No. 12-207

IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

ALONZO JAY KING, JR.,

Respondent

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR THE HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ADERSON B. FRANÇOIS
Counsel of Record
HOWARD UNIVERSITY
SCHOOL OF LAW
CIVIL RIGHTS CLINIC
2900 Van Ness Street NW
Washington, DC
(202) 806-8065
Afrancois@law.howard.edu

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INTEREST OF *AMICUS CURIAE*

Amicus curiae are faculty in the Howard University School of Law and attorneys in the Civil Rights Clinic.[1] As part of the Law School's educational mission, the Civil Rights Clinic at the Howard University School of Law engages in trial and appellate impact litigation in the service of human rights, social justice, economic fairness and political equality. The Clinic provides *pro bono* services to indigent prisoners, and *pro se* clients in federal and state courts on a range of civil rights matters, including but not limited to employment and housing discrimination, voting rights, police brutality, unconstitutional prison conditions, habeas corpus, and unfair procedural barriers to the courts.

Before the Court is the question of whether under the Collection of DNA Samples provision of the Maryland Code[2] the collection and analysis of DNA from an individual who has been arrested but not convicted of a crime offends the Fourth Amendment. This type of DNA farming for use in the investigation of both past and future crimes goes beyond basic identification of a suspect, is deeply invasive, violates the protections of the Fourth Amendment, and ignores the reasonable suspicion requirements set forth by this Court's jurisprudence. Because

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[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] Md. Code Ann., Collection of DNA Samples, § 2-504(3) (West 2012).

indiscriminately collecting and analyzing DNA materials from a person from the moment police believe that person may have committed a crime poses a grave threat to the constitutional privacy rights of all Americans, *amicus curiae* respectfully submits this brief in support of Respondent Alonzo Jay King, Jr. to urge the Court to uphold the decision of the Maryland Court of Appeals, finding the DNA collection provision of the Maryland Code unconstitutional.

SUMMARY OF ARGUMENT

Identification of suspects for law enforcement purposes is a legitimate government interest. However, DNA farming and warehousing of the sort contemplated by the Maryland Statute is not a legitimate means of identifying individuals who have been merely arrested but nether tried nor convicted of any crime. Unlike other established forms of identification such as fingerprints, DNA analysis is a wide open door into a person's life: it can reveal such private and sensitive matters as a person's entire family tree, physical and mental health, and any number of genetic information protected by federal law.[3] Considering the immense weight of personal

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[3] *See generally* Health Insurance Portability and Accountability of Act of 1996, 42 U.S.C. §1320d *et seq.* (2012); Patient Protection and Affordable Care Act, 42 U.S.C. §1320a-7k(b)(2) (2012); Md. Code Ann., Confidentiality of Medical Records §4-302 (West 2008); *Genetic Discrimination*, Nat'l Human Genome Research Inst., http://www.genome.gov/10002077 (last visited January 20, 2013)("Genetic Information Non-Discrimination Act of 2008: GINA protects Americans from discrimination based on their genetic information in both health insurance (Title I) and employment (Title II)."); *Building Trust: Confidentiality and the Ryan White HIV/AIDS Program*, HRSA.gov, http://hab.hrsa.

information that DNA carries, allowing law enforcement to seize a person's DNA for no other reason than that they are under arrest, is to give law enforcement uncontrolled and unprecedented access to a person's health information, family history, and virtually their entire life. The type of DNA collection considered by the Maryland statute is nothing more than an end-run around the Fourth Amendment.

This Court has never permitted law enforcement to use investigative police work as a basis for ignoring the Fourth Amendment. In fact, the Fourth Amendment has only permitted suspicionless searches in special classified instances, none of which are applicable in the case before the Court. *See infra* parts I.B-I.C.

Even if, like fingerprints, it is assumed that DNA could be used in a limited fashion merely to ascertain the identity of a suspect and nothing more, the Maryland statute would still run afoul of the Fourth Amendment. Courts have rightly refused to permit the police to use fingerprints as a means to investigate whether or not an individual committed a crime when they were allegedly obtained for identification purposes. *See infra* part II.B. The comparison to fingerprints also demonstrates that DNA farming and warehousing has grave implications for investigatory misuse, because the analysis and collection of DNA arrestees has the potential to create a class of Americans who are permanently tracked by law enforcement. Stop and Frisk policies, racial profiling during vehicular stops, and the War on Drugs all serve as examples of policies whereby law

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gov/livinghistory/issues/confidentiality_1.htm (last visited January 20, 2013).

enforcement sought to diminish crime but then quickly turned them against African Americans, Latinos, and other non-privileged groups *See infra* parts III.A-III.C. For these reasons and those set forth below, *amicus curiae* submits that, as currently drafted, the Maryland DNA collection statute cannot constitutionally coexist with the Fourth Amendment.

ARGUMENT

I. THE COURT HAS LONG REFUSED TO PERMIT THE GOVERNMENT TO TURN A LEGITIMATE INTEREST IN IDENTIFYING SUSPECTS INTO AN UNCONSTITUTIONAL END-RUN AROUND THE FOURTH AMENDMENT'S PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES

This Court has long articulated a need for officers to obtain certain identification information from suspects or persons suspected to be engaged in, or about to engage in, criminal behavior. *See Hiibel v. Sixth Judicial District of Nevada*, 542 U.S. 177, 186 (2004); *Hayes v. Florida*, 470 U.S. 811, 816 (1985); *Adams v. Williams*, 407 U.S. 143, 146 (1972). At the same time, the court has limited such quests for identification to the mere requirement to provide a name or identification document and has refused to turn the mere request for identification information into an unrestricted police investigatory tool. *See Hiibel*, 542 U.S. at 185. To be sure, the Court has allowed suspicionless searches in special circumstances—for instance, in the interest of jailhouse security or amongst probationers and parolees. *See Samson v. California,* 547 U.S. 843, 848 (2006); *United States v. Knights*, 534 U.S. 112, 122 (2001). However, even when dealing with special needs searches, the Court has been clear that such searches are unconstitutional when conducted for a

solely investigatory purpose. *See Chandler v. Miller*, 520 U.S. 305, 308 (1997).

A. The Fourth Amendment Limits Police Requests for Identification to only information necessary to ascertain a person's identity

Taken alone, the act of requiring a suspect to identify him or herself does not violate the Fourth Amendment. *Hiibel,* 542 U.S. at 185 ("In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment."). Thus, when the police have a reasonable suspicion for stopping and questioning an individual, the Court has consistently permitted law enforcement to ascertain a suspect's identity through questions or by asking to review a suspect's identification documents. *Id.* at 186. As a practical matter, this means that a suspect who is legally seized for Fourth Amendment purposes must provide the police with some form of identifying documentation, such as a driver's license or passport, or to verbally identify themselves to law enforcement. *See Hiibel,* 542 U.S. at 185 (noting that an officer's reasonable suspicion "permits the officer to stop the person for a brief time and take additional steps to investigate further").

However, the general law enforcement interest in identifying suspects is subject to two crucial limitations. First, even when the police may have a reasonable suspicion to stop and question an individual, this Court has also held that gathering identifying information of an unidentified suspect may only be used to determine who the person is, and may not be used as a pretext to open the person's life to investigation. *See Davis v. Mississippi*, 394 U.S.

721, 726 (1969) ("[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention."); *see also People v. Buza*, 129 Cal. Rptr. 3d 753, 783 (Cal. Ct. App. 2011) (finding the requirement of felony arrestees to submit a DNA sample for investigatory purposes analysis and inclusion in state and Federal DNA databases invalid under the Fourth Amendment); Corey Preston, Note, *Faulty Foundations: How the False Analogy to Routine Fingerprinting Undermines the Argument for Arrestee DNA Sampling*, 19 Wm. & Mary Bill Rts. J. 475, 508 (2010) ("This intuition in Davis towards suppressing evidence that is gained from a broad criminal investigative purpose or searches lacking individualized suspicion, has been consistently reaffirmed by the Court.").

Second, law enforcement interest in suspect identification does not extend so far as to permit police to compel a person to stop and identify himself absent reasonable suspicion that is based upon objective facts that the person was engaged in, or is about to engage in a crime. *See* Robert A. Hull, Note, *"What Hath Hiibel Wrought?": The Constitutionality of Compelled Self Identification*, 33 Pepp. L. Rev. 185, 223-25 (2005) (discussing the implications of the Court's decision in *Hiibel*). Without reasonable suspicion, the individual's privacy interests tip the balance such that the conduct of law enforcement in collecting certain identification information can constitute a Fourth Amendment violation. *Compare Haskell v. Harris*, 669 F.3d 1049, 1066 (9th Cir. 2012)

(Fletcher, J., dissenting) (stating taking DNA samples from arrestees solely absent reasonable suspicion or a warrant violates the Fourth Amendment) *with Hiibel*, 542 U.S. at 189 (upholding conviction under stop and identify statutes where the officer's request for an individual to identify himself was "reasonably related in scope to the circumstances which justified the stop.").

B. In the Absence of Reasonable Suspicion, the Fourth Amendment Does Not Permit the Police to use a Request for Identification as a Pretext to Open a Person's Life to Investigation

The Fourth Amendment to the United States Constitution states that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "This restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion." *Chandler v. Miller*, 520 U.S. 305, 308 (1997) (citations omitted) (internal quotation marks omitted). As such, the Court has made it clear that the government does not possess unfettered discretion in conducting suspicionless searches for the purpose of uncovering evidence of a crime. *United States v. Cortez*, 449 U.S. 411, 417 (1981) ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be engaged in criminal activity."). Rather, at minimum, government actors must possess articulable individualized suspicion in order to pursue their crime control ends within the constraints of the Constitution. *Florida v. J.L.*, 529 U.S. 266, 268

(2000) (searches conducted without individualized reasonable suspicion are unconstitutional).

To be sure, the Court has carved out narrow exceptions to the prohibition of using suspect identification as an investigatory tool, namely to ensure jailhouse security amongst pre-trial detainees while in custody, and amongst probationers and parolees. *See Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987). However, even when authorizing these certain special needs searches, the Court has been careful not to allow them to be used to conduct suspicionless searches for an investigatory purpose. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (discussing the limited circumstances under the special needs exception that permit search and seizure absent individualized suspicion).

C. Even under the Special Needs Exception of Administrative Security for Pre-trial Detainees, Probationers, and Parolees, the Fourth Amendment does not Permit Law Enforcement to use Requests for Identification as a Primary Tool of Investigation

The government may take measures that are reasonably calculated to effectuate pretrial detention. However, pre-trial detainees do not forfeit all constitutional rights just because they are in custody, *Magill v. Lee County*, 990 F. Supp. 1382, 1387 (M.D. Ala. 1998), and they continue to maintain a right of privacy and a degree of freedom, although limited, from unreasonable searches under the Fourth Amendment. *See Clark v. Tinnin*, 731 F. Supp. 998, 1004-05 (D. Colo. 1990).

The authority to conduct a suspicionless search of a pre-trial detainee is based upon the legitimate government interest in managing the facility in which the individual is detained. Another basis for the authority of prison officials over pretrial detainees comes from the responsibility of prison officials to ensure the appearance of detainees at trial. *Newkirk v. Sheers*, 834 F. Supp. 772, 781 (E.D. Pa. 1993). To reach these ends, the government is allowed to ensure no weapons or illicit drugs are within a detention center, and to maintain its overall security. However, the Supreme Court has never "ruled that law enforcement officers may conduct suspicionless searches on pretrial detainees for reasons other than prison security." *Friedman v. Boucher*, 580 F.3d 847, 856-57 (9th Cir. 2009) (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

Correspondingly, it is important to distinguish a diminished expectation of privacy based on administrative security versus one that is based upon guilt. The Court has found that a probationer or parolee's expectation of privacy is substantially diminished as compared to pre-trial detainees. Unlike pre-trial detainees, parolees and probationers are still under prison control upon their release; and this presumption of control based upon the guilt of conviction, tips the Fourth Amendment balance to government discretion in allowing suspicionless searches of probationers and parolees. *Samson v. California,* 547 U.S. 843, 848 (2006); *United States v. Knights*, 534 U.S. 112, 122 (2001); *see also Buza*, 129 Cal. Rptr. 3d at 767. For parolees and probationers, searches by law enforcement are not unreasonable because they are already convicted of a crime and the government interest in identifying these classes of offenders is compelling. "[I]n comparison to the

probationer cases, the interests in supervision and prevention of recidivism are much diminished, if not absent, in the context of arrestees and pretrial detainees." *United States v. Mitchell*, 652 F.3d 387, 415 n. 25 (3d Cir. 2011). Unlike mere arrestees, searches of parolees, who have a diminished expectation of privacy based on guilt, are not unreasonable and do not violate the Fourth Amendment. In sum, where suspicionless searches have been allowed, it has been limited to jailhouse security and persons who have already been convicted.

Even in the course of certain specified special needs searches, which may be conducted without particularized reasonable suspicion, the Court has limited such searches when the primary purpose has been found to be investigatory. The Court has recognized an exception to the Fourth Amendment's prohibition of suspicionless searches when "special needs beyond the normal need for law enforcement make the warrant and probable-cause requirements impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 872 (1987); *see generally Veronina School District 47J v. Acton*, 515 U.S. 646 (1995) (random drug testing of student-athletes aimed at deterring drug use); *Skinner v. Railway Labor Execs. Ass'n.*, 489 U.S. 602 (1989) (drug and alcohol tests for railway employees for the purpose of workplace safety).

However, this exception does not apply when "the immediate objective of the [search is] to generate evidence for law enforcement purposes," even if the "ultimate goal" is to advance an interest not related to crime control. *Ferguson v. City of Charleston*, 532 U.S. 67, 82-84 (2001). Instead, individualized suspicion is required "where governmental authorities primarily pursue their general crime control ends."

City of Indianapolis v. Edmond, 531 U.S. 32, 43 (2000).

In declining to recognize an investigatory purpose as sufficient to dispense with the Fourth Amendment's requirement of individualized suspicion, the Court has noted that allowing such searches would circumvent the very protections afforded by the Fourth Amendment. *See id.* at 42. For example, in *City of Indianapolis v. Edmond*, the Court invalidated a city's highway narcotics checkpoint program because its primary purpose was to uncover evidence of ordinary criminal wrongdoing. *Id.* at 41-42. The Court reasoned "without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." *Id.* at 42.

Similarly, in *Ferguson v. City of Charleston*, the Court invalidated a hospital policy of performing drug tests on pregnant patients suspected of using cocaine and forwarding positive results to law enforcement for prosecution. 532 U.S. 67, 70-73 (2001). The Court found that "[w]hile the ultimate goal of the program was to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal." *Id.* at 82-83. A "benign" motive, according to the Court, could not justify a departure from Fourth Amendment protections. *Id.* at 85-86. Rather, the mere fact that the hospital used the test for an investigatory purpose "provides[s] an affirmative reason for enforcing the strictures of the Fourth Amendment." *Id.* at 84.

The Court's special needs jurisprudence illustrates that suspicionless searches are never permissible for the purpose of uncovering evidence of a crime. Rather, in such circumstances, a valid search warrant is required. Therefore, the suspicionless search conducted when the government requires the DNA of an arrestee be taken upon booking cannot be justified by the government's interest in solving past and future crimes.

II. THE MARYLAND DNA COLLECTION STATUTE VIOLATES THE FOURTH AMENDMENT BECAUSE ITS PRIMARY PURPOSE IS INVESTIGATORY RATHER THAN FOR IDENTIFICATION, ADMINISTRATIVE NEEDS, JAILHOUSE SECURITY OR OTHER SPECIAL NEED

The Maryland DNA statute pursues a general interest in crime control and investigation, a purpose that is incompatible with the Fourth Amendment. The Maryland DNA collection statute enumerates five purposes for the collection of DNA from those that come in contact with the criminal justice system: "(1) to analyze and type the genetic markers contained in or derived from the DNA samples; (2) as part of an official investigation into a crime; (3) to help identify human remains; (4) to help identify missing individuals; and (5) for research and administrative purposes." Md. Code Ann., Purposes of Testing DNA Samples § 2-505(a) (West 2012). Importantly, the statute does not indicate identification of an individual as one of the purposes. Nor was the purpose of the statute amended to include an interest in identification when its scope was expanded to include arrestees in 2008. Disregarding the statute's stated purpose to investigate criminal suspects, the State of Maryland

argued in *King* that the DNA collected under the statute was meant to identify arrestees. *King v. Maryland*, 42 A.3d 549, 578-600 (Md. Ct. App. 2012).

A. The Primary Goal of the Maryland DNA Collection Statute is to Investigate Crime

From its inception, the DNA collection statute has had the explicit goal of battling crime. In his 2008 annual State of the State address, Maryland Governor Martin O'Malley stated that he intended to promote certain initiatives to battle crime in Maryland. Governor Martin O'Malley, State of the State Address (Jan. 23, 2008). http://www.governor.maryland.gov/speeches/080123. One such initiative would involve the collection of DNA from persons arrested of violent crimes. *Id.* Further, while the committee amendment provided that an arrestee's DNA could be taken upon arrest, his or her DNA would not be tested until after arraignment. Md. S. Amend. 2008 Sess. S.B. 211. These provisions, which were ultimately incorporated into the statute, further establish that the express purpose of the statute is not to identify criminal suspects but to pursue a general goal of investigating past and future crimes.

The State's claim that DNA collection is used merely for identification is further undercut by the procedure put in place to test an arrestee's DNA sample. Unless the arrestee requests or consents otherwise, the results are not immediate and would not aid law enforcement in identifying the individual until the DNA is thoroughly processed. DNA must first be analyzed, then a DNA profile is created and that profile is run through a DNA database. *Frequently Asked Questions on the CODIS Program and National System Database*, FBI, http://www.

fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet (last updated July 14, 2011). Once an individual's DNA is entered into a DNA database the profile is not identified by name or case information, instead, it is only after a DNA match occurs that law enforcement is able to discern the identity of the individual. *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1190-91 (N.D. Cal. 2009). A California district court noted that "the average processing time for arrestee [DNA] samples is currently about 31 calendar days." *Haskell*, 677 F. Supp. 2d at 1201 (internal quotation marks omitted). In the case of Alonzo King, his DNA was uploaded on July 13, 2009 and there was a "hit" on his DNA on August 4, 2009, a processing time of about three weeks. *King*, 42 A.3d at 553. Notably, this is shorter than the average processing time in California but it is still significantly longer than the time it takes to identify an arrestee via fingerprints, which can yield a response in four minutes for electronic criminal fingerprints. *See Fact Sheet*, FBI, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_facts (last updated Oct. 16, 2012).

For these reasons, the Maryland DNA Collection Statute does not in practice serve to identify arrestees in connection with the crime that they are currently charged. Assuming a suspect who is apparently unidentifiable to this point, consents to or requests the testing, the processing time for DNA does not allow for a quick turn around in a way that could realistically aid law enforcement in identification. Therefore, an objective analysis proves that the statute in fact serves a suspicionless investigative purpose and therefore violates the Fourth Amendment to the Constitution.

B. Because the DNA Evidence Seized Under the Maryland DNA Collection Act is Merely for Investigatory Purposes, it Does not Further the Government's Interest in Identifying Arrestees

The Maryland DNA Collection Act authorizes the seizure of DNA samples, in a way that does not further the government's interest in accurately identifying arrestees. The DNA samples taken are for investigation purposes, and the government's interest in investigation is not strong enough to overcome the high level of privacy interests that arrestees have in preserving the confidentiality of their DNA.

This Court and the Circuit Courts of Appeals have addressed the admissibility of fingerprint evidence on many occasions. Through those cases the courts have demonstrated that identity, when discovered through fingerprinting, is always admissible while fingerprints taken for an investigatory purpose must be supported by probable cause.

Fingerprint evidence taken for an investigatory purpose without probable cause must always be suppressed. *Hayes v. Florida*, 470 U.S. 811, 816 (1985); *Davis v. Mississippi*, 394 U.S. 721, 722 (1969). In *Hayes* and *Davis,* police fingerprinted individuals suspected of committing crimes in order to determine whether they were connected to those crimes. *See generally Hayes v. Florida*, 470 U.S. 811 (1985); *Davis v. Mississippi*, 394 U.S. 721 (1969). In both cases, the fingerprints were excluded because the arrests that led to the fingerprints were not supported by probable cause. The Court stated that individuals have an interest in their own privacy and

that legally, the "line is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes." *Hayes,* 470 U.S. at 816.

It is an entirely different matter when the information is procured for identification purposes because an individual's identity is admissible regardless of how it was obtained. In *Lopez-Mendoza*, Adan Lopez-Mendoza disputed a court's jurisdiction over him after he was illegally arrested and discovered to be illegally present in the United States. *I.N.S., v. Lopez-Mendoza*, 468 U.S. 1032, 1040 (1984). Even though the arrest leading to the discovery was illegal, the Court said the "body or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest." *Id.* at 1039.

Subsequent courts have interpreted and applied this statement. The Fifth Circuit in *United States v. Roque-Villanueva* held that the Immigration and Naturalization record of an undocumented resident was not suppressible even though his identity was learned as a result of an illegal stop. *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999).

In *United States v. Guzman-Bruno*, the suspect moved to suppress his identity and criminal record as products of an illegal arrest. The court of appeals held "the district court did not err when it held that neither Guzman-Bruno's identity nor the records of his previous convictions and deportations could be suppressed as a result of the illegal arrest." *United States v. Guzman-Bruno*, 27 F.3d 420, 422 (9th Cir. 1994). The Ninth Circuit later narrowed its ruling in

Guzman-Bruno, "Guzman-Bruno, however, did not involve fingerprint evidence and the need to classify it as either investigatory or identification evidence (and thus Hayes and Davis were not implicated)." *United States v. Garcia-Beltran*, 389 F.3d 864, 867 n.4 (9th Cir. 2004).

The Ninth Circuit stayed in line with existing law by stating that the "simple fact of who a defendant is cannot be excluded, regardless of the nature of the violation leading to his identity." *Id.* at 868. But the Ninth Circuit ultimately remanded the case for a determination of the intent behind the fingerprinting. "Thus, on remand, if the evidence were to show that as a consequence of the illegal arrest of Garcia–Beltran, law enforcement officials obtained his fingerprints to pursue a criminal immigration law violation, the fingerprints would be subject to suppression unless they were obtained by 'means sufficient to have purged the taint of the initial illegality.'" *Garcia-Beltran*, 389 F.3d at 868 (citing *United States v. Guevara-Martinez*, 262 F.3d 751, 755 (8th Cir. 2001)). The Ninth Circuit recognized the special difficulty with fingerprint evidence in that it can be used to identify as well as investigate.

This overlap between investigation and identification was also an issue in *Guevara-Martinez*, where the Eighth Circuit questioned the intent behind a fingerprinting of a suspected illegal immigrant. *United States v. Guevara-Martinez*, 262 F.3d 751 755 (8th Cir. 2001). It is of special significance that, the suspect was not fingerprinted upon his arrest, but had his fingerprints taken later after being interviewed by an INS detective. *Id.* at 756. Both *Garcia-Beltran*, and *Guevara-Martinez* acknowledge the occasional difficulty in determining whether

prints are taken for an investigatory purpose, but both also make clear what should be done with the prints once the purpose behind taking them is determined: if they were taken to identify a suspect, they are admissible into evidence; if they were taken to without probable cause to investigate, they are not.

Similarly, here because the stated purpose of the Maryland DNA Collection Act is to use DNA evidence to investigate criminality, the collection and analysis of this DNA evidence cannot be reconciled with the Fourth Amendment.

III. IDENTIFICATION POLICIES THAT APPEAR FACIALLY NEUTRAL HAVE BEEN USED DISPROPORTIONALLY AS INVESTIGATORY TOOLS AGAINST MINORITY POPULATIONS

Law enforcement policies premised on investigation have historically affected minorities at a higher rate,[4] thus increasing the likelihood that these individuals will come in contact with the criminal justice system. The disproportionate impact of these seemingly neutral police practices is apparent in at least three instances: the Stop and Frisk policy practiced by the New York City Police Department, searches of vehicles of African American and Latino drivers, and finally the implementation and impact of the so-called War on Drugs.

A. Stop and Frisk Law Enforcement Policies have Resulted in Police Practices that Specifically Target Minorities

The "stop and frisk", or more broadly termed, a *Terry* stop, is a seemingly neutral policy designed to

[4] *See infra* parts III.A – III.C.

protect police officers while on patrol as well as to deter crime. The policy includes a subjective reasonableness requirement, which demands the police officer use a great deal of discretion. During a stop and frisk, an officer detains an individual based on a reasonable suspicion that the individual has engaged in or is about to engage in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). The officer may not conduct a frisk unless he has a reason to suspect that the person is armed or dangerous. *Id*. Another justification for the stop and frisk is that it is thought to make gang and drug crime more risky and less lucrative by increasing the risk of arrest and the difficulty of establishing stable drug-market monopolies. Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang's Finances*, 115 Q.J. Econ. 755, 781-82 (2000). Unfortunately, studies have shown the policy tends to be used as a license to stop and frisk a disproportionate number of African Americans and Latinos, resulting in a publicly recognized policy of discrimination.[5]

While police forces across the country use *Terry* stops, because the New York City Police Department (NYPD) has been a particularly ardent proponent of the policy, its disproportionate use against minorities demonstrate the dangers of permitting seemingly neutral, limited identification practices to be used for

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[5]*See generally*, Joseph Goldstein, *Police Stop-and-Frisk Program in Bronx is Ruled Unconstitutional*, N. Y. Times (Jan. 8, 2013), http://www.nytimes.com/2013/01/09/nyregion/judge-limits-nypd-stop-and-frisk-program-in-bronx.html; James Warren, *Driving While Black*, The Atlantic (July 2009), http://www.theatlantic.com/magazine/archive/2009/07/driving-while-black/307625/; Ctr. for Constitutional Rights, *Stop and Frisk—The Human Impact Report* (July 2012), http://stopandfrisk.org/the-human-impact-report.pdf.

open-ended investigations. In New York City, there has been a six hundred percent increase in the number of *Terry* stops conducted in the city in the past decade. Darius Charney, Jesus Gonzalez, David Kennedy, Noel Leader, Robert Perry, *Suspect Fits Description: Responses to Racial Profiling in New York City*, 14 CUNY L. Rev. 57, 73 (2010).[6] While "the number of stops in 2011 [in New York City] was the largest on record . . . 2012 is on track to be higher still, with over 203,500 stops in the first three months alone." *Id.* According to data from 2011, 84% of the 685,724 stops were of African American or Latino residents while African American and Latino individuals comprise only about 23% and 29% of the city's population, respectively. George Lipsitz, *"In an Avalanche Every Snowflake Pleads Not Guilty:" The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. Rev. 1746, 1782-83 (2012).[7] This polarization was less dramatic in the 1990's but has increased with the NYPDs aggressive use of the policy over time to stop and frisk an overwhelming amount of innocent minorities. Greg Ridgeway, *Analysis of Racial Disparities in the New York Police Department's Stop, Question, and Frisk Practices*, http://www.rand.org/pubs/technical_reports/TR534.html.

While proponents argue that police target African Americans and Latinos more than whites because more crime takes place in communities of color, the

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[6] *See also* Ctr. for Constitutional Rights, *Stop and Frisk-The Human Impact* (July 2012), http://stopandfrisk.org/the-human-impact-report.pdf.

[7] *See also* New York Civil Liberties Union, *Stop and Frisk 2011* (May 9, 2012), http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf.

New York Civil Liberties Union found that even in neighborhoods where African Americans and Latinos made up 14% or less of the population, police targeted them for 70% of stops. *Id*. Based on police records, 88% of all stops did not result in an arrest or a summons being given. Contraband was found in only 2% of all stops. *Id*. The NYPD claims their stop and frisk policy prevents weapons distribution, but weapons were recovered in only 1% of all stops. *Id*. Additionally, only 5.37 % of stops between 2004 and 2009 even yielded an arrest. Michael Powell, *For New York Police, There's No End to the Stops*, N.Y. Times, (May 14, 2012) http://www.nytimes.com/2012/05/15/nyregion/for-new-york-police-theres-no-end-to-the-stops.html. Furthermore, African American and Latino individuals are stopped more frequently than whites, even after controlling for precinct variability and race-specific estimates of crime participation. Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. Am. Stat. Ass'n 813, 813 (2007).

Initially, police retained an electronic database of the identity information of all persons stopped and frisked and used it to bolster criminal suspicion in subsequent encounters. Wayne A. Logan, *Policing Identity*, 92 B.U. L. Rev. 1561, 1599 (2012). After the state legislature banned the computer storage of identity information on persons stopped but not arrested, police continued to retain and use such information in paper form under the guise of internal monitoring. *Id.* Similarly, while it is conceivable that at some points during an investigation in which police officers have probable cause to investigate a crime for which a defendant is being currently charged they would need a buccal swab of DNA, the

storage of such information for use in investigation of both past and future crimes for which the police have no objective, particularized reasonable suspicion, much less probable cause, is an affront to the Fourth Amendment and the jurisprudence set forth by this Court. Essentially, the practice of warehousing DNA of arrestees is creating a "reasonable suspicion" or "probable cause" generator—opening up the lives of those who come in contact with the criminal justice system in the most intrusive biological ways. Because evidence shows that a disproportionate number of minorities, and specifically male minorities, come in to contact with the criminal justice system, it can therefore be surmised that the keeping and utilization of this database will have a disproportionate impact upon male minorities not only in Maryland, but all states that have such a statute. The creation and existence of this database serves to erode the Fourth Amendment protections that are afforded to all Americans, but particularly eroding such rights amongst communities of color.

In New York, officers complete a standardized form after a stop that includes a checklist of acceptable reasons. *Floyd v. City of New York*, 813 F. Supp. 2d 417, 422-23, 425 (S.D.N.Y. 2011). The data suggests that the racial disparity which exists amongst individuals who are stopped has more to do with officer bias and discretion than to do with actual crime rates. Charney, *supra*, at 104 (citing Al Baker, *City Minorities More Likely To Be Frisked*, N.Y. Times, May 13, 2010, at A1.). An analysis of Stop and Frisks between 2006 and 2010 broke down the purported reasons for such stops by "acceptable" checklist category: 44.1% stopped for "furtive movement"; 16.7% for "fits description"; and 20.2% for "other". *Stop, Question and Frisk in New York*

Neighborhoods, N.Y. Times (July 11, 2010), http://www.nytimes.com/interactive/2010/07/11/nyregion/20100711-stop-and-frisk.html?ref=nyregion. It appears the NYPD, and presumably police departments in other jurisdictions, operate with different thresholds of reasonable suspicion for different races; African Americans are stopped in situations where whites are left alone. Craig Menchin, *Why NYPD Terry Stops Are More Problematic Than You Think*, 8 Stan. J. Civ. Rts. & Civ. Liberties 299, 310 (2012). Minorities are stopped for nebulous reasons like suspected weapons possession, while whites are generally stopped for a more concrete purpose. *Id.* at 306.

However, a biased administration of the *Terry* stop is not necessarily based on malice; because of the wide discretion police are afforded in whom they stop, subconscious racial biases may arise without intentional unfairness by an officer. "[R]esearchers [have] concluded that unconscious racial stereotypes can be activated in actual criminal justice decision makers and that, once activated, those stereotypes can influence judgments and behavioral intentions . . . [a]lthough officers who treat minorities differently from [w]hites could be acting out of racial animus, it is far more likely that they possess unconscious biases toward minority citizens that are created through either differential exposure to groups involved in deviant or criminal behavior or through illusory correlation mechanisms." Michael R. Smith & Geoffrey P. Alpert, *Explaining Police Bias: A Theory of Social Conditioning and Illusory Correlation* (10th ed. 2007) 34 Criminal Justice and Behavior 1262, 1283 (internal citations omitted).

Similarly, while the Maryland DNA statute may not appear biased on its face, it has the potential,

much like *Terry* stops, to subject a much larger number of innocent minorities to unnecessary searches versus their innocent white counterparts.

B. African American and Latino Drivers Continue to Have Their Vehicles Searched at a Higher Rate During Traffic Stops

Police officers have a large amount of discretion in whom they choose to stop and often times use that discretion to investigate minorities. For instance, pretextual searches occur when police officers pull over drivers for minor offenses such as "burned out tail-lights, unsignaled lane changes, and speeding" and use the encounter as an opportunity to conduct an investigation. Janice Nadler and J.D. Trout, *The Language of Consent in Police Encounters, in Oxford Handbook on Linguistics and Law* (Peter Tiersma ed., 2012). Police incentives to attend to such administrative violations often rest not on the risk posed by the violations themselves, but rather on the opportunity such stops provide for investigating "suspicious" citizens." *Id.* Police officers can use pretext to pull over anyone they see as suspicious, but they are more likely to see African American and Latino men as suspicious. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. Rev. 956, 987-88 (1999) ("Social scientific research shows that the stereotypic judgments and biases that an individual brings to an event fundamentally shapes perception."). Because "[t]he threshold for labeling conduct as 'criminal' lowers when viewing conduct by people of color," officers may go into encounters with unconscious biases that African American and Latino men engage

in a higher rate of criminal behavior and thus are more likely to be the subject of a pretextual stop.

Traffic stop data across many American cities show that police officers are more likely to view African Americans and Latinos as suspicious, even though the results of these stops prove that African Americans and Latinos are no more likely to commit a crime. For instance, data from Charlotte, Kansas City, Raleigh and St. Louis show that "black drivers were stopped between 1.6 and 2.2 times as often as white drivers."[8] Latino drivers in those same cities were between 0.7 and 1.2 times as likely to be stopped as white drivers.[9] Statistics from Milwaukee, Wisconsin produced even more astonishing results. African American drivers were seven times more likely to be stopped than whites and Latino drivers were five times more likely to be stopped.[10] A 2007 study conducted in Illinois showed that African American drivers were three times more likely to be stopped than white drivers while Latino drivers were twice as likely to be stopped.[11]

Despite the disparities in stopping minority drivers, African American and Latinos are no more likely to carry contraband in their vehicles than

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[8]Ben Poston, *Disparities are Greater than other Large Metro Police Departments*, Journal Sentinel, Dec. 3, 2011, http://www.jsonline.com/watchdog/watchdogreports/racial-gap-found-in-traffic-stops-in-milwaukee-ke1hsip-134977408.html.

[9]*Id*.

[10]*Id.*

[11]Monique Garcia & Ray Long, *Study Sees Racial Bias in Traffic-Stop Searches,* Chicago Trib., July 24, 2008, http://articles.chicagotribune.com/2008-07-25/news/0807250350_1_consent-searches-white-drivers-hispanics.

white drivers. In the Milwaukee study, the percentage of stops that lead to a finding of contraband were the same across racial lines. Poston, *supra*. In fact, according to an Illinois study, "troopers found contraband in the vehicles of white motorists almost twice as often as they did in the vehicles of blacks and eight times more often than the vehicles of Latino[s]." Garcia & Long, *supra*. If searches of vehicles driven by African American and Latino drivers actually produced more evidence, it could be argued that the disparate rate of stops amongst African Americans and Latinos is justified, but the facts reveal otherwise.

The aforementioned statistics demonstrate that racial biases influence police officers to make determinations as to who is suspicious. Those determinations lead law enforcement agents to stop vehicles so that they can investigate their drivers. Those same biases that lead law enforcement agents to investigate cars driven by African Americans and Latinos at rates higher than other racial groups will lead them to investigate African American and Latino DNA at higher rates.

C. African Americans are Predominately Arrested for Drug Use While all Evidence Suggests Individuals of Other Races Partake in Equal Amounts of Illegal Narcotics use

The "War on Drugs"[12] serves as another example of a neutral law enforcement policy that has

[12]The term the "War on Drugs" refers to the anti-drug policies that were spearheaded by President Reagan in the early 1980's. Kenneth B. Nunn, *Race, Crime and the Pool of Surplus*

disproportionately affected African Americans and other minorities. Despite the seemingly neutral and benevolent goal of battling drug abuse and curbing the illicit businesses fueling drug abuse, since its inception the War on Drugs has had a disproportionate impact on African Americans. *See* Kenneth B. Nunn, *Race*, *Crime and the Pool of Surplus Criminality: Or Why the War on Drugs Was a War on Blacks,* 6 J. Gender Race & Just. 381, 336 (2002). Both Presidents Reagan and H.W. Bush utilized the War on Drugs as a means to emphasize their concern with public safety. *Id.* at 388. (citing Michael Tonry, *Malign Neglect-Race, Crime, and Punishment in America* 117 (1995)). However, just as all wars require an enemy for the War on Drugs, that enemy has predominately been African Americans. *See* Nunn *supra*, at 390-91. As a result, the War on Drugs has targeted low-income minority communities even though research demonstrates that the sale and use of drugs does not vary widely among races. Michelle Alexander, *The New Jim Crow*, 9 Ohio St. J. Crim. L. 7, 13 (2011) (citation omitted).

Key examples of the disproportionate impact of the drug war on African Americans are the demonstrably disparate arrest rates between African Americans and their peers. From 1980-2003 drug arrests for African Americans increased three times the amount of drug arrests for whites. *See* Ryan S. King, *Disparity by Geography: The War on Drugs in America's Cities*, The Sentencing Project (May 2008) www.sentencingproject.org/doc/publications/dp_drug

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Criminality: Or Why the War on Drugs Was a War on Blacks, 6 J. Gender Race & Just. 381, 382 n.1, 386-87 (2002).

arrestreport.pdf.[13] While "the proportions of arrested drug offenders should mirror the proportions of drug users," this neutral policy is anything but neutral; its disproportionate impact is a direct result of an uneven practice of arresting minority drug users more often than whites. Kathleen R. Sandy, *The Discrimination Inherent In America's Drug War: Hidden Racism Realized By Examining the Hysteria Over Crack*, 54 Ala. L. Rev. 665, 672-73 (2003)." The claim that African Americans violate the drug laws at a greater rate, and that this justifies the great disparities in rates of arrests and incarceration, is inaccurate. Most drug arrests are made for the crime of possession. Possession is crime that every drug user must commit and, in the United States, most drug users are white." Nunn, *supra* at 395 (citations omitted).

As a facially neutral policy, the War on Drugs has yielded a disproportionate impact upon minorities due to a number of factors, yet there are significant similarities between this policy and the Maryland DNA Collection statute. While the actual taking of DNA samples from arrestees is not a matter of

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[13]"[D]isproportionate arrests may simply be a function of discriminatory exercise of discretion by police officers. Police officers may decide to arrest African Americans under circumstances when they would not arrest white suspects, and they may be in a position to do so more frequently than with whites because they are more likely to stop and detain African Americans." Nunn, *supra* at 395. (citations omitted). African Americans historically have been harassed and have had their civil rights disregarded by police officers. *Id.* at 401. "However, the war on drugs made the types of police harassment . . . [stopping African American drivers, drug sweeps, and over-policing of the African American community] more likely to occur." *Id.*

discretion, there is no check on the discretion of the officers who make the arrests that create the opportunity for DNA sampling until after the sample has been taken and may already have been used for investigative purposes." *People v. Buza*, 129 Cal.Rptr.3d 753, 780-81 (Cal Ct. App. 2011) *reh'g granted People v. Buza*, 262 P.3d 854 (Cal. 2011) (holding that DNA testing of arrestees is a violation of the Fourth Amendment). This risk of misuse is especially a cause for concern for the rights of African Americans due to the racial bias that exists in the criminal justice system. Kevin Lapp & Joy Radice, *A Better Balancing: Reconsidering Pre-Conviction DNA Extraction from Federal Arrestees*, 90 N.C. L. Rev. Addendum 157, 175 (2012). The likely outcome of a statute continually authorizing DNA collection from arrestees is a DNA database of African Americans. *Id.*

As such, the Maryland DNA statute will continue to have a similarly disproportionate impact upon communities of color. The demonstrated disproportionate effect of seemingly neutral police practices on African Americans indicates that the Court should be wary of sanctioning another practice that would likely have the same disproportionate effect. History and practice dictate that the wider the discretion that law enforcement officers have in implementing policies to serve their crime control ends, the more likely that these policies will be used to harass and infringe upon the rights of people of color.

CONCLUSION

The collection and analysis of DNA from individuals arrested but not yet convicted of crimes offends the Fourth Amendment. The State of Maryland's claim that DNA is used to identify

individuals at the time of arrest is contradicted by the plain text of the statute and the time it takes to yield a result after collection. The State's identification rationale shrouds the true purpose of the statute, which is to assist law enforcement in the investigation of crimes. Statutes, like the Maryland DNA statute that have a purpose of generalized crime control, have never been able to pass scrutiny under the Fourth Amendment.

While the expressed purpose of the statute purports to be beneficial in curbing crime, historically there have been a number of law enforcement techniques, seemingly benign on their face, that have yielded disproportionate impacts on African Americans and Latinos. The regular police practice of stopping and frisking African American men because they look suspicious, and targeting low income urban communities serve as stark examples of benign policies with disproportionate impacts. Not only does the statute's purpose violate the Fourth Amendment, its implementation will also disproportionately impact African Americans and Latinos, as these individuals are more often arrested for qualifying crimes under the Maryland statute.

Respectfully submitted,

ADERSON B. FRANÇOIS
Counsel of Record
HOWARD UNIVERSITY
SCHOOL OF LAW
CIVIL RIGHTS CLINIC
2900 Van Ness Street NW
Washington, DC
(202) 806-8065
Afrancois@law.howard.edu