholas Cage have their faces surgically removed and exchanged to thwart a terrorist plot.

CONCLUSION

For the foregoing reasons and those set forth in the original Petition, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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