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UNPRECEDENTED INFRINGEMENT: DEBUNKING THE CONSTITUTIONALITY OF DNA COLLECTION FROM MERE ARRESTEES IN LIGHT OF *MARYLAND V. KING*

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I. INTRODUCTION

Consider the following scenario: David, a drug dealer, meets Victor through some friends at a party. As their friendship grows, David, who Victor does not know is a drug dealer, asks Victor to hold a package for a few weeks. Victor accepts, unaware that the package contains five pounds of cocaine. As it turns out, detectives have been surveilling David for months, and upon approaching him, offer to not prosecute him if he provides the detectives with his drug source. David, taking advantage of the detective's appealing offer, implicates Victor, telling the detectives where and how much cocaine Victor has. After procuring a search warrant, the detectives arrest Victor, bring him to the station house, and take a sample of his DNA via cheek swab. Victor's DNA is processed in a nation-wide DNA database that runs DNA taken from arrestees and convicts against a database that contains samples from perpetrators who have left their DNA behind at crime scenes, hoping to find a match.

Victor's DNA, however, is never matched to an unknown sample. Later, the charges against Victor are dismissed for lack of evidence, but Victor's DNA is still in the database until he affirmatively takes action to remove it. Even then, the government will retain a copy of Victor's sample indefinitely.

This hypothetical illustrates the less glamorous side of DNA collection

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statutes. Usually, the use of DNA in capturing a criminal is hailed as an incredible advent of technology, but consideration is rarely given to the constitutional implications that these glorious triumphs carry with them. For example, in *Maryland v. King*,² a man arrested on assault charges had his DNA collected pursuant to state law.³ After his DNA was processed, he was linked to an unsolved 2003 rape case, and subsequently prosecuted.⁴

The majority opinion, written by Justice Kennedy, upheld the validity of DNA collection from mere arrestees because it served the legitimate governmental interest of accurately identifying an arrestee as the person he claims to be.⁵ Scalia's scathing dissent, however, argued that this "identification" use is instead a pretext for an impermissible use of the Fourth Amendment—" [to search] a person for evidence of a crime when there is no basis for believing the person is guilty of the crime."⁶ Scalia was referring to the Fourth Amendment's protection of an individual's privacy by requiring that law enforcement have "probable cause" before initiating a search against any person.⁷ He argued that when an arrestee—a person who has not yet been convicted of a crime—has his DNA collected and searched against a system of "unsolved" crimes, law enforcement officials lack probable cause to link that individual to any of the crimes that his DNA is being searched against.

The Maryland⁸ and federal⁹ DNA collection statutes upheld in *King* result in serious Fourth Amendment deprivations, the most significant of these being the violation of the general prohibition against searches without probable cause. Accordingly, this Comment proposes a series of legislative changes that would protect a person's Fourth Amendment rights, but still allow for the existence of arrestee DNA collection statutes. Under these changes, an arrestee's DNA is searched only against DNA in which there exists probable cause to run a search. This revision to the current statutory scheme would preserve both the government's and the arrestee's interests substantially.

Part II of this Comment summarizes the science behind DNA use, the inner workings of the government's Combined DNA Index System

² *Maryland v. King*, 133 S. Ct. 1958 (2013).

³ *Id.* at 1966.

⁴ *Id.*

⁵ *Id.* at 1970.

⁶ *Id.* at 1980 (Scalia, J., dissenting).

⁷ U.S. CONST. amend. IV.

⁸ MD. CODE ANN., PUB. SAFETY § 2-504 (LexisNexis 2012).

⁹ DNA Fingerprint Act of 2005, 42 U.S.C. § 14132(a) (2006).

(CODIS), and current Fourth Amendment jurisprudence. Part III explores the rationale behind the majority and dissenting opinions in *King*, while Part IV engages in a critical analysis of it, mainly attacking the majority's conclusion that arrestees maintain a diminished expectation of privacy that justifies the warrantless searches of their DNA. Part V considers the unrecognized consequences of the Court's decision, while Part VI offers a series of legislative remedies that bring the arrestee DNA collection statutes in compliance with the Constitution.

II. BACKGROUND: THE INTERPLAY BETWEEN DNA, CODIS, AND THE FOURTH AMENDMENT

DNA contains information specific to each person, allowing forensic scientists to match DNA samples by creating links of this specific information between the sample and its origin.¹⁰ Because this unique identifying feature of DNA can help law enforcement identify criminals, the federal government created the Combined DNA Index System (CODIS) to store DNA information.¹¹ CODIS, however, raises serious Fourth Amendment concerns.

A. Biology 101 - A Beginner's Guide To DNA

Deoxyribonucleic acid (DNA) is present in every nucleus-containing cell in the human body.¹² Shaped like a double helix, this molecule contains the genetic makeup of each individual.¹³ DNA molecules are located in the nucleus of each cell and are formed in strands.¹⁴ The sides of each strand are connected by "bases," which form ladder-like steps within the strands.¹⁵ There are four types of bases: A (adenine), C (cytosine), G (guanine), and T (thymine).¹⁶ In forming the ladder steps, the bases connect in a very specific manner—A always pairs with T, and C always pairs with

¹⁰ John D. Biancamano, *Arresting DNA: The Evolving Nature of DNA Collection Statutes and Their Fourth Amendment Justifications*, 70 OHIO ST. L.J. 619, 623-24 (2009).

¹¹ 42 U.S.C. § 14135a(b) (2006).

¹² Lisa R. Kreeger & Danielle M. Weiss, *Forensic DNA Fundamentals for the Prosecutor: Be Not Afraid*, American Prosecutors Research Institute, 4 (Nov. 2003), <http://www.crime-scene-investigator.net/APRI-DNAfundamentalsprosecutor.pdf>

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

G.¹⁷ The areas on the chromosome in which the base pairs repeat are called “loci”.¹⁸ It is the precise order in which these bases connect that create an individual’s DNA sequence, and the differences in DNA sequences give each individual their unique identity.¹⁹ Fascinatingly, no two individuals share the same DNA sequence.²⁰

Because crime scene evidence is often in the form of blood, hair, or saliva, it is no wonder that the DNA present in such biological evidence is extremely helpful in the criminal justice context. Forensic scientists collect DNA and create a “suspect profile,” analyzing the unique order in which the base pairs connect.²¹ In practice, forensic scientists use short tandem repeat (STR) testing as a method to compare the repeated base pair sequences to loci on other chromosomes.²² The likelihood that two individuals share the same number of STRs at all the various loci tested is almost impossible, thus ensuring that DNA profiles remain distinct.²³ Once a profile is analyzed, it is stored in a DNA database for future access.²⁴ Future collections of DNA evidence from either individuals in police custody or from crime scenes are compared against the suspect profiles in the database, and prosecution may begin against an individual if a match is found.

Despite the seemingly comprehensive knowledge that scientists have about DNA, DNA largely remains a mystery—over 98 percent of DNA performs an unknown function.²⁵

B. Creation of a Profile in CODIS

In enacting the Violent Crime Control and Law Enforcement Act of 1994, Congress authorized the Federal Bureau of Investigation (FBI) to collect DNA from both convicted felony offenders and crime scenes where DNA was left behind.²⁶ The FBI used this grant of authority to create

¹⁷ *Id.*

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 3-4.

²⁰ *Id.* Identical twins are the only exception to this rule.

²¹ *Id.* at 6.

²² D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL’Y 455, 461 (2001).

²³ *Id.*

²⁴ Irina Sivachenko, *DNA as the Twenty-First Century Fingerprint: Approval of DNA Collection Upon Arrest in United States v. Mitchell*, 53 B.C. L. REV. E-Supplement 249, 252 (2012).

²⁵ Jaan Suurkula, *Junk DNA*, PSRAST.ORG, <http://www.psrast.org/junkdna.htm> (last visited Jan. 8 2014).

²⁶ 42 U.S.C. § 14132 (2012) (“The Director of the Federal Bureau of Investigation may establish

CODIS, a combined effort by local, state, and federal governments to join their DNA databases in order to grant seamless access to law enforcement officials.²⁷ In response to privacy concerns, only “junk” DNA—the portion of DNA that contains information pertaining to the identity of the individual, but no other physical or medical characteristics—is analyzed.²⁸

CODIS is expansive; all 50 states mandate the collection of DNA from certain convicted felons.²⁹ Courts have upheld the practice of collecting and maintaining DNA samples and profiles from convicted felons.³⁰ Recently, however, controversy over whether DNA collection applies to mere arrestees has surfaced—mostly because arrestees are not yet convicted of a crime and may ultimately be acquitted or found not guilty. Arrestee-collection statutes were first pioneered by the states,³¹ with the federal government quickly following suit with the DNA Fingerprint Act of 2005, expressly authorizing the collection of DNA from arrestees.³² The Act contains certain safeguards: disclosure of DNA is limited to criminal justice agencies for identification purposes, legal proceedings, and research

an index of . . . DNA identification records of persons convicted of crimes . . . [and] analyses of DNA samples recovered from crime scenes”).

²⁷ See H.R. Rep. No. 106-900 (I), at 8 (2000) (noting that “CODIS allows State and local forensics laboratories to exchange and compare DNA profiles electronically in an attempt to link evidence from crime scenes for which there are no suspects to DNA samples of convicted offenders on file in the system); see also Kaye, *supra* note 12 at 462.

²⁸ See H.R. Rep. No. 106-900(I), at 27. Because of the sensitive information that DNA contains, only junk DNA is analyzed when creating a CODIS profile:

[T]he genetic markers used for forensic DNA testing were purposely selected because they are not associated with any known physical or medical characteristics, providing further assurance against the use of convicted offender DNA profiles for purposes other than law enforcement identification . . . [T]hey show only the configuration of DNA at selected “junk sites” which do not control or influence the expression of any trait. DNA records in the national database contain the following information only: an agency identifier for the agencies submitting the DNA profile; the specimen identification number; the DNA profile; and the name of the DNA personnel associated with the DNA analysis. [CODIS DNA profiles] do not reveal information relating to any medical condition or other trait. By design, the effect of the system is to provide a kind of genetic fingerprint, which uniquely identifies an individual, but does not provide a basis for determining or inferring anything else about the person.

²⁹ See CODIS and NDIS Fact Sheet, FBI.GOV, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited Jan. 10, 2014); see also Michelle Hibbert, *DNA Databanks: Law Enforcement’s Greatest Surveillance Tool?*, 34 Wake Forest L. Rev. 767, 775 (1999).

³⁰ See, e.g., *United States v. Kincade*, 379 F.3d 813, 832 (9th Cir. 2004) (en banc), *cert. denied*, 125 S. Ct. 1638 (2005); *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1996).

³¹ See, e.g., LA. REV. STAT. ANN. § 15:609(A)(1) (2005) (“A person who is arrested for a felony . . . shall have a DNA sample drawn or taken at the same time he is fingerprinted”); VA. CODE ANN. § 19.2-310.2:1 (2004) (“Every person arrested for the commission or attempted commission of a violent felony . . . shall have a sample of his saliva or tissue taken for DNA analysis”).

³² DNA Fingerprint Act of 2005, 42 U.S.C. § 14132(a) (2006) (“The Director of the Federal Bureau of Investigation may establish an index of DNA identification records of . . . persons convicted of crimes, persons who have been charged in an indictment or information with a crime”).

and development.³³ The Act also places a criminal penalty of imprisonment of up to one 1 year or a fine of no more than \$250,000 for anyone who “knowingly discloses a sample or result . . . in any manner to any person not authorized to receive it, or obtains or uses, without authorization, such sample or result.”³⁴

To remove one’s DNA information from CODIS, an individual must go through the process enumerated in the Violent Crime Control and Law Enforcement Act.³⁵ A DNA profile may be expunged from CODIS if two conditions are met. First, a DNA profile may be expunged if a conviction is overturned, a charge is dismissed, or if an individual is arrested but not charged.³⁶ Second, a final court order must be submitted establishing such.³⁷ Effectively, the burden is placed on the individual to expunge the information. The Violent Crime Control and Law Enforcement Act, however, only explains how to expunge DNA *profiles*, not DNA *samples*.³⁸ A DNA sample is a bodily sample from an individual on which DNA analysis can be performed.³⁹ Conversely, a DNA analysis (or profile) is the actual analysis of a bodily sample.⁴⁰ Congress has peculiarly remained silent on the issue of expungement for the actual DNA sample, leading scholars to believe that the government indefinitely retains DNA samples.⁴¹

In sum, when a DNA sample is collected from an arrestee, that sample is run against unknown DNA samples in CODIS. If a match is found, proceedings against the arrestee may begin for that crime linked to the matched DNA sample. The Fourth Amendment is offended, however, each time such a search is run, because law enforcement (a) have no warrant or

³³ *Id.* at § 14132(b)(3) (noting that stored DNA samples and analyses are only disclosed to “criminal justice agencies for law enforcement identification purposes; in judicial proceedings; . . . for criminal defense purposes . . . or if personally identifiable information is removed, for a population statistics database, [or] for identification research”).

³⁴ 42 U.S.C. § 14135e(c) (2004).

³⁵ 42 U.S.C. § 14132(d)(1). The expungement process requires that the Director of the Federal Bureau of Investigation expunge the DNA analysis of a person who submits a “certified copy of a final court order establishing that [the] conviction has been overturned[.]” The Director must also expunge the DNA analysis of anyone who is arrested and charged, upon submitting a “certified copy of a final court order establishing that [the] charge has been dismissed or has resulted in an acquittal or that no charge was filed within the applicable time period.”

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Stephanie Beauth, *How the DNA Act Violates the Fourth Amendment Right to Privacy of Mere Arrestees and Pre-Trial Detainees*, 59 LOY. L. REV. 157, 165 (2013).

⁴⁰ *Id.*

⁴¹ *See id.* at 170; *see also* Jason Tarricone, “An Ordinary Citizen Just Like Everyone Else”: The Indefinite Retention of Former Offenders’ DNA, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 209, 221 (2005).

probable cause to search the arrestee's DNA, and (b) have no probable cause to link the arrestee to the crime linked to the now-matched DNA sample.

C. An Overview of the Fourth Amendment

The Fourth Amendment affords to the people the "right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."⁴² For an individual to invoke this amendment's protection, she must first establish that a reasonable expectation of privacy exists in that which she is seeking to protect against search or seizure.⁴³ To establish this, an individual must have (1) a subjective expectation of privacy and (2) an expectation of privacy that society deems reasonable.⁴⁴ Once this expectation of privacy is established, law enforcement may only search a person or place upon the issuance of a warrant based on probable cause.⁴⁵ Although strict adherence to the Fourth Amendment's requirements is almost always required, the Court has loosened these requirements in very limited circumstances.⁴⁶

One such exception is the "special needs" test.⁴⁷ This test renders the probable cause and warrant requirement unnecessary in situations where "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."⁴⁸ In other words, courts do not apply this exception if the policy in question is geared towards solving or detecting crimes, because solving or detecting crimes is not "beyond the normal need for law enforcement."⁴⁹ Accordingly, the Court has applied this exception in cases where the search is conducted for reasons other than promoting normal law enforcement goals, such as

⁴² U.S. CONST. amend. IV.

⁴³ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring in judgment).

⁴⁴ *Id.*; *cf.* *California v. Greenwood*, 486 U.S. 35 (1988) (holding that there is no reasonable expectation in one's trash placed outside for public collection).

⁴⁵ *See Katz*, 389 U.S. at 357.

⁴⁶ *See Beaght*, *supra* note 39, at 175-92; *see also Tarricone*, *supra* note 41, at 217-21.

⁴⁷ *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment).

⁴⁸ *Id.*

⁴⁹ *Maryland v. King*, 133 S. Ct. 1958, 1981 (2013) (Scalia, J., dissenting) (quoting *Skinner v. Ry. Labor Excs. Ass'n*, 489 U.S. 602, 617 (1989)).

maintaining drunk-driver free roads,⁵⁰ public safety on railroads,⁵¹ school discipline,⁵² and effective workplaces.⁵³ Because the very nature of this exception is to serve the public interest, no individualized suspicion is necessary in searching an individual pursuant to this test.⁵⁴

Courts have created a second exception for certain groups of people with the “totality of the circumstances” test.⁵⁵ This test is used when a court must determine if, in executing a warrantless search, police officers had probable cause to believe that a person committed a crime.⁵⁶ In determining whether a search was reasonable under the totality of the circumstances, a court balances the government’s interests against an individual’s expectation of privacy.⁵⁷ Often, an individual’s expectation of privacy depends on his or her legal status.⁵⁸ Accordingly, courts have held that prisoners,⁵⁹ probationers,⁶⁰ and parolees⁶¹ have diminished privacy rights and are therefore subject to warrantless searches that are “reasonable.”⁶² The rationale behind this position is that once in state custody, the government has a legitimate interest in a convict or prisoner’s

⁵⁰ See *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding the constitutionality of police sobriety check points because states have a substantial governmental interest in preventing drunk driving).

⁵¹ See *Skinner*, 489 U.S. at 633 (1989) (upholding random drug testing on railroad employees because they are engaged in “safety-sensitive tasks”).

⁵² *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995) (upholding random drug testing of student athletes by public schools because schools have an interest in preventing student drug use).

⁵³ *O’Connor v. Ortega*, 480 U.S. 709, 722 (1987) (upholding work-related searches of public employees because they are incident to employment).

⁵⁴ See, e.g., *Vernonia*, 515 U.S. at 665.

⁵⁵ See, e.g., *United States v. Mitchell*, 652 F.3d 387, 414 (3d Cir. 2011) (finding that collection of defendant’s DNA was reasonable when the court balanced the scope of sensitive information stored in DNA with the government’s interest in collecting information to aid law enforcement); see also *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005) (finding that the collection of a probationer’s DNA was justified under the totality of the circumstances when the court balanced the intrusion of the blood test with the fact that the defendant was a convicted felon).

⁵⁶ *Illinois v. Gates*, 462 U.S. 213 (1983).

⁵⁷ *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

⁵⁸ *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985) (stating that “Although the underlying command of the Fourth Amendment is always that searches and seizures must be reasonable, what is reasonable depends on the context within which a search takes place”); see also *United States v. Kincade*, 379 F.3d 813, 834-35 (9th Cir. 2004) (en banc), cert. denied, 125 S. Ct. 1638 (2005) (holding that “parolees have demonstrated by their adjudicated criminal conduct a capacity and willingness to commit crimes serious enough to deprive them of liberty”).

⁵⁹ See *Hudson v. Palmer*, 468 U.S. 517 (1984) (holding that prisoner who was searched by prison guards did not suffer Fourth Amendment violation because “privacy” is incompatible with prison security).

⁶⁰ See *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (upholding constitutionality of warrantless searches of probationer’s home by probation officer because he remained in the custody of the state).

⁶¹ See *Samson v. California*, 547 U.S. 843 (2006) (upholding random search of parolee by parole officer because parolee was still in custody of the state until his sentence was completed).

⁶² See *Jones v. Murray*, 962 F.2d 302, 306-07 (4th Cir. 1992).

identity.⁶³ For example, this interest stems from law enforcement's need to ascertain who an individual is in the event that a prisoner or convict alters his appearance.

In contrast to the special needs exception, the totality of the circumstances test generally requires some degree of individualized suspicion. Often, the fact that an individual is in the state's custody is grounds for such suspicion because that individual's expectation of privacy is diminished.⁶⁴ Just like the special needs exception, however, a search analyzed using the totality of the circumstances test (and any search in general) may *never* be for the purpose of ordinary-crime solving.⁶⁵ As the next section explains, however, this very premise was violated in *Maryland v. King*.

III. THE SEMINAL CASE: EXPLORING THE RATIONALE BEHIND *MARYLAND v. KING*

In 2009, Alonzo King was arrested for menacing a group of people with a shotgun.⁶⁶ Incident to his arrest, and pursuant to Maryland law,⁶⁷ police officers took a sample of King's DNA by placing a cotton swab to the inside of his cheeks.⁶⁸ Once King's DNA was collected, processed, and analyzed, it was revealed that King's DNA matched the DNA sample recovered at an unsolved 2003 rape case.⁶⁹ A search warrant was issued and King was subsequently prosecuted for the 2003 rape case.⁷⁰ King moved to suppress the DNA match, arguing that the Maryland statute authorizing such DNA collection violated his Fourth Amendment right

⁶³ See, e.g., *Dunn v. White*, 880 F.2d 1188, 1196–97 (10th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990) (holding blood testing of prisoners constitutional in light of government's interest in controlling AIDS in prison).

⁶⁴ See *Samson*, 547 U.S. at 849-50; see also Charles J. Nerko, *Assessing Fourth Amendment Challenges to DNA Extraction Statutes After Samson v. California*, 77 *FORDHAM L. REV.* 917, 926-937 (2008).

⁶⁵ *Maryland v. King*, 133 S. Ct. 1958, 1982 (2013) (Scalia, J., dissenting). When a search is incident to an arrest, the search "either serves other ends (such as officer safety, in a search for weapons) or is not suspicionless (as when there is reason to believe the arrestee possesses evidence relevant to the crime of arrest).

⁶⁶ *Id.* at 1965.

⁶⁷ MD. CODE ANN., PUB. SAFETY § 2-504 (LexisNexis 2012) ("[A] DNA sample shall be collected from an individual who is charged with a crime of violence or an attempt to commit a crime of violence").

⁶⁸ *Maryland*, 133 S. Ct. at 1965.

⁶⁹ *Id.* at 1966.

⁷⁰ *Id.*

against unreasonable searches and seizures.⁷¹ The Supreme Court granted a writ of certiorari to address the issue of whether the Fourth Amendment prohibits the collection and analysis of DNA samples from mere arrestees that have not yet been convicted.⁷²

Justices Kennedy, Roberts, Thomas, Breyer, and Alito held that the procedure was constitutional. The Court applied the “totality of the circumstances” test, balancing the interests of the government against an arrestee’s expectation of privacy. In doing so, it found that the government’s legitimate interest in accurately identifying an arrestee outweighed the expectation of privacy of an arrestee.

In beginning its inquiry, the Court noted that a cheek swab for an arrestee’s DNA constitutes a search.⁷³ The Court then proceeded to analyze the reasonableness of the search by identifying the legitimate governmental interests served by the Maryland DNA Collection Act. The Court stated that “the legitimate government interest . . . is one that is well established: the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody.”⁷⁴ The Court’s opinion examined (1) the state’s interest in accurately identifying arrestees in its custody, (2) the state’s interest in doing so safely, and (3) the state’s interest in properly processing an arrestee.

The first and most emphasized interest the Court recognized was the need for law enforcement officers to be able to accurately identify persons in its custody.⁷⁵ According to the majority, the search of King’s person was incident to his legal arrest and thus was valid.⁷⁶ The search of his person, which yielded his DNA, was purportedly further justified by the fact that the government has an interest in an arrestee’s identity, which “goes beyond ensuring that the proper name is typed on the indictment.”⁷⁷ Collection of an arrestee’s DNA is critical in determining a suspect’s criminal history, which in turn helps law enforcement identify an arrestee, the Court opined.⁷⁸ The Court reasoned that this quest to determine past criminal history is indistinguishable from comparing a suspect’s booking photograph to a sketch artist’s drawing of a perpetrator, except for the fact

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 1969.

⁷⁴ *Id.* at 1970.

⁷⁵ *Id.* at 1971.

⁷⁶ *Id.* at 1970-71.

⁷⁷ *Id.* at 1971.

⁷⁸ *Id.*

that DNA is more accurate.⁷⁹ The Court mentioned that fingerprints and DNA are both forms of identification that perform the same function.⁸⁰

The Court moved on to examine the second recognized state interest: ensuring that the custody of an arrestee does not pose a risk to staff or other detainees.⁸¹ DNA identification is useful in this context because it can help law enforcement evaluate the risk an arrestee poses, such as a past history of violence or mental disorder.⁸² This is particularly helpful, the Court reasoned, because an arrestee's name lacks the ability to furnish such elaborate information.⁸³

The Court then recognized the third state interest in "ensuring that persons accused of crimes are available for trials."⁸⁴ In possessing an arrestee's DNA, law enforcement can more accurately gauge an individual's likelihood of fleeing the instant charges, if, for example, the instant charge is less severe than the uncharged crime an arrestee's DNA information links him to.⁸⁵ This is also relevant to a fourth consideration the Court probed: whether or not an individual should be released on bail.⁸⁶ An arrestee's "future dangerousness" can impact a judge's decision about whether an individual should be released on bail and how much bail should be set.⁸⁷

Next the Court further examined the similarities between DNA identification and fingerprinting.⁸⁸ Citing Judge Hand, the Court reiterated the belief that fingerprinting was a widely accepted and thus unchallenged procedure,⁸⁹ indicating that DNA identification will attain the same status once it ceases to be so novel.⁹⁰

To end its inquiry and complete the balancing test, the Court examined

⁷⁹ *Id.* at 1971-1972.

⁸⁰ *Id.* at 1972.

⁸¹ *Id.*

⁸² *Id.* (citing *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 186 (2004)).

⁸³ *Maryland*, 133 S. Ct. at 1972.

⁸⁴ *Id.* at 1964 (citing *Bell v. Wolfish*, 441 U.S. 520, 534 (1979)).

⁸⁵ *Maryland*, 133 S. Ct. at 1973.

⁸⁶ *Id.*

⁸⁷ *Id.* at 1973-1974.

⁸⁸ *Id.* at 1976.

⁸⁹ *Id.* (citing *United States v. Kelly*, 55 F.2d 67, 69-70 (2d Cir. 1932)).

⁹⁰ The first noted instance of fingerprinting in a criminal case dates back to 1892 in Buenos Aires, Argentina. MARK R. HAWTHORNE, *FINGERPRINTS: ANALYSIS AND UNDERSTANDING* 9 (CRC Press et al. eds., 2009). In contrast, the first use of arrestee DNA was in Louisiana after it passed a law authorizing such use in 1997. *DNA Sample Collection From Arrestees*, NIJ.GOV, <http://www.nij.gov/nij/topics/forensics/evidence/dna/collection-from-arrestees.htm> (last visited Oct. 21, 2013).

the other side of the equation: the arrestee's expectation of privacy. Because "the expectations of privacy of an individual taken into police custody 'necessarily [are] of a diminished scope,'"91 an arrestee's person and possessions are subject to "extensive exploration,"92 and arrestees may even have to lift their genitals or cough in a squatted position.⁹³ The Court placed further focus on the nonintrusive nature of the search, holding that the "gentle rub" of a cotton swab contains no risks of danger to the arrestee.⁹⁴

Next, the Court looked to whether the processing of King's DNA sample intruded his expectation of privacy. The Court first noted that the CODIS loci came from junk DNA, which does not reveal any sensitive genetic information.⁹⁵ By stating that junk DNA in its *current* understanding does not have the capability to reveal such information, the Court sidestepped the issue as to whether junk DNA can reveal sensitive information sometime in the *future*.⁹⁶ Alternatively, the Court determined that even if genetic information can be retrieved from junk DNA, it is not tested for that purpose.⁹⁷ Instead, the Court stated that law enforcement officials use a DNA sample to generate only a unique serial number that correlates to the sample so that future samples can be matched to it.⁹⁸ Specifically, a House Report explains that "DNA records in the national database contain the following information only: an agency identifier for the agencies submitting the DNA profile; the specimen identification number; the DNA profile; and the name of the DNA personnel associated with the DNA analysis."⁹⁹

Lastly, the Court considered the safeguards within the Maryland Act to conclude that the state's legitimate interests supersede King's expectation of privacy. The Act forbids the collection of DNA information that pertains to information other than the identification of the individual.¹⁰⁰ Therefore, since the act forbids any other use of an arrestee's DNA, the

91 *Maryland*, 133 S. Ct. at 1978 (quoting *Bell v. Wolfish*, 441 U.S. 520, 557 (1979)).

92 *Id.* (citing *United States v. Robinson*, 414 U.S. 218, 227 (1973)).

93 *See id.* (quoting *Florence v. Bd. of Chosen Freeholders of the Cnty. Of Burlington*, 132 S. Ct. 1510, 1520 (2012)).

94 *Id.* at 1979.

95 *Id.*

96 *Id.*

97 *Maryland*, 133 S. Ct. at 1979.

98 *Id.*

99 H.R. REP. NO. 106-900, pt. 1 at 27 (2000).

100 *Maryland*, 133 S. Ct. at 1980 (quoting MD. PUB. SAFETY CODE ANN. § 2-512(c)) (effective Jan. 1, 2009).

majority found that the search of his DNA did not intrude on King's expectation of privacy.

In a scathing dissent, which Justices Ginsburg, Sotomayor, and Kagan joined, Justice Scalia argued that the majority's finding that "identification" was Maryland's legitimate interest was really a pretext for solving unsolved crimes, a "noble" but impermissible interest under Fourth Amendment jurisprudence.¹⁰¹ The dissent framed its analysis under the general principle that the Fourth Amendment "forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment."¹⁰² The dissent then began to pick apart the majority's rationale by reiterating the circumstances when applying the "special needs" and "totality of the circumstances" tests are appropriate. When no individualized suspicion to search an individual exists, the special needs test applies only when the search is done for reasons other than ordinary crime solving.¹⁰³ On the other hand, when individualized suspicion is present, the totality of the circumstances test applies only when a governmental purpose other than crime solving is at issue.¹⁰⁴ The dissent ultimately undermined the one proposition that the majority's totality of the circumstances test relied on: that the principal purpose of the DNA search was something other than detecting criminal wrongdoing.¹⁰⁵

Justice Scalia first noted that a search incident to an arrest may only be executed to yield either weapons or evidence that the individual may destroy, or evidence that is relevant to the crime of arrest.¹⁰⁶ In searching an arrestee for his DNA, none of these objectives are satisfied.¹⁰⁷ Scalia argued that by recognizing this, the majority attempted to emphasize the fact that the search had a goal of "identifying" King.¹⁰⁸ As mentioned earlier, the majority stated that an arrestee's past criminal history (which running an arrestee's DNA against the CODIS database would reveal,

¹⁰¹ See *Maryland*, 133 S. Ct. at 1989 (Scalia, J., dissenting).

¹⁰² *Id.* at 1980.

¹⁰³ *Id.* See *supra* text accompanying notes 44-47 for an illustration of case law applying the special needs test.

¹⁰⁴ *Maryland*, 133 S. Ct. at 1982.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (citing *Arizona v. Gant*, 556 U.S. 332, 343-44 (2009); *Thorton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

assuming there is a match found) is relevant to determine his “identity.”¹⁰⁹ The majority justified this conclusion by rattling off a list of government interests in an arrestee’s identity: it can inform law enforcement of the violent past/tendencies of an individual and ensure that the arrestee is appropriately handled if he presents a risk to staff and other detainees,¹¹⁰ can determine the likelihood that an arrestee will return for trial in light of knowledge of his past crimes,¹¹¹ and can help inform a judge if and when an arrestee should be released on bail once due consideration is given to the arrestee’s past record.¹¹² But the majority seemed to establish an arrestee’s identity by identifying what unsolved crimes the arrestee has committed, the dissent pointed out.¹¹³ In turn, this becomes “indistinguishable from the ordinary law-enforcement aims that have never been thought to justify a suspicionless search.”¹¹⁴

Scalia then argued that confirming King’s identity could not have been so urgently crucial to determine the risks of danger he posed to society, as the majority held, in light of the fact that Maryland law enforcement took three days to begin testing King’s DNA.¹¹⁵ Because Maryland law mandated this three-day waiting period before DNA could be tested,¹¹⁶ the dissent suggested that Maryland lawmakers did not enact the law with the majority’s purpose of “identification” in mind.¹¹⁷ The dissent similarly undermined the majority’s conclusion that King’s identification was crucial to the judge’s decision to set bail. The fact that Maryland law prohibited DNA testing until King was *arraigned* was at odds with the majority’s ascribed purpose, since bail is often set *during* arraignment, and in Maryland’s case, without the qualifying “identification information” the DNA sample apparently would provide.¹¹⁸ Scalia further illustrated this

¹⁰⁹ *Maryland*, 133 S. Ct. at 1972.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1972-73.

¹¹² *Id.* at 1973.

¹¹³ *Id.* at 1983 (Scalia, J., dissenting).

¹¹⁴ *Maryland*, 133 S. Ct. at 1983

¹¹⁵ *Id.*

¹¹⁶ *Id.*; MD. PUB. SAF. CODE ANN. § 2-504(d)(1) (2011). § 2-504(d)(1) states that:

A DNA sample collected from an individual charged with a crime under subsection (a)(3) of this section may not be tested or placed in the statewide DNA data base system prior to the first scheduled arraignment date unless requested or consented to by the individual as provided in paragraph (3) of this subsection.

¹¹⁷ *Id.* For example, MD. PUB. SAF. CODE ANN. § 2-512(c)-(e) goes as far as imposing a punishment of up to five years’ imprisonment to anyone who tests an individual’s DNA information in anyway except as provided in the statute.

¹¹⁸ *Id.* at 1984.

point by noting the length of time it took the Maryland State Police Forensic Science Division to test King's sample: his sample was seized on April 10, 2009, was received by the forensic unit on April 23, 2009, and was mailed to a lab for testing on June 25, 2009 – almost three months from the date of King's arrest.¹¹⁹ The lab results were finally made available on July 13, 2009, and on August 4, 2009, it was revealed that King's sample yielded a match to the 2003 unsolved rape case.¹²⁰

Still, Scalia opined that King could not have been “identified” by this match.¹²¹ Scalia noted that CODIS is categorized by two distinct collections.¹²² The first collection, which Scalia named the “Convict and Arrestee Collection,” contains DNA samples taken from *known* convicts and arrestees.¹²³ He named the second collection the “Unsolved Crimes Collection,” which consists of unknown samples taken from crime scenes.¹²⁴ The “Convict and Arrestee Collection” does not contain any information that could identify who the sample was taken from, such as a name, for example.¹²⁵ This collection instead contains only the “DNA information itself, the name of the agency that submitted it, the laboratory personnel who analyzed it, and an identification number for the specimen.”¹²⁶ The only reason CODIS does not allow any identifying information for a given specimen is because “the submitting state laboratories are expected *already* to know the identities of the convicts and arrestees from whom samples are taken,”¹²⁷ Scalia reasoned. Furthermore, the majority's “identification” purpose is not achieved when considering CODIS's central function: checking the samples contained in the “Unsolved Crimes Collection” against the samples in the “Convict and Arrestee Collection.”¹²⁸ If identification was the state's actual purpose,

¹¹⁹ *Maryland*, 133 S. Ct. at 1984.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* (citing *FBI, CODIS, and NDIS Fact Sheet*, FBI.GOV, <http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet> (last visited October 2, 2015)).

¹²³ *Id.*

¹²⁴ *Maryland*, 133 S. Ct. at 1984 (Scalia, J., dissenting).

¹²⁵ *Id.*; See also H.R. REP. NO. 106-900, pt. 1, at 27 (2000) (stating that “DNA records in the national database contain the following information only: an agency identifier for the agencies submitting the DNA profile; the specimen identification number; the DNA profile; and the name of the DNA personnel associated with the DNA analysis”).

¹²⁶ *Maryland*, 133 S. Ct. at 1984 (Scalia, J., dissenting).

¹²⁷ *Id.* Other methods of “identifying” King include taking and checking his fingerprints, and documenting his name, sex, race, height, weight, date of birth, and address. *Id.* at 1985. Also, Scalia suggested that if the DNA testing were aimed at “identifying” King, then the lab results would have returned actual results of his identification.

¹²⁸ *Id.* at 1984.

then it would check King's DNA sample against the "Convict and Arrestee Collection" in order to search whether King was already in the system.¹²⁹ If King was in the system, then a match would appear, and law enforcement would be able to conclusively determine that Alfonso King was really who he claimed to be.

The only thing that was "identified" was the previously taken DNA sample from the 2003 crime scene.¹³⁰ Scalia argued that King's identity was already known; the police had taken his full name, race, sex, height, weight, date of birth, and address.¹³¹ Just as no one would say that an arrestee is "identified" when he matches the description of a man on a "wanted" poster, no one would say that the matched DNA sample "identified" King.¹³² Instead, the man in the "wanted" poster is identified, and in King's case, it is the previously unidentified perpetrator in the 2003 rape case that is identified.¹³³

Scalia then criticized the majority for failing to consider the actual text of the Maryland Act, which would presumably shed light on Maryland's intended "purpose" in collecting arrestee DNA.¹³⁴ Proceeding to analyze what the majority ignored, the dissent noted that "identification" was not among the Act's intended purposes. Section 2-505(a)(2) of the Act¹³⁵ states that DNA samples are tested "as a part of an official investigation into a crime," or as Scalia put it, for ordinary law-enforcement purposes.¹³⁶ The

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Maryland*, 133 S. Ct. at 1984 (Scalia, J., dissenting).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ MD. CODE ANN., PUB. SAFETY § 2-505(a) states that DNA samples shall be collected and tested:

- (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, including:
 - (i) development of a population data base after personal identifying information is removed;
 - (ii) support of identification research and protocol development of forensic DNA analysis methods; and
 - (iii) quality control.

¹³⁶ *Maryland*, 133 S. Ct. at 1984 (Scalia, J., dissenting). Scalia illustrated this point further by providing a comment from the Governor of Maryland. He commented that he was glad the Supreme Court granted certiorari to hear the case because "[a]llowing law enforcement to collect DNA samples . . . is absolutely critical to our efforts to continue driving down crime," and "bolsters our efforts to resolve open investigations and bring them to a resolution." *Id.* (citing Marbella, *Supreme Court Will Review Md. DNA Law*, BALTIMORE SUN, Nov. 10, 2012, at 1, 14).

Act mentions using a DNA sample for identification, but only for the purposes of identifying human remains¹³⁷ and to help identify missing individuals.¹³⁸

In its final remarks, the dissent addressed the majority's analogy between fingerprints and DNA.¹³⁹ The majority's analogy was improperly drawn, Scalia argued, because fingerprints are used to actually identify an arrestee, while DNA is used to solve crimes.¹⁴⁰ Furthermore, the FBI's Integrated Automated Fingerprint Identification System (IAFIS) contains the identifying information that the DNA profile lacks, including criminal history, mug shots, and physical markers like tattoos, scars, height, weight, and eye color.¹⁴¹ The fingerprint system is more than adequate to address the government's "identity" concerns; all that DNA adds is the promising benefits of solving crimes.¹⁴² In sum, Scalia questioned the authenticity of the majority's conclusion that law enforcement retains a substantial interest in an arrestee's DNA for identification purposes, especially when the Maryland statute did not include "identification" as a purpose, and when a fingerprint system already exists to meet these concerns.

IV. UNDERMINING THE MAJORITY'S RATIONALE

As the dissent pointed out, the majority in *King* made some obvious errors. First, by failing to consider the text of the Maryland statute itself, the Court did not recognize that "identification" was never the legislature's purpose. Additionally, many of the majority's points are at odds with the actual statute—or example, the fact that Maryland mandated a three-day waiting period before testing a DNA sample is at odds with the majority's belief that urgent identification was necessary to identify any violent tendencies or risks King could pose.¹⁴³ The Court also made a hasty determination in holding that arrestees have a diminished expectation of privacy. The dissent avoided rebutting this portion of the majority's holding, but, as I explain below, the majority's reasoning in reaching that conclusion is flawed.

¹³⁷ *Id.* at 1986 (Scalia, J., dissenting) (citing MD. CODE ANN., PUB. SAFETY § 2-505(a)(3)).

¹³⁸ *Id.* (citing § 2-505(a)(4)).

¹³⁹ *Id.* at 1987 (Scalia, J., dissenting).

¹⁴⁰ *Id.*

¹⁴¹ *Maryland*, 133 S. Ct. at 1987. Fingerprints recovered from crimes scenes are not compared against a database of known fingerprints.

¹⁴² *Id.*

¹⁴³ *Id.* at 1983 (2013).

A. An Arrestee's Privacy Interests are Superior to the Government's Interests

An arrestee can find himself in three situations: (1) he can be arrested, charged, and convicted; (2) he can be arrested and charged but not convicted; or (3) he can be arrested, not charged, and released. In the last two situations, the arrestee is never convicted of a crime. The collection of an arrestee's DNA is impermissible because arrestees maintain an expectation of privacy that surpasses that of a parolee, probationer, or convict. This is because of the appreciable differences between an arrestee, parolee, probationer, and convict: the arrestee is the only individual in this group who has not been convicted of a crime—the very reason why parolees, probationers, and convicts have a diminished expectation of privacy. Because arrestees maintain an expectation of privacy, a search of the arrestee's DNA would not be justified without a warrant or probable cause.

The majority, in applying the totality of the circumstances test, found that an arrestee may have his DNA searched and placed in CODIS because his legal status as an arrestee diminishes his expectations of privacy.¹⁴⁴ This rationale is flawed. True, an arrestee does not enjoy the expansive expectation of privacy that a non-arrested individual enjoys (since he is in police custody). But an arrestee maintains a higher expectation of privacy than a parolee, probationer, or convict. These individuals have a substantially diminished expectation of privacy and are thus subject to warrantless searches because they have been convicted of a crime.¹⁴⁵ “A conviction causes a permanent change in the convicted person's status, because the status changes from an ordinary citizen to a ‘lawfully adjudicated criminal[] whose proven conduct substantially heightens the government's interest in monitoring’ him and ‘quite properly carries lasting consequences.’”¹⁴⁶ An arrestee, in contrast, has yet to be convicted (and even *charged* in some jurisdictions)¹⁴⁷ and is presumed innocent until proven guilty. The rationale behind upholding warrantless searches against probationers, parolees, and convicts does not extend to arrestees

¹⁴⁴ *Id.* at 1978 (quoting *Bell v. Wolfish*, 441 U.S. 520, 557, 99 S. Ct. 1861).

¹⁴⁵ *See, e.g., Hudson v. Palmer*, 468 U.S. 517 (1984); *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987); *Samson v. California*, 547 U.S. 843, 848-49 (2006).

¹⁴⁶ *Beaugh, supra* note 39, at 197 (citing *United States v. Kincaid*, 379 F.3d 813, 836 (9th Cir. 2004) (en banc) (plurality opinion)).

¹⁴⁷ *See, e.g., CAL. PENAL. CODE* § 296.1 (a)(1)(A) (2012) (collecting DNA “immediately following arrest”).

whatsoever, since the charges against them may even be dismissed!

Because an arrestee retains an expectation of privacy greater than a convict, parolee, or probationer, a search of an arrestee's DNA would not be justified without a warrant or probable cause. Accordingly, the governmental interests that the majority in *King* belabored would not outweigh King's expectation of privacy. The government's interest in identification is a pretext for searching for evidence of ordinary criminal wrongdoing, as the dissent illustrated, and such an interest is not constitutionally permissible to justify general searches.

B. Fingerprints Differ Vastly From DNA

The majority's reasoning does not only suffer from its inability to distinguish arrestees from convicts, parolees, and probationers, but also from its ill-placed emphasis on the likeness between DNA and fingerprints. The Court peculiarly forgot to address the extremely sensitive information present in DNA, instead, it focused on the minimal invasiveness of the search. DNA information can be used to run familial searches,¹⁴⁸ and although federal law provides for "safeguards,"¹⁴⁹ there is no oversight body ensuring that such private information will not be misused.

The use of "junk DNA" is also potentially problematic. Although the government claims that junk DNA is used to ensure anonymity of the donor,¹⁵⁰ some scholars allege that junk DNA may actually contain valuable genetic material.¹⁵¹

Furthermore, and most importantly, fingerprints, unlike DNA, are not used to solve crimes. Instead, fingerprints are taken at arrest, to actually "identify" individuals by running a taken fingerprint through a database of known fingerprints, unlike what CODIS does.¹⁵²

The sensitive information present in DNA is enormous, and the field of

¹⁴⁸ See *infra* Part V.B.

¹⁴⁹ 42 U.S.C. § 14135e(c) (2012). The Act contains certain safeguards: it imposes a criminal penalty of imprisonment of up to 1 year or a fine of no more than \$250,000 to anyone who "knowingly discloses a sample or result . . . in any manner to any person not authorized to receive it, or obtains or uses, without authorization, such sample or result." *Id.* It also limits disclosure of DNA information to criminal justice agencies for identification purposes, legal proceedings, and research and development. *Id.* at § 14132(b)(3).

¹⁵⁰ See DNA ANALYSIS BACKLOG ELIMINATION ACT OF 2000, H.R. REP. NO. 106-900(I), at 27 (2000).

¹⁵¹ See, e.g., JOHN M. BUTLER, *Forensic DNA Typing: Biology, Technology, and Genetics of STR Markers*. 17-22 (2d ed. 2005) (Stating what we once referred to as "junk DNA" may later be found to contain valuable genetic information).

¹⁵² See *Maryland v. King*, 133 S. Ct. 1988, 1997 (2013) (Scalia, J., dissenting).

science has yet to even fully understand its inner workings to an extensive degree. Notwithstanding this lack of knowledge, sensitive DNA information is used without regard to the future discoveries to be made about the mysterious DNA molecule. If junk DNA is found to contain sensitive material in the future, for example, then the government's alleged safeguard of using non-identifying information is pointless. Using junk DNA when the possibility that it could contain sensitive information, especially while an existing system already functions efficiently to identify, is beyond comprehension.

V. IGNORING THE TEMPTATION TO SUPPORT A POWERFUL CRIME-FIGHTING TOOL: RECOGNIZING THE REAL WORLD CONSEQUENCES OF THE *KING* DECISION

The *King* decision carries with it serious implications for all citizens: law-abiding or not. An array of individuals may unfortunately face the consequences of the Court's decision to uphold the DNA collection from mere arrestees, including individuals who are falsely accused, mistakenly identified, acquitted, innocent, nonviolent, or ultimately not prosecuted. Even those who are correctly arrested under probable cause face the devastating consequences of DNA collection that the *King* decision fails to acknowledge. First, if one wishes to remove his information from CODIS, the burden is on the individual. Even after these efforts, only an individual's DNA *profile* is removed, not the actual DNA sample. Second, DNA can be used to facilitate familial searches—a search of a DNA sample's family members, which has its own Fourth Amendment implications.

A. Expungement of DNA in CODIS¹⁵³

At the federal level, expungement of a DNA profile may only occur if an arrestee obtains a final court order stating that the charges against her have been dismissed.¹⁵⁴ The burden of expungement is on the arrestee; she must expend her efforts and go before the legal system to obtain a court order finalizing the disposition of the charges brought against her.

If an arrestee refuses to submit a DNA sample, she is charged with a

¹⁵³ This section focuses on expungement at the federal level, since the federal scheme applies to all arrestees wishing to expunge their information from CODIS, regardless of which state they are arrested in.

¹⁵⁴ 42 U.S.C. § 14132(d)(1) (2006).

class A misdemeanor.¹⁵⁵ Even worse, if an arrestee who is wrongly identified refuses to submit a DNA sample because of her non-involvement in the crime of arrest, she will still face a federal offense after her exoneration, because she failed to submit a DNA sample.

Perhaps the most alarming feature of the federal government's DNA statute is that after expungement, the government may retain an individual's DNA sample indefinitely.¹⁵⁶ Proponents of CODIS will quickly counter that like DNA, the government indefinitely retains fingerprints without any public objection. The indefinite retention of DNA, however, raises different concerns in light of the possible discoveries about junk DNA usefulness.¹⁵⁷

Yet another concern is the undeniable possibility of government abuse of retained DNA samples. If the government has an ulterior motive in keeping an individual's DNA, such as investigating his involvement in another crime, it might delay the submission of the final court order,¹⁵⁸ or create a new profile from the retained DNA sample in order to investigate the individual.

Granting the government unlimited access to DNA through its ability to indefinitely retain samples from the profiles entered in CODIS is a bold violation of the Fourth Amendment's guarantee of privacy, especially since the government retains no interest in a DNA sample once an arrestee proves that the charges against him were never filed or were dropped.

B. DNA Can be Used to Facilitate Familial Searches

Because DNA contains sensitive genetic information, it can be used to perform familial searches. A familial search is a partial search in which law enforcement, who cannot match a recovered DNA sample from a crime scene to the CODIS database, search the database for someone who might be *related* to the recovered sample.¹⁵⁹ If a familial relationship between the known individual in CODIS and the unknown sample is shown, law enforcement can find and investigate the known individual and his family in efforts to find the true perpetrator.¹⁶⁰ This has serious privacy

¹⁵⁵ 42 U.S.C. § 14135a(a)(5)(A) (2006).

¹⁵⁶ See Tarricone, *supra* note 41, at 221.

¹⁵⁷ See *supra* Part IV.B.

¹⁵⁸ See Beagh, *supra* note 39, at 199.

¹⁵⁹ See Jeffery Rose, *Genetic Surveillance for All?*, SLATE (Mar. 17, 2009) <http://www.tinyurl.com/rosencodis>.

¹⁶⁰ *Id.*

implications. Firstly, it subjects purely innocent individuals to harassment and investigation by law enforcement. Secondly, African Americans are more likely to be the subject of this harassment, since they represent about 40 percent of people convicted of felonies each year.¹⁶¹ One study showed that “17 percent of African American citizens could be identified through familial searches, as opposed to only 4 percent of the Caucasian population.”¹⁶² Lastly, probable cause to search CODIS for a match is absent.

Proponents of DNA searching argue that CODIS only analyzes junk DNA, the part of a DNA strand that does not contain any genetic information. But these proponents fail to give full credit to the ever-developing field of science; many scholars assert that junk DNA has the potential to indeed reveal sensitive information.¹⁶³

Proponents also claim that familial searching is not a real criticism of DNA collection because it is not a procedure that the FBI authorizes.¹⁶⁴ But this neglects the fact that as of 2011, California, Texas, Colorado, and Virginia all perform familial searching.¹⁶⁵

Although familial searching can be useful, it presents serious privacy concerns. Existing DNA profiles being searched for a relationship with an unknown DNA sample have not given law enforcement probable cause to search their DNA profiles, and if a link is found, they are subject to the harassing techniques of law enforcement officers who seek information. A 2008 study noted that 84 percent of Americans thought that laws prohibiting law enforcement from gaining access to genetic research information are important,¹⁶⁶ indicating society’s consensus that law enforcement should not be granted unfettered access to genetic information.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See BUTLER, *supra* note 151.

¹⁶⁴ See SHELDON KRIMSKY & TANIA SIMONCELI, DNA DATA BANKS, CRIMINAL INVESTIGATIONS, AND CIVIL LIBERTIES 76-81 (2d ed. 2012).

¹⁶⁵ *Familial Searching*, FBI.GOV, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/familial-searching> (last visited Jan. 9, 2014).

¹⁶⁶ David J. Kaufman et al., *Public Opinion about the Importance of Privacy in Biobank Research*, 85 *Am. J. Human Genetics* 643, 649 (Nov. 13, 2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2775831>.

VI. PROPOSALS TO AMEND THE FEDERAL ARRESTEE DNA COLLECTION STATUTE

As an obvious start, Congress can amend the DNA Fingerprint Act of 2005 by reverting to the pre-arrestee version of the statute, where only those convicted of a felony were subject to DNA collection.¹⁶⁷ Alternatively, I present some possibilities that all serve to protect the government's interest in "identification" while maintaining an arrestees privacy rights.

One possible legislative solution is to limit the collection of arrestee DNA to individuals who have been convicted. Law enforcement would still be free to pursue a warrant based upon probable cause to collect and process the DNA before conviction if it deemed it necessary, as it normally does. But this differs from the pre-arrestee version of the statute because the warrant would permit the testing of an individual's DNA against unknown DNA only if there exists probable cause to link the individual to the sample (which is linked to the crime the arrestee is suspected of being involved in) instead of allowing an endless search through all unidentified DNA samples. If a warrant is issued, but the arrestee is nonetheless found innocent at trial or has the charges against him dropped, the government would have the burden of expunging the profile. Although critics may argue that the already burdened system would be disadvantaged by such a policy, it is only fair that the government bear the costs of a policy it wishes to implement.¹⁶⁸ Lastly, Congress could specifically provide for the immediate and permanent destruction of all DNA samples, adopting a measure where the government would notify an arrestee and his attorney that the sample has been destroyed, and assigning an oversight body to ensure these procedures are followed.

If "identification" really is the motivating goal behind CODIS, then this proposal would maintain the government's interest in identifying an individual. Fingerprints would operate in the meantime to ascertain that an individual is who he claims to be, because, as illustrated in the facts of *King*, identifying an arrestee is not an urgent concern, considering the fact that King's DNA was used to identify him days after his arrest. If the

¹⁶⁷ See Sarah B. Berson, Debating DNA Collection, NIJ.GOV, <http://www.nij.gov/journals/264/pages/debating-DNA.aspx> (Oct. 29, 2009); 42 U.S.C.A. § 14135a (West 2005).

¹⁶⁸ See Beagh *supra* note 39, at 194 (comparing placing the burden of expungement on the government to tort and contract theory, where the party who causes the injury must bear the cost).

arrestee is convicted, law enforcement is free to use his DNA in the database to find matches as it currently does, because at that point, it is established that the individual's expectation of privacy is substantially diminished.

Finally, Congress could keep the arrestee DNA collection statute as is, but in order to ensure that CODIS is only used for "identification" purposes, and to make it as closely analogous to fingerprinting as possible, Congress could enact legislation that expressly prohibits matching the known arrestee DNA profiles against the unknown DNA samples. If used solely for the purpose of taking an arrestee's DNA sample to ensure that an individual is who he claims to be, it will be akin to fingerprinting and will finally achieve the "identification" purpose the statute currently lacks.

VII. CONCLUSION

The current arrestee DNA collection statute violates longstanding notions of privacy, probable cause, and the presumption of innocence. The Court's decision in *Maryland v. King* fails to recognize that identification of an arrestee is not the primary function of DNA identification laws.

It is irrefutable that the fields of science and technology are advancing at unprecedented rates. These advancements often have serious privacy implications, and in an effort to uphold the worthy guarantees of the Constitution, the judicial and legislative branches must be cognizant of them. DNA has the potential to be a powerful crime-fighting agent, but the Fourth Amendment guarantee against unreasonable searches and seizures, combined with the serious risks associated with granting unfettered access to sensitive genetic information, trump this potential. Therefore, a proposal allowing for law enforcement to search an arrestee's DNA only against DNA profiles in which there exists probable cause will not only ensure that the extent to which this sensitive information is exposed is limited, but also that the Fourth Amendment's guarantees against unreasonable searches and seizures are vigilantly guarded.