Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Search and Seizure

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**Maryland v. King, ___ U.S. ___** (2013)

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*Alonzo King was arrested after he allegedly threatened several people with a shotgun. During the booking process, Maryland officials took a buccal swab to the inside of King's cheeks to obtain a DNA sample. Several months later, Maryland officials determined that DNA sample matched a DNA sample from an unsolved rape case. King was promptly arrested and indicted for that rape. After King's motion to suppress the DNA evidence was denied, he was convicted and sentenced to life in prison. The Maryland Court of Appeals overturned the conviction on the grounds that the buccal swab was a constitutionally unreasonable search under the Fourth Amendment as incorporated by the Fourteenth Amendment. Maryland appealed to the Supreme Court of the United States.*

*The Supreme Court by a 5–4 vote reinstated King's conviction. Justice Kennedy's majority opinion held that DNA swabs were constitutionally reasonable means for ensuring the identity of persons arrested by police officers. What did Kennedy claim are the unconstitutional uses of DNA swabs? What uses did he claim are constitutional? Did Justice Scalia's dissent challenge Kennedy's distinction between constitutional and unconstitutional uses of DNA swabs or did Scalia insist that the swabs were being used for reasons the majority opinion regarded as unconstitutional? In* King, *Justice Breyer voted with the conservatives and Justice Scalia with the liberals. This voting pattern is not uncommon in Fourth Amendment cases. Why is Justice Breyer more conservative on what constitutes a constitutional search and Justice Scalia more liberal?*

JUSTICE KENNEDY delivered the opinion of the Court.

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The advent of DNA technology is one of the most significant scientific advancements of our era. The full potential for use of genetic markers in medicine and science is still being explored, but the utility of DNA identification in the criminal justice system is already undisputed. Since the first use of forensic DNA analysis to catch a rapist and murderer in England in 1986, law enforcement, the defense bar, and the courts have acknowledged DNA testing's "unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices."

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. . . . [U]sing a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search. Virtually any "intrusio[n] into the human body," *Schmerber v. California* (1966), will work an invasion of "'cherished personal security' that is subject to constitutional scrutiny." The Court has applied the Fourth Amendment to police efforts to draw blood, scraping an arrestee's fingernails to obtain trace evidence, and even to "a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis."

A buccal swab is a far more gentle process than a venipuncture to draw blood. It involves but a light touch on the inside of the cheek; and although it can be deemed a search within the body of the arrestee, it requires no "surgical intrusions beneath the skin." The fact that an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines that term.

"As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" In giving content to the inquiry whether an intrusion is

reasonable, the Court has preferred "some quantum of individualized suspicion . . . [as] a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion."

In some circumstances, such as "[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." Those circumstances diminish the need for a warrant, either because "the public interest is such that neither a warrant nor probable cause is required," or because an individual is already on notice, for instance because of his employment, or the conditions of his release from government custody, that some reasonable police intrusion on his privacy is to be expected. The need for a warrant is perhaps least when the search involves no discretion that could properly be limited by the "interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer."

. . . . The Maryland DNA Collection Act provides that, in order to obtain a DNA sample, all arrestees charged with serious crimes must furnish the sample on a buccal swab applied, as noted, to the inside of the cheeks. The arrestee is already in valid police custody for a serious offense supported by probable cause. The DNA collection is not subject to the judgment of officers whose perspective might be "colored by their primary involvement in 'the often competitive enterprise of ferreting out crime.'" As noted by this Court in a different but still instructive context involving blood testing, "[b]oth the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them. . . . Indeed, in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate."

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The legitimate government interest served by the Maryland DNA Collection Act 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. It is beyond dispute that "probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." Also uncontested is the "right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested." . . . Even in that context, the Court has been clear that individual suspicion is not necessary, because "[t]he constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search."

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First, "[i]n every criminal case, it is known and must be known who has been arrested and who is being tried." . . . Disguises used while committing a crime may be supplemented or replaced by changed names, and even changed physical features." An "arrestee may be carrying a false ID or lie about his identity," and "criminal history records . . . can be inaccurate or incomplete." A suspect's criminal history is a critical part of his identity that officers should know when processing him for detention. . . . Police already seek this crucial identifying information. They use routine and accepted means as varied as comparing the suspect's booking photograph to sketch artists' depictions of persons of interest, showing his mugshot to potential witnesses, and of course making a computerized comparison of the arrestee's fingerprints against electronic databases of known criminals and unsolved crimes. In this respect the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides.

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Second, law enforcement officers bear a responsibility for ensuring that the custody of an arrestee does not create inordinate "risks for facility staff, for the existing detainee population, and for a new detainee." DNA identification can provide untainted information to those charged with detaining suspects and detaining the property of any felon. For these purposes officers must know the type of person whom they are detaining, and DNA allows them to make critical choices about how to proceed. . . .

Third, looking forward to future stages of criminal prosecution, "the Government has a substantial interest in ensuring that persons accused of crimes are available for trials." A person who is arrested for one offense but knows that he has yet to answer for some past crime may be more inclined to flee the instant charges, lest continued contact with the criminal justice system expose one or more other serious offenses. . . .

Fourth, an arrestee's past conduct is essential to an assessment of the danger he poses to the public, and this will inform a court's determination whether the individual should be released on bail. . . .

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Finally, in the interests of justice, the identification of an arrestee as the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned for the same offense. . . .

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DNA identification represents an important advance in the techniques used by law enforcement to serve legitimate police concerns for as long as there have been arrests, concerns the courts have acknowledged and approved for more than a century. Law enforcement agencies routinely have used scientific advancements in their standard procedures for the identification of arrestees. . . . Perhaps the most direct historical analogue to the DNA technology used to identify respondent is the familiar practice of fingerprinting arrestees. From the advent of this technique, courts had no trouble determining that fingerprinting was a natural part of "the administrative steps incident to arrest." In the seminal case of *United States v. Kelly*, 55 F.2d 67 (2nd Cir. 1932), Judge Augustus Hand wrote that routine fingerprinting did not violate the Fourth Amendment precisely because it fit within the accepted means of processing an arrestee into custody:

> Finger printing seems to be no more than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations of the criminal laws. It is known to be a very certain means devised by modern science to reach the desired end, and has become especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification.
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DNA identification is an advanced technique superior to fingerprinting in many ways, so much so that to insist on fingerprints as the norm would make little sense to either the forensic expert or a layperson. The additional intrusion upon the arrestee's privacy beyond that associated with fingerprinting is not significant and DNA is a markedly more accurate form of identifying arrestees. A suspect who has changed his facial features to evade photographic identification or even one who has undertaken the more arduous task of altering his fingerprints cannot escape the revealing power of his DNA.

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In this critical respect, the search here at issue differs from the sort of programmatic searches of either the public at large or a particular class of regulated but otherwise law-abiding citizens that the Court has previously labeled as "'special needs'" searches. When the police stop a motorist at a checkpoint, or test a political candidate for illegal narcotics, they intrude upon substantial expectations of privacy. So the Court has insisted on some purpose other than "to detect evidence of ordinary criminal wrongdoing" to justify these searches in the absence of individualized suspicion. Once an individual has been arrested on probable cause for a dangerous offense that may require detention before trial, however, his or her expectations of privacy and freedom from police scrutiny are reduced. . . .

. . . . [A] buccal swab involves [a] more brief and . . . minimal intrusion. A gentle rub along the inside of the cheek does not break the skin, and it "involves virtually no risk, trauma, or pain." A brief intrusion of an arrestee's person is subject to the Fourth Amendment, but a swab of this nature does not increase the indignity already attendant to normal incidents of arrest.

In addition the processing of respondent's DNA sample's 13 CODIS loci did not intrude on respondent's privacy in a way that would make his DNA identification unconstitutional. . . . It is undisputed that law enforcement officers analyze DNA for the sole purpose of generating a unique identifying number against which future samples may be matched. . . . If in the future police analyze samples to determine, for instance, an arrestee's predisposition for a particular disease or other hereditary factors not relevant to identity, that case would present additional privacy concerns not present here.

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In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

JUSTICE SCALIA, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

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. Whenever this Court has allowed a suspicionless search, it has insisted upon a justifying motive apart from the investigation of crime.

It is obvious that no such noninvestigative motive exists in this case. The Court's assertion that DNA is being taken, not to solve crimes, but to *identify* those in the State's custody, taxes the credulity of the credulous. And the Court's comparison of Maryland's DNA searches to other techniques, such as fingerprinting, can seem apt only to those who know no more than today's opinion has chosen to tell them about how those DNA searches actually work.

At the time of the Founding, Americans despised the British use of so-called "general warrants"—warrants not grounded upon a sworn oath of a specific infraction by a particular individual, and thus not limited in scope and application. The first Virginia Constitution declared that "general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed," or to search a person "whose offence is not particularly described and supported by evidence," "are grievous and oppressive, and ought not be granted." . . . As ratified, the Fourth Amendment's Warrant Clause forbids a warrant to "issue" except "upon probable cause," and requires that it be "particula[r]" (which is to say, *individualized*) to "the place to be searched, and the persons or things to be seized." And we have held that, even when a warrant is not constitutionally necessary, the Fourth Amendment's general prohibition of "unreasonable" searches imports the same requirement of individualized suspicion.

Although there is a "closely guarded category of constitutionally permissible suspicionless searches," that has never included searches designed to serve "the normal need for law enforcement, . . . " Even the common name for suspicionless searches—"special needs" searches—itself reflects that they must be justified, *always,* by concerns "other than crime detection." We have approved random drug tests of railroad employees, yes—but only because the Government's need to "regulat[e] the conduct of railroad employees to ensure safety" is distinct from "normal law enforcement." . . . To put it another way, both the legitimacy of the Court's method and the correctness of its outcome hinge entirely on the truth of a single proposition: that the primary purpose of these DNA searches is something other than simply discovering evidence of criminal wrongdoing. As I detail below, that proposition is wrong.

The Court alludes at several points to the fact that King was an arrestee, and arrestees may be validly searched incident to their arrest. But the Court does not really *rest* on this principle, and for good reason: The objects of a search incident to arrest must be either (1) weapons or evidence that might easily be destroyed, or (2) evidence relevant to the crime of arrest. Neither is the object of the search at issue here.

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[T]he Court elaborates at length the ways that the search here served the special purpose of "identifying" King. But that seems to me quite wrong—unless what one means by "identifying" someone is "searching for evidence that he has committed crimes unrelated to the crime of his arrest." At points the Court does appear to use "identifying" in that peculiar sense—claiming, for example, that knowing "an arrestee's past conduct is essential to an assessment of the danger he poses." If identifying someone means finding out what unsolved crimes he has committed, then identification is indistinguishable from the ordinary law-enforcement aims that have never been thought to justify a suspicionless search. . . .

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King was arrested on April 10, 2009, on charges unrelated to the case before us. That same day, April 10, the police searched him and seized the DNA evidence at issue here. . . . King's DNA sample was not received by the Maryland State Police's Forensic Sciences Division until April 23, 2009—two weeks after his arrest. It sat in that office, ripening in a storage area, until the custodians got around to mailing it to a lab for testing on June 25, 2009—two months after it was received, and nearly three since King's arrest. After it was mailed, the data from the lab tests were not available for several more weeks, until July 13, 2009, which is when the test results were entered into Maryland's DNA database, *together with information identifying the person from whom the sample was taken*. Meanwhile, bail had been set, King had engaged in discovery, and he had requested a speedy trial—presumably not a trial of John Doe. It was not until August 4, 2009—four months after King's arrest—that the forwarded sample transmitted (*without* identifying information) from the Maryland DNA database to the Federal Bureau of Investigation's national database was matched with a sample taken from the scene of an unrelated crime years earlier.

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[I]f anything was "identified" at the moment that the DNA database returned a match, it was not King—his identity was already known. . . . Rather, what the August 4 match "identified" was *the previously-taken sample from the earlier crime*. That sample was genuinely mysterious to Maryland; the State knew that it had probably been left by the victim's attacker, but nothing else. King was not identified by his association with the sample; rather, the sample was identified by its association with King. The Court effectively destroys its own "identification" theory when it acknowledges that the object of this search was "to see what [was] already known about [King]." King was who he was, and volumes of his biography could not make him any more or any less King. No minimally competent speaker of English would say, upon noticing a known arrestee's similarity "to a wanted poster of a previously unidentified suspect," that the *arrestee* had thereby been identified. It was the previously unidentified suspect who had been identified—just as, here, it was the previously unidentified rapist.

That taking DNA samples from arrestees has nothing to do with identifying them is confirmed not just by actual practice (which the Court ignores) but by the enabling statute itself (which the Court also ignores). The Maryland Act at issue has a section helpfully entitled "Purpose of collecting and testing DNA samples." . . . That provision lists five purposes for which DNA samples may be tested. By this point, it will not surprise the reader to learn that the Court's imagined purpose is not among them.

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The Court asserts that the taking of fingerprints was "constitutional for generations prior to the introduction" of the FBI's rapid computer-matching system. This bold statement is bereft of citation to authority because there is none for it. The "great expansion in fingerprinting came before the modern era of Fourth Amendment jurisprudence," and so we were never asked to decide the legitimacy of the practice. As fingerprint databases expanded from convicted criminals, to arrestees, to civil servants, to immigrants, to everyone with a driver's license, Americans simply "became accustomed to having our fingerprints on file in some government database." But it is wrong to suggest that this was

uncontroversial at the time, or that this Court blessed universal fingerprinting for "generations" before it was possible to use it effectively for identification.

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Today, it can fairly be said that fingerprints really are used to identify people—so well, in fact, that there would be no need for the expense of a separate, wholly redundant DNA confirmation of the same information. What DNA adds—what makes it a valuable weapon in the law-enforcement arsenal—is the ability to solve unsolved crimes, by matching old crime-scene evidence against the profiles of people whose identities are already known. That is what was going on when King's DNA was taken, and we should not disguise the fact. Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches. The Fourth Amendment must prevail.

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The most regrettable aspect of the suspicionless search that occurred here is that it proved to be quite unnecessary. All parties concede that it would have been entirely permissible, as far as the Fourth Amendment is concerned, for Maryland to take a sample of King's DNA as a consequence of his conviction for second-degree assault. So the ironic result of the Court's error is this: The only arrestees to whom the outcome here will ever make a difference are those who *have been acquitted* of the crime of arrest (so that their DNA could not have been taken upon conviction). In other words, this Act manages to burden uniquely the sole group for whom the Fourth Amendment's protections ought to be most jealously guarded: people who are innocent of the State's accusations.

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