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## Note

### The Twenty-First Century Fingerprint: Previewing *Maryland v. King*

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#### INTRODUCTION

Currently, all states and the federal government compel *convicted* felons to submit DNA samples to law enforcement, and Courts of Appeals have affirmed the constitutionality of the practice.<sup>1</sup> These efforts have allowed law enforcement to link convicted felons to unsolved crimes,<sup>2</sup> and evidence suggests that maintaining a DNA database of convicted felons dissuades parolees and probationers from committing future crimes.<sup>3</sup> The State of California, for example, reports that over 8,000 cold cases were aided by leads generated from convicted felons' DNA samples.<sup>4</sup> This apparent success spurred

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1. Federal courts have upheld as constitutional state statutes compelling convicts, probationers, and parolees to provide DNA samples. See *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995) *overruled on other grounds* by *Crowe v. County of San Diego*, 608 F.3d 406 (9th Cir. 2010); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004).

2. See *BFS DNA Frequently Asked Questions*, CAL. DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., <http://oag.ca.gov/bfs/prop69/faqs> (last visited Apr. 16, 2013).

3. See *Rise*, 59 F.3d 1556.

4. *Cal-DNA Investigations Aided December 1999 to November 2012*, CAL. DEP'T OF JUSTICE,

states and the federal government to expand DNA collection and analysis to include individuals *arrested* for felonies, thereby increasing the number of samples and potentially the number of links to unsolved crimes. But this expansion comes at a high price, as individuals in police custody are forced to forfeit their genetic material to the state. The United States Supreme Court is currently considering whether this expansion is constitutional.<sup>5</sup> Specifically, it will decide this spring whether collecting DNA samples from a felony arrestee violates the arrestee's Fourth Amendment right to be free from "unreasonable searches and seizures."<sup>6</sup>

The decision will have national implications, as twenty-eight states and the federal government currently collect and analyze DNA samples from felony arrestees.<sup>7</sup> Notably, the Solicitor General petitioned the Court to participate in the oral arguments in support of the State of Maryland's DNA Act. Additionally, the Court's analysis will have direct implications on a California Supreme Court case<sup>8</sup> and a Ninth Circuit case,<sup>9</sup> both of which are considering the constitutionality of California's Proposition 69, which authorized law enforcement to take DNA samples from felony arrestees. As a result, *Maryland v. King* has received national attention in the media, ranging from reports in national nightly news to an editorial in the *New York Times*.<sup>10</sup> As Justice Alito remarked during oral arguments, in resolving the circuit split, the Justices will be deciding "perhaps the most important criminal procedure case that [the] Court has heard in decades."<sup>11</sup>

If the Court finds that the collection and analysis of an arrestee's DNA sample is a "search," thereby implicating the Fourth Amendment protection against unreasonable searches and seizures,<sup>12</sup> there are three ways for the Court to assess whether the "search" is reasonable. Alonzo King, who is challenging the Maryland Act, urges the Court to find that the search is unreasonable *per se* because it is both warrantless and suspicionless.<sup>13</sup> Alternatively, some lower

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OFFICE OF THE ATTORNEY GEN., [http://oag.ca.gov/sites/all/files/pdfs/bfs/Investigations\\_Aided\\_by\\_CAL-DNA\\_Trends\\_12-21-2012.pdf](http://oag.ca.gov/sites/all/files/pdfs/bfs/Investigations_Aided_by_CAL-DNA_Trends_12-21-2012.pdf) (last visited Apr. 16, 2013).

5. *Maryland v. King*, No. 12-207 (U.S. argued Feb. 26, 2013).

6. *Id.*; U.S. CONST. amend. IV.

7. See Brief for State of California et al. as Amici Curiae Supporting Petitioner, *King*, No. 12-207, 2013 WL 98697.

8. *People v. Buza*, 262 P.3d 854 (Cal. 2011) (granting certiorari).

9. See *Haskell v. Harris*, 686 F.3d 1121 (9th Cir. 2012) (granting rehearing en banc).

10. See *NBC Nightly News* (NBC television broadcast Feb. 26, 2013), transcript available at Lexis Nexis, TRANSCRIPT: 022601cb.502; see also Editorial, *DNA and the Constitution*, N.Y. TIMES (Feb. 24 2013), <http://www.nytimes.com/2013/02/25/opinion/dna-and-the-constitution.html>.

11. *Maryland v. King* – *Oral Argument* at 33:00, OYEZ, [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_207](http://www.oyez.org/cases/2010-2019/2012/2012_11_207) (last visited Apr. 16, 2013).

12. See *Katz v. United States*, 389 U.S. 347 (1967) (Harlan, J., concurring). It is likely the Court will deem the intrusion a "search" as both parties agree that both the buccal swab to obtain the sample and the comparison of the sample to the COIDS database is a search.

13. Brief for the Respondent at 18, *Maryland v. King*, No. 12-207 (U.S. argued Feb. 26, 2013), 2013 WL 315233. King's position is not novel. Judge Fletcher's dissent in *Haskell v. Harris* forcefully argued that a suspicionless search cannot be reasonable under the Fourth Amendment. 669 F.3d 1049,

courts have found that non-law enforcement justifications for maintaining a DNA database support the suspicionless search under a “special needs” analysis.<sup>14</sup> More likely, however, the Court will apply the traditional Fourth Amendment analysis that balances the government’s interest in the search against the individual’s reasonable expectation of privacy, as articulated by the Court in *United States v. Knights*.<sup>15</sup> Because a majority of state and lower federal courts, including the Maryland Court of Appeals,<sup>16</sup> applied the *Knights* balancing test,<sup>17</sup> this Note will focus on the interests at stake in the *Knights* Fourth Amendment balancing test.

This Note begins, in Part I, with a review of the history of state and federal government efforts to expand law enforcement’s use of DNA samples. Then in Part II and III, through a comparison of the Maryland Court of Appeals’ decision to other state lower federal court decisions, this Note previews the arguments the Court will consider in making its decision. First, the Court will assess the weight of the government’s interest in collecting and analyzing felony arrestees’ DNA by deciding whether the government uses DNA profiles to “identify” arrestees or to “investigate” unsolved crimes. Case law suggests that warrantless and suspicionless searches to help identify arrestees are constitutional while warrantless and suspicionless searches to further investigations are the very things that the Fourth Amendment forbids.<sup>18</sup> Second, the Court will determine whether arrestees have a reasonable expectation of privacy in their DNA profile. While there is conflicting precedent that the Court will have the opportunity to clarify, it is more likely that the Court will conclude that DNA samples are sufficiently like fingerprints so that collection of DNA samples is similarly constitutional as a part of modern routine booking procedures. This conclusion will allow the Court to

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1075 (9th Cir. 2012) (Fletcher, J., dissenting). However, the Supreme Court’s opinion in *Samson v. California* may suggest that the Court will apply the balancing test even to warrantless, suspicionless searches. See 547 U.S. 843 (2006).

14. See, e.g., *United States v. Hook*, 471 F.3d 766 (7th Cir. 2006); *United States v. Amerson*, 483 F.3d 73 (2d Cir. 2007). The Supreme Court first articulated the special needs test in *National Treasury Union v. Von Raab*, 489 U.S. 656 (1989). The Court applies the “special needs” test to searches that are warrantless and suspicionless but are necessary because of a non-law enforcement need. For example, in *Von Raab*, the Court upheld the Treasury Department’s mandatory, random drug test as reasonable under the Fourth Amendment because the government had a need to ensure its employees were not using illegal substances. *Id.* at 665.

15. See *Katz*, 389 U.S. 347 (Harlan, J., concurring); *United States v. Knights*, 534 U.S. 112, 118–19 (2001); see also *Samson*, 547 U.S. 843.

16. The Maryland Court of Appeals is the highest court in the State of Maryland.

17. See *King v. State*, 42 A.3d 549, 557 (2012); *Haskell*, 669 F.3d 1049 (9th Cir. 2012), vacated following grant of reh’g en banc, 686 F.3d 1121 (9th Cir. 2012).

18. Compare *Haskell*, 669 F.3d 1049 (upholding the constitutionality of California’s arrestee DNA Act because the court found that the government used the DNA profile to “identify” arrestees) with *King*, 42 A.3d at 552 (concluding that the government’s primary purpose is to use the DNA profile to investigate past crimes and not compelling enough to outweigh the arrestee’s expectation of privacy).

overturn the decision of the Maryland Court of Appeals and uphold the taking of DNA samples from felony arrestees.

## I.

### THE DEVELOPMENT AND EXPANSION OF DNA SAMPLING

Over the past twenty years, state and federal law enforcement have increasingly used DNA samples to track and investigate individuals in custody. Use of DNA technology in criminal law began in earnest in 1994, when the United States Congress passed the Violent Crime Control and Law Enforcement Act (“Federal DNA Act”).<sup>19</sup> The Federal DNA Act established the Combined DNA Index System (“CODIS”), a database that all states can access to upload and compare DNA profiles.<sup>20</sup> With access to the CODIS database, states can link the DNA profile of individuals in custody to genetic material such as blood or saliva collected at unsolved crime scenes.<sup>21</sup> The Act originally authorized federal authorities to take DNA samples from federal convicted felons.<sup>22</sup> However, through its regulatory authority, the U.S. Department of Justice expanded the application of the Federal DNA Act in 2008 to include federal felony arrestees.<sup>23</sup>

Since the passage of the Federal DNA Act, all states have enacted statutes to take DNA samples from convicted felons and participated in the CODIS database.<sup>24</sup> Maryland legislators created its statewide DNA database in 1994, and in 2002 directed law enforcement to take DNA samples from individuals convicted of a felony.<sup>25</sup> In 2008, the Maryland legislature expanded the state DNA Act to allow state police to take DNA samples from individuals arrested for, but not yet convicted of, a felony offense.<sup>26</sup> Similar expansions of DNA sample collection procedures occurred in the twenty-seven other states that currently require law enforcement to take DNA samples from arrestees.

Currently, the Maryland statute provides that law enforcement can take a DNA sample from an individual upon a felony arrest with a buccal swab and send the sample to the Maryland State Police Crime Laboratory.<sup>27</sup> At the

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19. 42 U.S.C. § 14132 (2012).

20. *Id.*

21. Ashley Eiler, Note, *Arrested Development: Reforming the Federal All-Arrestee DNA Collection Statute to Comply with the Fourth Amendment*, 79 GEO. WASH. L. REV. 1201, 1204 (2011).

22. *Id.*

23. 28 CFR § 28.12 (2012). This expansion was challenged and upheld in *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012). However, Mitchell was indicted by a grand jury before law enforcement took his DNA sample. *Id.* at 389. Because King was not indicted by a judicial body, but had merely been arrested on law enforcement’s finding of probable cause, the cases can be distinguished. See *King*, 42 A.3d at 552.

24. See Robin Cheryl Miller, *Validity, Construction, and Operation of State DNA Database Statutes*, 76 A.L.R. 5th 239, 252 (2000).

25. MD. CODE ANN., PUB. SAFETY § 2-504(a)(3) (West 2013).

26. *Id.*

27. *Id.* § 2-504(d). “Buccal swab” refers to the collection of the buccal epithelial cells from the inside of the cheek using a foam-tipped swab. See Eiler, *supra* note 21, at 1209.

laboratory, the sample is processed into a unique DNA profile.<sup>28</sup> The profile is comprised of “non-coding” DNA, which does not reveal information relating to the individual’s personal traits.<sup>29</sup> Once processed, the state uploads the profile to the federal CODIS database.<sup>30</sup> If the individual’s DNA profile matches the DNA found at an unsolved crime scene, the laboratory will notify state police of the match.<sup>31</sup>

The Maryland statute attempts to protect the privacy interests of those in police custody by providing more protection than other states that collect and analyze arrestee DNA.<sup>32</sup> Like most states, the statute creates criminal penalties to prevent law enforcement from misusing DNA samples.<sup>33</sup> Moreover, the Maryland legislature included two important additional protections. First, the state does not submit the sample to the CODIS database until a judicial body arraigns the arrestee.<sup>34</sup> Second, if an arrestee at trial is not convicted at trial, the state automatically expunges the profile from the state and federal database and destroys the buccal swab sample.<sup>35</sup>

Before the expansion of the Maryland statute in 2008 to include felony arrestees, the Maryland Court of Appeals upheld the constitutionality of the application of the state DNA law to convicts, probationers, and parolees.<sup>36</sup> This is consistent with other state and federal courts, which have also found the application of state and federal DNA acts to different classes of convicted individuals constitutional under the Fourth Amendment.<sup>37</sup> These courts routinely found persuasive the arguments that DNA samples help to “identify” convicts and that profiling reduces the likelihood that convicted felons reoffend upon release.<sup>38</sup> Perhaps more importantly, these courts found that conviction was a watershed event that severely diminished the individual’s reasonable expectation of privacy.<sup>39</sup> Balancing the compelling government interest against

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28. PUB. SAFETY § 2-504(d). Each individual’s DNA-profile is so unique that the probability that two people will have the same DNA profile is one in 180 trillion. *See Eiler, supra* note 21, at 1205.

29. *Eiler, supra* note 21, at 1205.

30. PUB. SAFETY § 2-504(a)(3).

31. *Id.*

32. *Id.* §§ 2-504(a)(3), 2-508.

33. *Id.* § 2-512.

34. *Id.* § 2-504(d)(1).

35. *Id.* § 2-511. Notably, Maryland’s statute provides relatively strong privacy protections.

Comparatively, California’s statute instructs that law enforcement should compare an arrestee’s DNA sample to the CODIS database “as soon as administratively practicable” and only requires the state to expunge a record if the arrestee files a petition for expungement with the court. As a result, if California statute remains intact, and as technology advances, individuals arrested for a felony in California may soon have their information compared to the CODIS database of unsolved crimes simply because a police officer determined there was sufficient probable cause for arrest. And for California arrestees who do not request expungement, the state will retain their DNA regardless of their criminal status. CAL. PENAL CODE §§ 296.1(b), 299 (West 2012).

36. *See State v. Raines*, 857 A.2d 19 (2004).

37. *See, e.g., Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004).

38. *Id.*

39. *See, e.g., Rise*, 59 F.3d at 1560.

a convicted individual's diminished expectation of privacy, courts have consistently upheld the collection and analysis of convicted felons' DNA.<sup>40</sup> This spring, the Supreme Court will decide whether this logic extends to the collection and analysis of felony arrestees' DNA.

## II.

### MARYLAND V. KING

In 2009, Maryland police arrested Alonzo King for assault, a felony offense. Pursuant to the Maryland DNA Act, law enforcement took his DNA and uploaded his genetic profile to the federal CODIS database.<sup>41</sup> Nearly four months later, King's DNA profile generated a match to a previously unsolved rape from 2003.<sup>42</sup> Maryland police used the match to obtain a judicial warrant for police to take a second DNA sample. When that sample generated the same result, Maryland used the match as the only evidence to obtain a grand jury indictment against King for the rape, for which he was subsequently found guilty and sentenced to life in prison.<sup>43</sup> King challenged the conviction, arguing that DNA evidence should be suppressed at trial because the Maryland DNA Act authorized a warrantless, suspiciousless search that violated his Fourth Amendment rights.<sup>44</sup>

The Maryland Court of Appeals applied the traditional Fourth Amendment test to determine if the search was "reasonable" by balancing King's expectation of privacy against the government's interest served by the search.<sup>45</sup> The court found that because King was a "mere arrestee" and not yet convicted, his expectation of privacy was closer to that of an innocent individual than to that of a convict.<sup>46</sup> The court found compelling that "the arrestee's presumption of innocence remains" absent a conviction.<sup>47</sup> Additionally, the court held that obtaining and analyzing King's DNA constituted a serious intrusion into King's privacy because the DNA sample contained a "genetic treasure map" that the state retains.<sup>48</sup> Rejecting the analogy that a DNA sample is similar to a fingerprint, the court concluded that

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40. *Id.*

41. *King v. State*, 42 A.3d 550, 552 (2012).

42. *Id.*

43. *Id.*

44. *Id.* at 554.

45. *Id.* at 557.

46. *Id.* at 577. *Contra* *Haskell v. Harris*, 669 F.3d at 1078 (9th Cir. 2012) (Fletcher, J., dissenting) (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

47. *King*, 42 A.3d at 577. However, the dissent concluded that the "presumption of innocence . . . has little to do with the reduced expectation of privacy attendant to . . . arrest." *Id.* at 582.

48. *Id.* at 597. *Contra* *Anderson v. Commonwealth*, 650 S.E.2d 702, 705 (Va. 2007) (holding that the "intrusion is no more intrusive than the fingerprint procedure and the taking of one's photograph that a person must already undergo as a part of the normal arrest process"); *United States v. Kincade*, 379 F.3d 813, 837–38 (9th Cir. 2004) (concluding the court should not be swayed by the "'nightmarish' possibilities" and "Hollywood fantasies" but on the "concretely particularized facts" in the record.).

while police can *only* use fingerprints to identify individuals, police could use DNA sample to determine an individual's personal characteristics.<sup>49</sup>

Assessing the government's interest, the court held that the interest was not significant enough to support the search.<sup>50</sup> Applying a narrow definition of "identification," the court concluded that the state did not use King's DNA sample for identification—to determine he was who he claimed to be.<sup>51</sup> Rather, because DNA analysis takes many days to complete, police had already identified King with his fingerprints and used the DNA profile to investigate King's connection to unsolved crime.<sup>52</sup> Therefore, the court held that "a warrantless, suspicionless search can not be upheld by a generalized interest in solving crimes."<sup>53</sup> Additionally, the court rejected the assertion that DNA profiles reduced recidivism.<sup>54</sup> Quoting the Third Circuit Court of Appeals, the Maryland Court of Appeals noted that, "interests in supervision and prevention of recidivism are much diminished, if not absent, in the context of arrestees and pretrial detainees."<sup>55</sup>

Balancing the interests, the Maryland Court of Appeals found that the state's DNA Act as applied to felony arrestees was unconstitutional under the Fourth Amendment.<sup>56</sup> Because the court concluded that police obtained King's DNA illegally, it held that the evidence linking King to the unsolved rape was "fruit from the poisonous tree" and that the lower court should have suppressed it at trial.<sup>57</sup>

### III.

#### ISSUES BEFORE THE SUPREME COURT

Recall that the Court will answer two questions before coming to the *Knights* balancing test. First, the Court must answer the threshold question of whether the taking of a felony arrestee's DNA sample is a search at all under the Fourth Amendment. Given the current case law, it is almost certain that the Court will rule this a search.<sup>58</sup> Next, the Court will determine whether the

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49. *King*, 42 A.3d at 577–77.

50. *Id.* at 578.

51. *Id. Contra Haskell*, 669 F.3d at 1062 (finding that identification "encompasses not merely a person's name, but also other crimes to which the individual is linked"); *United States v. Mitchell*, 652 F.3d 387, 413 (3d Cir. 2011) (finding "[m]ost compelling is the Government's strong interest in identifying arrestees" through DNA profiles).

52. *King*, 42 A.3d at 579.

53. *Id.* (internal quotations omitted).

54. *Id.* at 567. *Contra Haskell*, 669 F.3d at 1059 (finding the government's interest in solving crime and exonerating the innocent sufficiently compelling in the absence of the interest to reduce recidivism).

55. *King*, 42 A.3d at 567 (quoting *Mitchell*, 652 F.3d at 414 n.25) (internal quotations omitted).

56. *Id.* at 581.

57. *Id.*

58. *See Schmerber v. California*, 384 U.S. 757, 767 (1966); *see also* Brief for the Respondent at 18–19, *Maryland v. King*, No. 12-207 (U.S. argued Feb. 26, 2013), 2013 WL 315233.

search qualifies for any of the current exemptions, such as “special needs.” Because it is unlikely that the Court will find that there is a “special need” that justifies the search, the Supreme Court will then apply the *Knights* balancing test that weighs the competing interests of the state and the individual.

The Court’s balancing decision will likely hinge on two key questions. First, does law enforcement have a significant interest in the DNA profile because it confirms an individual’s identity, or is law enforcement simply analyzing DNA to investigate unsolved crimes? Second, does a felony arrestee have a reasonable expectation of privacy in his DNA profile? However, the Court could avoid these questions by finding that DNA samples are the twenty-first century version of fingerprinting—a process which is unquestionably constitutional—and are simply an upgrade of routine booking procedures. It is likely that the Court will answer these questions differently than the Maryland Court of Appeals, and thus will reverse the Maryland court.

A. *Identification v. Investigation:*

*What Is the Government’s Interest in Searching the DNA Profile?*

The crucial component of the government’s case is establishing that states primarily use DNA profiles to identify arrestees, which is a legitimate state interest. On the other hand, if the Court finds that the state’s use of DNA profiles is investigatory in nature, the state’s interest in warrantless acquisition of the DNA samples would be too weak to overcome an arrestee’s privacy expectations. Therefore, the government argues that the Court should adopt a broad definition of identification: one that includes both verifying the arrestee is who he claims and whether he has committed past crimes. While some lower courts have adopted this definition,<sup>59</sup> the Maryland Court of Appeals rejected it.<sup>60</sup>

As highlighted by Justice Breyer during oral arguments, a pivotal part of the Court’s decision will be the answer to the question, “What does the word ‘identification’ mean?”<sup>61</sup> The Ninth Circuit answered this question directly in *Haskell v. Harris*, concluding that within the law enforcement context, identity includes both verifying the individual is who he claims to be and determining if he has a record of violence.<sup>62</sup> Although the Supreme Court has not directly addressed the question of what constitutes a person’s identity, the Ninth Circuit relied on the Supreme Court’s ruling in *Hiibel v. Sixth Judicial District Court*.<sup>63</sup> In *Hiibel*, the Supreme Court evaluated a Nevada statute authorizing law enforcement to “stop and identify” individuals suspected of criminal conduct,

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59. See *Haskell*, 669 F.3d at 1059–60 (adopting a broad definition of identity); see also *Anderson v. Commonwealth*, 650 S.E.2d 702, 705–06 (Va. 2007) (concluding that DNA is the modern fingerprint).

60. *King*, 42 A.3d at 581.

61. *Maryland v. King – Oral Argument*, *supra* note 11, at 48:00.

62. *Haskell*, 669 F.3d at 1059–60.

63. 542 U.S. 177, 186 (2004).



and made it a crime for an individual to refuse to disclose his names to police.<sup>64</sup> The Court upheld Nevada's statute because the state had a legitimate interest in the identity of an individual suspected of a crime and because "knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence."<sup>65</sup> If the Supreme Court affirms this broad definition of identity, the government's interest in "identifying" arrestees will weigh heavily in its favor for the balancing test.<sup>66</sup>

However, the Court could also conclude, like the Maryland Court of Appeals, that police take DNA samples primarily for investigatory purposes, which significantly diminishes the government's interest in the search. Noting that police did not upload King's DNA profile to the state's database for nearly four months after his initial arrest,<sup>67</sup> the Maryland Court of Appeals concluded that the "expansive definition of 'identification'" described by the Ninth Circuit in *Haskell* "stretch[ed] the bounds of reasonableness under . . . proper Fourth Amendment analysis."<sup>68</sup> And as Judge Fletcher's dissent argued in *Haskell*, the Supreme Court has stated in dictum that "identification" is crime specific—that is, police cannot take identifying information from a suspect unless there is a reasonable basis to conclude that the information will "establish or negate the suspect's connection *with that crime*."<sup>69</sup> Justice Ginsburg raised this concern during oral arguments when she remarked that DNA samples provide "a very reliable tool, but [one that] is not based on any kind of suspicion of the individual who is being subjected to it."<sup>70</sup> Police did not use King's DNA to connect him to the original charge of assault but to find whether he had committed any additional crimes. Therefore, under Fletcher's argument in *Haskell*, police could not use the probable cause that supported King's arrest for assault to further search his criminal history because police lacked specific individualized suspicion that King committed other past crime.<sup>71</sup>

Determining the government's interest in this case presents a difficult question for the Supreme Court, as both sides can find support in the Court's Fourth Amendment jurisprudence. The Justices have the opportunity to clarify how courts are to assess the government's interest by applying the traditional balancing test. However, as this Note explains below, it is more likely that the Court will avoid this question by finding that DNA samples are substantially similar to fingerprints and that law enforcement can take both during routine booking procedures.

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64. *Id.* at 182.

65. *Id.* at 186.

66. *See* *United States v. Mitchell*, 652 F.3d 387, 413 (3d Cir. 2011).

67. *King v. State*, 42 A.3d 549, 553 (2012).

68. *Id.* at 578.

69. *Haskell*, 669 F.3d 1049, 1075 (9th Cir. 2012) (Fletcher, J., dissenting) (quoting *Hayes v. Florida*, 470 U.S. 811, 817 (1985)).

70. *Maryland v. King – Oral Argument*, *supra* note 11, at 5:40.

71. 669 F.3d at 1075 (Fletcher, J., dissenting) (arguing that the DNA sample "is taken to investigate another crime for which there is no probable cause").

*B. What Are The Reasonable Privacy Expectations of a Felony-Arrestee?*

Weighing against the state's interest in identifying an individual (or solving unsolved crimes) is the individual's reasonable expectation of privacy. Thus, the second question the Court will address is to what extent an individual's status as an arrestee diminishes his expectation of privacy in his DNA. While the Court has not addressed the question directly, its recent opinion in *Samson v. California* indicates that the Roberts Court is unlikely to imbue felony arrestees with the same privacy protections as ordinary citizens. In *Samson*, the Court considered whether, as a condition of release, a parolee could be subject to suspicionless searches.<sup>72</sup> Justice Thomas, writing for the majority, concluded that as a parolee, Samson existed "on the 'continuum' of state-imposed punishments," and that as a result "parolees have fewer expectations of privacy."<sup>73</sup> The State of Maryland's brief to the Court uses *Samson* to argue that like parolees, "people arrested for violent crimes are incarcerated," and therefore the arrest, "correspondingly diminishes the individual's expectation of privacy."<sup>74</sup> The Court has applied this continuum theory to convicts and parolees to find the government's warrantless searches constitutional under the Fourth Amendment.<sup>75</sup> The question for the Court will be whether to extend that logic to an individual who has not been convicted, but merely detained.

If the Court extends *Samson's* logic to arrestees, it will have to find that it is not the conviction that alters the expectation of privacy but instead a police officer's determination of probable cause for arrest. While this conclusion may stretch the Court's continuum doctrine, it would be in line with the Court's recent decision in *Florence v. Board of Chosen Freeholders of Burlington*.<sup>76</sup> In *Florence*, the Court held that the Fourth Amendment was not violated by a police policy to strip search an arrestee before his admission to jail, even though the arrestee's detention was only supported by a police officer's finding of probable cause.<sup>77</sup> Justice Kennedy, writing for the majority, concluded that law enforcement could subject an individual to a strip search "regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history."<sup>78</sup> Although the government interest in *Florence* was different—maintaining safe prisons—the case could be read to suggest that custody, not conviction, diminishes an individual's reasonable expectation of privacy. Indeed, in oral arguments, it was Justice Kennedy that asked King's counsel, "Does a person who has been arrested for a felony have a reduced

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72. See *Samson v. California*, 547 U.S. 843 (2006).

73. *Id.* at 850.

74. See Brief for the Petitioner at 17, *Maryland v. King*, No. 12-207 (U.S. argued Feb. 26, 2013), 2012 WL 6755127.

75. See *id.*; *United States v. Knights*, 534 U.S. 112 (2001).

76. *Florence v. Bd. of Chosen Freeholders*, No. 10-945, slip op. at 18–19 (U.S. Apr. 2, 2012).

77. *Id.*

78. *Id.* at 3.

expectation of privacy at the time of his arrest?”<sup>79</sup> Still, to rule for Maryland based on an arrestee’s diminished privacy interests, the Court will have to find that not only is an arrestee’s expectation of privacy diminished but that it is so constrained by the arrest that the individual no longer has a reasonable expectation of privacy in his DNA.

On the other hand, the Court could also find that while an individual has a reasonable expectation of privacy in his DNA, the Maryland statute includes sufficient safeguards to ensure that the DNA profile is not misused. In considering the constitutionality of the Federal DNA Act as applied to an arrestee, the Third Circuit in *Mitchell v. United States* concluded that the privacy concerns are “unavailing.”<sup>80</sup> The Federal statute includes many of the same privacy protections as the Maryland DNA Act, and the Third Circuit found those protections sufficient to limit any potential privacy intrusion.<sup>81</sup> Considering the Third Circuit’s logic and the Supreme Court’s recent hostility to privacy rights,<sup>82</sup> the Court is likely to conclude that even if an arrestee has a significant expectation of privacy in his DNA sample, Maryland’s statute provides sufficient protections to prevent a violation of an arrestee’s expectation of privacy.

Nonetheless, some courts, like the Maryland Court of Appeals, have found that an arrestee retains a strong privacy interest that includes a reasonable expectation of privacy in DNA.<sup>83</sup> Indeed, in earlier cases that analyzed the collection and analysis of DNA from convicted felons, the courts often emphasized that conviction acted as a watershed event for privacy rights. The Ninth Circuit came to this conclusion in *Rise v. Oregon*.<sup>84</sup> There, the court considered an Oregon statute authorizing law enforcement to draw blood in order to obtain a DNA sample from convicted felons. Concluding that the law did not violate the Fourth Amendment, the court noted that the law did not include “free persons or *mere arrestees*.”<sup>85</sup>

Here again, the Court confronts a difficult question: In the context of the Fourth Amendment, how much, if at all, does an arrest diminish an individual’s expectation of privacy? While the Court may take the opportunity to clarify, or extend its more recent cases to arrestees, the Court more likely will adopt the fingerprint analogy, as discussed below.

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79. *Maryland v. King – Oral Argument*, *supra* note 11, at 56:45.

80. *United States v. Mitchell*, 652 F.3d 387, 412 (3d Cir. 2011).

81. *Id.*

82. *See* THOMAS N. MCINNIS, *THE EVOLUTION OF THE FOURTH AMENDMENT* 283 (2009).

83. *King v. State*, 42 A.3d 549, 577 (2012); *see also In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. Ct. App. 2006).

84. *See Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995).

85. *Id.* at 1560 (emphasis added).

C. *The Easy Way Out:*

*Finding that DNA Samples are the 21st Century Fingerprint*

The Supreme Court could avoid resolving the inconsistencies about suspicionless searches and reasonable privacy expectations of an arrestee if it adopts the “fingerprint-to-DNA analogy” rejected by the Maryland Court of Appeals.<sup>86</sup> Of the state and lower federal courts that have permitted the extension of DNA-Acts to arrestees, nearly all have found the analogy persuasive.<sup>87</sup> Although the Supreme Court has never addressed whether fingerprinting is a “search” or “reasonable” under the Fourth Amendment, federal circuit courts have rejected constitutional challenges to the practice.<sup>88</sup> These courts have concluded that because law enforcement has an interest in knowing who they have in custody, and fingerprinting is integrated into the routine booking procedure of an arrest, it does not violate arrestees’ expectation of privacy.<sup>89</sup>

This reasoning allows the Court to avoid answering whether there is individualized suspicion to support the DNA search. Justice Alito posed this comparison to King’s counsel, saying that “the purpose of fingerprinting . . . was identification and DNA can do exactly the same thing, except more accurately.”<sup>90</sup> King’s counsel conceded during oral argument that if law enforcement could process DNA profiles as fast as fingerprints, the practice likely would not violate the Fourth Amendment.<sup>91</sup> But as Justice Alito noted, processing speed is not necessarily a constitutional consideration.<sup>92</sup> Indeed, in the first case to consider the constitutionality of fingerprints in 1932, the Second Circuit Court of Appeals decided the practice was constitutional, despite it presumably taking days to process fingerprints.<sup>93</sup> Rather, the court considered the *accuracy* of the method.<sup>94</sup> Additionally, the Court may find that the fingerprint analogy is particularly persuasive because police currently take fingerprints from arrestees and compare the profile to the federal Integrated Automated Fingerprint Identification System database, which includes latent fingerprints from unsolved crimes.<sup>95</sup> If the Court decides to treat

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86. See *King*, 42 A.3d at 576.

87. See, e.g., *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012); *Anderson v. Virginia*, 650 S.E.2d 702 (Va. 2007); *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011).

88. See *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963); *Napolitano v. United States*, 340 F.2d 313, 314 (1st Cir. 1965) (finding that the “[t]aking of fingerprints . . . is [a] universally standard procedure, and [there is] no violation of constitutional rights”).

89. See *id.*

90. *Maryland v. King – Oral Argument*, *supra* note 11, at 47:00.

91. *Id.* at 52:00.

92. *Id.* at 17:00.

93. See *United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932) (denying the suppression of fingerprints at trial).

94. *Id.* at 69 (finding that police must use fingerprints because “the notoriety of the individual in the community no longer [suffices as] a ready means of identification”).

95. See *Integrated Automated Fingerprint Identification System*, FBI.GOV, [http://www.fbi.gov/about-us/cjis/fingerprints\\_biometrics/iafis/iafis](http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis) (last visited Apr. 16, 2013).

a DNA search like a fingerprint search, police would not need any additional individualized suspicion to conduct the DNA analysis beyond that which justified the original arrest.

Adopting the DNA-to-fingerprint analogy also permits the Court to avoid answering the privacy question. The Court's reasoning in *Hiibel*, the case evaluating Nevada's "stop and identify" law, suggests that an individual suspected of a crime cannot withhold his identity from police.<sup>96</sup> Some lower federal courts have concluded from *Hiibel* that an arrestee does not have a privacy interest in identifying information, such as fingerprints, once arrested.<sup>97</sup> If the Court concludes that DNA profiles are like fingerprints—in that DNA profiles provide identifying information—an individual could not claim a privacy interest in that identifying information upon arrest. The Court could thereby avoid determining whether, and to what extent, arrest diminishes an individual's expectation of privacy.

Nevertheless, the DNA-to-fingerprint analogy has its own set of complicating considerations. As the Maryland Court of Appeals described, the most important consideration is timing.<sup>98</sup> DNA profiles require many days to process, while fingerprints can confirm an individual's identity within minutes. Justice Kagan adopted this reasoning at oral argument, asserting to counsel for the United States that DNA profiles are "functioning as 'let's solve some crimes,' which is a good thing . . . but [it is not functioning] as an identification device."<sup>99</sup> And during rebuttal, when the State of Maryland argued that DNA analysis will soon become as rapid as fingerprint analysis, Chief Justice Roberts asked, "How can I base a decision today on what you tell me is going to happen in two years?"<sup>100</sup>

Despite these concerns, it is likely that Chief Justice Roberts will find a way to answer his own question and join with four other members of the Court to uphold the government's ability to conduct the search.<sup>101</sup> As Chief Justice Roberts wrote in the Court's opinion to stay the Maryland Court of Appeals' decision, "[c]ollecting DNA from individuals arrested for violent felonies provides a valuable tool for investigating unsolved crimes and thereby helping

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96. *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177, 186 (2004).

97. *See Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992) (holding that "when a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it").

98. *King v. State*, 42 A.3d 549, 579 (2012).

99. *Maryland v. King – Oral Argument*, *supra* note 11, at 18:30.

100. *Id.* at 59:15.

101. *See* MCINNIS, *supra* note 82; *see also* Jeffrey Toobin, *No More Mr. Nice Guy*, THE NEW YORKER (May 25, 2009), [http://www.newyorker.com/reporting/2009/05/25/090525fa\\_fact\\_toobin](http://www.newyorker.com/reporting/2009/05/25/090525fa_fact_toobin) (describing Chief Justice John Roberts's belief that "the Court should almost always defer to the existing power relationships in society. In every major case since he became the nation's seventeenth Chief Justice, Roberts has sided with the prosecution over the defendant, the state over the condemned . . .").

to remove violent offenders from the general population.”<sup>102</sup> Additionally, a majority of the courts that have considered the constitutionality of taking and analyzing a felony arrestee’s DNA have found that the government has a significant interest at stake because DNA is similar to fingerprints.<sup>103</sup> Therefore, the Supreme Court is likely to find, as did the Supreme Court of Virginia, that “[l]ike fingerprinting, the Fourth Amendment does not require additional finding of individualized suspicion before a DNA sample can be taken.”<sup>104</sup>

#### IMPLICATIONS AND CONCLUSION

In addition to the more general implications on the way law enforcement integrates DNA technology into booking and investigatory procedure, the resolution of the case will have a direct impact on two California cases that are on hold pending the Supreme Court’s decision: the en banc review of *Haskell v. Harris* in the Ninth Circuit and *People v. Buza* in the Supreme Court of California.

The Ninth Circuit reheard *Haskell v. Harris* en banc in January 2013, after the court vacated a two-to-one panel decision upholding the constitutionality of the California DNA Act’s application to felony arrestees.<sup>105</sup> If the Supreme Court finds the Maryland DNA Act unconstitutional, the decision will control the Ninth Circuit’s determination in *Haskell*. However, if the Supreme Court finds that the Maryland DNA Act is constitutional because it has strong privacy protections, the Ninth Circuit will have more work to do. As noted, California’s DNA Act only requires the state to expunge a record at the arrestee’s request, even if police do not charge the arrestee with a crime.<sup>106</sup> Additionally, California processes the DNA profiles soon after the police collect the buccal swab from felony arrestees, not after the arrestee is arraigned.<sup>107</sup> These significant variations have the potential to diminish the weight given to the California DNA Act’s privacy protections. As a result, if the Supreme Court finds the balancing is close, the Ninth Circuit will still have an opportunity to rebalance and find California’s Act unconstitutional.

*People v. Buza*, a case pending in the California Supreme Court, provides a more interesting question. In that case, law enforcement arrested Mr. Buza for a felony and compelled him to submit his DNA sample, which the state

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102. *Maryland v. King*, No. 12A48, slip op. at 3 (U.S. July 30, 2012) (granting application for stay).

103. *See Haskell v. Harris*, 669 F.3d 1049, 1059 (9th Cir. 2012) (upholding California’s DNA Act); *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) (upholding the Federal DNA Act); *Anderson v. Virginia*, 650 S.E.2d 702, 705–06 (Va. 2007) (upholding Virginia’s DNA Act).

104. *Anderson*, 650 S.E.2d at 705 (quoting *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992)) (internal quotation marks omitted).

105. *See Haskell*, 669 F.3d at 1075 (Fletcher, J., dissenting), *reh’g en banc granted*, 686 F.3d 1121 (9th Cir. 2012).

106. CAL. PENAL § 299.

107. *Id.* § 296.1(b).

processed and compared to the CODIS database. Buza challenged California's DNA Act on both federal and state constitutional grounds.<sup>108</sup> As a result, regardless of the Supreme Court's decision in *Maryland v. King*, the California Supreme Court will have an opportunity to decide if the California Constitution provides additional protection for arrestees beyond those provided by the federal Constitution. If the case is decided on adequate and independent state grounds, then it will preclude the Supreme Court's review.

Although courts will continue to struggle with these questions despite the Supreme Court's impending decision, the Court's determination on such key questions as the government's interest and an arrestee's expectation of privacy could have a long-term impact. While the Court's more liberal members may find that the court in *King* and the dissent in *Haskell* provide cogent arguments for why Maryland's DNA Act should not be extended to arrestees, Justice Kennedy, who wrote the majority opinion in *Florence*, likely will join the more conservative members to uphold state efforts to take DNA samples from felony-arrestees.<sup>109</sup>

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108. See *People v. Buza*, 129 Cal. Rptr. 3d 753, 755 (2011).

109. Justice Scalia has shown a willingness to maintain a strong Fourth Amendment in his majority opinion in *Kyllo v. United States*, 533 U.S. 27 (2001); see also *United States v. Jones*, No. 10-1259 (U.S. Jan. 23, 2012); *Florida v. Jardines*, No. 11-564 (U.S. Mar. 26, 2013). However, *Kyllo* concerned intrusion into the home, fundamentally protected by the text of the Fourth Amendment. In *King*, the Fourth Amendment concern comes from the Warren Court's "expectation of privacy," which likely will not as easily relate to common law trespass and earn an originalist's judicial protection.