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Searches and Seizures – Fourth Amendment and Reasonableness: The Maryland DNA Collection Act Allows Pre-Conviction Securing of DNA Samples for Identification *Maryland v. King*, 133 S. Ct. 1958

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SEARCH AND SEIZURE—FOURTH AMENDMENT AND
REASONABLENESS: THE MARYLAND DNA COLLECTION
ACT ALLOWS PRE-CONVICTION SECURING OF DNA
SAMPLES FOR IDENTIFICATION PURPOSES
Maryland v. King, 133 S. CT. 1958 (2013)

ABSTRACT

In *Maryland v. King*, the United States Supreme Court held that mandatory collection of DNA, pursuant to the Maryland DNA Collection Act or other similar state acts, from an individual arrested for a serious crime does not violate the Fourth Amendment. The Court concluded that taking and analyzing a cheek swab is similar to fingerprinting and photographing, and it is a legitimate booking procedure for police officers that is reasonable under the Fourth Amendment. The Court found that the governmental interest of safely and accurately identifying individuals who are brought into custody outweighs the arrestee's privacy interests. Therefore, the Court held that the Court of Appeals of Maryland erred by reversing King's rape conviction under the Act. This case has important implications for understanding Fourth Amendment protections and the relationship between an individual's right to privacy and the methods which law enforcement may use to apprehend criminals.

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I. FACTS

In 2003, a Maryland woman was raped by a man who broke into her home.¹ Police were initially unable to find and identify the perpetrator, but they did obtain a sample of his DNA from the victim.² In 2009, Alonzo King was arrested in Maryland and charged with first and second-degree assault.³ A DNA sample was taken from King as a routine part of booking procedures, pursuant to the Maryland DNA Collection Act.⁴ His DNA profile was uploaded to the Maryland DNA database, and it was found to match the sample taken from the 2003 rape victim.⁵ This evidence was

1. *Maryland v. King*, 133 S. Ct. 1958, 1965 (2013).

2. *Id.*

3. *Id.* King was arrested after threatening a group of individuals with a shotgun. *Id.*

4. *Id.* at 1966. The Act authorizes law enforcement to collect DNA samples from arrestees who are booked for certain serious offenses. *Id.* at 1967. Specifically, it authorizes collection of DNA samples from, “An individual who is charged with . . . a crime of violence or an attempt to commit a crime of violence.” *Id.* (quoting MD. CODE ANN., PUB. SAFETY § 2-504 (West 2013)).

5. *Id.* at 1966.

presented to a grand jury, and King was indicted for the crime.⁶ There was no dispute that the original DNA sample taken from King led to King first having been linked to the crime and provided the sole probable cause for the grand jury indictment.⁷ Law enforcement then obtained a search warrant and took a second sample of King's DNA, which, again, matched the sample from the rape.⁸

At the district court, King moved to suppress the DNA evidence on the basis that the Act violated his Fourth Amendment rights.⁹ However, the judge found that the Act was constitutional, and King was tried and convicted of rape.¹⁰ The case was appealed, and on review of his conviction, the Maryland Court of Appeals found that certain portions of the Act allowing collection of DNA from arrestees were unconstitutional.¹¹ The majority found that King's privacy interests outweighed the state's interests of identifying him through a DNA sample.¹² They held that the sample of DNA obtained from King was an unlawful seizure because taking and using the DNA evidence from the cheek swab was an unreasonable search of the person in violation of the Fourth Amendment.¹³ The appeals court set aside his conviction.¹⁴

The Supreme Court of the United States granted certiorari and reversed the judgment of the Maryland court.¹⁵ The Court concluded that the governmental interest of safely and accurately identifying individuals who are brought into custody outweighs the arrestee's privacy interests.¹⁶ The Court held that mandatory collection of DNA, pursuant to the Maryland DNA Collection Act, from an individual arrested for a serious crime does not violate the Fourth Amendment protection against unreasonable search and seizure.¹⁷

6. *Id.*

7. *Id.* at 1965.

8. *Id.* at 1966.

9. *Id.*

10. *Id.* King was sentenced to life in prison without the possibility of parole after his conviction. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 1962.

15. *Id.* at 1965-66.

16. *Id.* at 1979.

17. *Id.* at 1980.

II. LEGAL BACKGROUND

Throughout American history, law enforcement personnel have used various methods for identifying criminals brought into custody.¹⁸ The increased use of DNA technology is a scientific advancement that has aided the criminal justice system in finding and identifying criminals.¹⁹ It excels above the processes of fingerprinting and photographing to more accurately identify those accused of crimes.²⁰ Because of the precision and accuracy that DNA identification provides, it also raises several privacy concerns.²¹ Since DNA collection has become more prominent, several states have enacted laws both allowing and restricting its use.²² The Maryland DNA Collection Act is one such law. To fully understand this law, a review of the history leading up to it and the process of DNA collection is required.

First, this section will discuss the history of criminal identification processes in America. Second, this section will discuss the process of DNA collection and identification. Finally, this section will look specifically at the Maryland DNA Collection Act and the provisions of the law at issue in *King*.

A. THE HISTORY OF THE CRIMINAL IDENTIFICATION PROCESS IN AMERICA

Identification through an individual's DNA is a significant advancement in the methodology used by law enforcement to identify arrestees, and it is certainly not the first method of identification.²³ One of the earliest methods of criminal identification was photography.²⁴ Police officers would take photographs of those arrested for crimes to keep and collect the faces of the criminals.²⁵ The courts upheld the use of this sort of identification by coming to the conclusion that "it would be a matter of regret to have its use unduly restricted upon any fanciful theory or constitutional privilege."²⁶

18. *Id.* at 1975.

19. *Id.*

20. *Id.* at 1976.

21. *Id.* at 1968. Although a buccal swab to obtain DNA presents a minimal intrusion that is quick and painless, it is still considered a search of the person and must comply with the Fourth Amendment. *Id.* at 1968-69.

22. *Id.* at 1970.

23. *Id.* at 1975.

24. *Id.*

25. *Id.*

26. *Shaffer v. United States*, 24 App. D.C. 417, 426 (D.C. Cir. 1904). Since it had become common practice for police officers to use photographic identification for criminals, the court did not see any reason for restricting its use for that purpose. *Id.*

Eventually, law enforcement also began using fingerprinting as a means of identification.²⁷ Since the beginning of its use, fingerprinting has been upheld by the courts as a reasonable and permissible method of criminal identification.²⁸ As the Supreme Court stated:

There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, [or] if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime²⁹

By the middle of the twentieth century, it was considered common practice for a person brought into custody to be both photographed and fingerprinted to identify who they were.³⁰

While fingerprinting provides a successful means of identification, the advent of DNA technology introduced an approach that is exceptionally better at identifying criminals.³¹ While suspects may be able to change their appearance in photographs or alter their fingerprints, they are not able to change the sequence of their DNA.³² This provides an accurate and almost absolute means of identifying a person.³³ While fingerprinting and photographing are still important methods that are used to this day, DNA technology has greatly advanced the criminal identification process.³⁴

B. THE PROCESS OF DNA COLLECTION AND TESTING

Deoxyribonucleic acid contains all of the material that comprises an individual's genetic makeup.³⁵ DNA is comprised of four base pairs: Adenine, Cytosine, Guanine, and Thymine.³⁶ The order in which these base pairs are aligned composes a person's DNA sequence.³⁷ Each DNA sample is unique to the individual it is obtained from, providing a very accurate method of identification.³⁸

27. *King*, 133 S. Ct. at 1976.

28. *Id.*

29. *Hayes v. Florida*, 470 U.S. 811, 817 (1985).

30. *King*, 133 S. Ct. at 1976.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Brief for Respondent at 3, *Maryland v. King*, 133 S. Ct. 1958 (2013) (No. 12-207).

36. *Id.*

37. *Id.*

38. *Id.*

The first use of DNA testing to identify criminals in America took place in the 1980s, although it took a fair amount of time for DNA testing to be accepted as a reliable form of identification for courtroom proceedings.³⁹ In order for officials to analyze DNA, a sample must be taken from the individual.⁴⁰ This can be done through a blood draw, cheek swab, or it can be collected from items that have come into contact with bodily fluids.⁴¹ Analysts then extract the DNA from the cells in these samples and compare the order of the base pairs that comprise the DNA.⁴² This creates a specific DNA profile.⁴³

There are two main methods that are used to analyze DNA once it has been collected.⁴⁴ The earliest method used was a process known as Restriction Fragment-Length Polymorphism, or “RFLP.”⁴⁵ While this method is known to be quite accurate for identification purposes, it also requires a large sample in order for it to be accomplished.⁴⁶ This posed a problem in cases where only a small amount of DNA could be obtained for testing.⁴⁷ Another method, known as Short Tandem Repeat (“STR”) testing, requires a much smaller sample of DNA and can be analyzed quickly.⁴⁸

STR testing looks at different places on the DNA strand that represent sets of base pairs that repeat.⁴⁹ Every person has different numbers of these repeats, which makes the DNA unique.⁵⁰ STR uses a process known as polymerase chain reaction (“PCR”).⁵¹ During PCR, several chemicals are added to the DNA sample and it is placed in an instrument which amplifies the sample, making millions of copies.⁵² A portion of this amplified sample is then sent through a process that separates the smaller and larger fragments of the DNA.⁵³ The number of times certain sequences of base pairs repeat can be counted at several different positions on the

39. Jennifer Boemer, Note, *In the Interest of Justice: Granting Post-Conviction Deoxyribonucleic Acid (DNA) Testing to Inmates*, 27 WM. MITCHELL L. REV. 1971, 1974 (2001).

40. *Id.* at 1973.

41. Respondent’s Brief, *supra* note 35, at 3.

42. *Id.* at 4.

43. *Id.* at 3.

44. Boemer, *supra* note 39, at 1973.

45. Erin Murphy, *The Art in the Science of DNA: A Layperson’s Guide to the Subjectivity Inherent in Forensic DNA Typing*, 8 EMORY L.J. 489, 494 (2008).

46. *Id.*

47. *Id.*

48. *Id.*

49. *People v. Jackson*, 77 Cal. Rptr. 3d 474, 480 (Cal. Ct. App. 2008).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

chromosomes.⁵⁴ This series of numbers creates the DNA profile.⁵⁵ The expert can then analyze these fragments and determine if there is a match to another reference sample.⁵⁶ The expert will also determine the statistical significance of any match that is found.⁵⁷

STR testing is the most common method used for DNA identification.⁵⁸ Accurate test results can be achieved with a relatively small sample, and the PCR process helps to focus on the specific regions of DNA that are used for identification.⁵⁹ While the regions of DNA used are extremely accurate for identification purposes, these regions do not show more complex characteristics, such as genetic traits.⁶⁰ For these reasons, STR testing has become a very useful tool for law enforcement officials in both exonerating and identifying criminals.⁶¹ DNA testing may “significantly improve both the criminal justice system and police investigative practices by making it possible to determine whether a biological tissue matches a suspect with near certainty.”⁶²

C. THE MARYLAND DNA COLLECTION ACT

All fifty states now require the collection of a DNA sample from individuals who are convicted of a felony.⁶³ This DNA is then entered into and held in each state’s database.⁶⁴ Courts have consistently rejected claims that analysis of DNA for convicted individuals violates the Fourth Amendment.⁶⁵ Following these rulings, some states began allowing the collection of samples from those arrested for serious crimes, but not yet convicted of those crimes.⁶⁶ Both the federal government and twenty-eight states now require the collection of DNA from at least some arrestees.⁶⁷

The Maryland DNA Collection Act (“Act”) also allows for the collection of DNA before the individual has actually been convicted of the crime being charged. In the early 1990s, Maryland established a state database of DNA profiles and required DNA collection from those

54. Respondent’s Brief, *supra* note 35, at 4.

55. *Id.*

56. *Jackson*, 77 Cal. Rptr. 3d at 481.

57. *Id.*

58. *Id.*

59. *Id.*

60. *King*, 133 S. Ct. at 1967.

61. *Id.* at 1966.

62. Dist. Attorney’s Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 55 (2009).

63. *King*, 133 S. Ct. at 1968.

64. *Id.*

65. Respondent’s Brief, *supra* note 35, at 5.

66. *Id.* at 5-6.

67. *Id.* at 6.

convicted of rape and sexual offenses.⁶⁸ Near the end of the decade, the Act was expanded to also cover anyone convicted of all felonies and some selected misdemeanors.⁶⁹ Then, in 2008, the Act was further expanded to include persons who had been charged with, but not yet convicted of, crimes of violence.⁷⁰ Maryland law defines crimes of violence to be murder, rape, first-degree assault, kidnapping, arson, mayhem, sexual assault, and several other severe crimes.⁷¹ The Act states that DNA samples shall be tested for several purposes including:

as part of an official investigation into [the] crime, to analyze and type the genetic markers contained in or derived from the sample [and] for research and administrative purposes, [such as] develop[ing] a population data base after personal identifying information is removed [and] support[ing] . . . identification research and protocol development of forensic DNA analysis methods.⁷²

This portion of the Act allows the state to store DNA samples, which can then be compared to other samples in national and state databases.⁷³

Once the sample is taken, it cannot be placed in the DNA database for processing until the individual has been arraigned.⁷⁴ If the charges are proven to be unfounded, the DNA sample must be destroyed.⁷⁵ This is also true if the trial process does not result in a conviction.⁷⁶ No purpose other than identification is allowed in testing the DNA sample.⁷⁷ If the process results in a conviction, the sample may be retained for an indefinite period of time.⁷⁸

Maryland enacted this law to assist law enforcement in the identification process of criminals brought into custody.⁷⁹ The accuracy of DNA testing provides a safe and reliable method when processing criminals

68. *Id.* at 7.

69. *Id.* These misdemeanors included any violation of § 6-205 (burglary in the fourth degree) or § 6-206 (breaking and entering a motor vehicle) of the Maryland Criminal Law Article. MD. CODE ANN., PUB. SAFETY § 2-505 (West 2013).

70. *Id.*

71. MD. CODE ANN., CRIM. LAW § 14-101 (West 2013).

72. MD. CODE ANN., PUB. SAFETY § 2-505 (West 2013).

73. Respondent's Brief, *supra* note 35, at 8.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *King*, 133 S. Ct. at 1971.

for detention.⁸⁰ However, it also implicates the Fourth Amendment protections against unreasonable searches and seizures.

III. THE COURT'S ANALYSIS

In *Maryland v. King*, Justice Kennedy authored the opinion for the Supreme Court of the United States, concluding that DNA collection from a person arrested for a serious crime is similar to fingerprinting and photographing, both of which are legitimate booking procedures that are reasonable under the Fourth Amendment.⁸¹ Justice Kennedy was joined in his majority opinion by Chief Justice Roberts, Justice Thomas, Justice Breyer, and Justice Alito.⁸² Justice Scalia filed a dissenting opinion, which Justice Ginsburg, Justice Sotomayor, and Justice Kagan joined.⁸³ Reversing the Court of Appeals of Maryland, the Court held that the taking and analyzing of King's DNA as a routine booking procedure pursuant to the Act did not violate King's constitutional rights against unreasonable search and seizure.⁸⁴ Justice Scalia questioned the Court's reasoning for allowing the analysis of an individual's DNA after they had been arrested, but not yet convicted, for the crime that was being charged.⁸⁵

A. MAJORITY OPINION

First, the Court provided a brief introduction regarding the impact of DNA testing and how it has the potential to greatly advance our criminal justice system.⁸⁶ The Court then discussed how obtaining a cheek swab of DNA from a person is considered a search for purposes of the Fourth Amendment, and as such, must meet the requirements of reasonableness.⁸⁷ Finally, the Court described why DNA collection under this statute, or similar statutes, does not violate standards of reasonableness under the Fourth Amendment.⁸⁸

1. *Impact of DNA Testing*

As an introduction, the Court discussed the ways in which DNA technology is one of the most significant scientific advancements in recent

80. *Id.* at 1963.

81. *Id.* at 1980.

82. *Id.* at 1965.

83. *Id.* (Scalia, J., dissenting).

84. *Id.* at 1965-66 (majority opinion).

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

86. *Id.* at 1966 (majority opinion).

87. *Id.* at 1968-69.

88. *Id.* at 1971.

history.⁸⁹ DNA testing may “significantly improve both the criminal justice system and police investigative practices.”⁹⁰ While other identification processes are effective, none can identify a person with the near certainty that DNA evidence provides.

The Court discussed how identification processes, such as fingerprinting and photographing, have been employed for years to aid in keeping a record of criminals.⁹¹ Police use similar routines with fingerprinting as is used with DNA by comparing the suspect sample to an electronic database of unsolved crimes and suspects.⁹² “In this respect the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides.”⁹³ Since DNA provides an almost certain means of matching suspects with crimes, the Court stressed the importance of law enforcement being able to use such a tool.⁹⁴ While proven to be useful, King argued that the collection of a DNA sample after being arrested, but not yet convicted of a crime, is unconstitutional.⁹⁵ The Court noted that the usefulness inherent in DNA technology, as discussed above, should factor in greatly when considering whether or not its use should be allowed and to what extent.⁹⁶

2. Reasonableness Under the Fourth Amendment

The Court then shifted its focus to the statute at issue and its constitutional implications.⁹⁷ The frame of reference for deciding this issue is settled, and the Court outlined this framework, beginning with the Fourth Amendment.⁹⁸ The Fourth Amendment of the Constitution provides that: “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”⁹⁹ The Court stated that “using a buccal swab on the inner tissues of a person’s cheek in order to obtain DNA samples is a search.”¹⁰⁰ This means that the DNA swab is subject to constitutional scrutiny.¹⁰¹ The

89. *Id.* at 1966.

90. *Id.* at 1967.

91. *Id.* at 1971-72.

92. *Id.*

93. *Id.* at 1972.

94. *Id.*

95. *Id.* at 1966.

96. *Id.* at 1971-77.

97. *Id.* at 1968-69.

98. *Id.* at 1968.

99. U.S. CONST. amend. IV.

100. *King*, 133 S. Ct. at 1969.

101. *Id.*

Court went on to state that “the ultimate measure of the constitutionality of a government search is reasonableness.”¹⁰² Therefore, to determine if the buccal swab collected from King after his arrest was constitutional, the Court was required to weigh “the promotion of legitimate governmental interests against the degree to which the search intrudes on an individual’s privacy.”¹⁰³ The Court completed this interests balancing analysis by individually looking at both interests at stake.

The primary governmental interest established by the Court was “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.”¹⁰⁴ The Court detailed how, after being legally arrested, probable cause provides a legal basis for certain administrative steps to be taken, including a search of the person.¹⁰⁵ The opinion stated, “[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.”¹⁰⁶

The Court then explained that after being arrested, the booking procedures and searches that are done incident to that arrest serve the legitimate governmental interest of identifying the person brought into custody.¹⁰⁷ The Court made clear that DNA identification serves a critical role in this identification process by stating, “[a] suspect’s criminal history is a critical part of his identity that officers should know when processing him for detention.”¹⁰⁸ The majority explained that the routine and accepted means of doing this identification, such as fingerprinting, are no different than DNA analysis used for the same purpose.¹⁰⁹ The only difference is that DNA analysis has the ability to more accurately and precisely identify the person in custody.¹¹⁰ In this way, the Court determined that DNA identification of a person who has been arrested serves real and legitimate governmental interests, and in this case, law enforcement officials had a legitimate interest in identifying King.¹¹¹

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

103. *Id.* at 1970.

104. *Id.*

105. *Id.*

106. *Id.* at 1971.

107. *Id.*

108. *Id.*

109. *Id.* at 1972.

110. *Id.*

111. *Id.* at 1974.

The Court then compared these governmental interests to the intrusion on individual privacy that the search has caused.¹¹² The majority explained that a legitimate governmental interest, alone, does not justify a search. “The government interest must outweigh the degree to which the search invades an individual’s legitimate expectations of privacy.”¹¹³ In certain situations, an individual possesses diminished privacy interests, which most pertinently occurs when the individual has some type of relationship with the government.¹¹⁴

In the case of Alonzo King, his relationship with the government was that of an arrestee.¹¹⁵ The Court stated that, “[o]nce an individual has been arrested on probable cause for a dangerous offense that may require detention before trial, his or her expectations of privacy and freedom from police scrutiny are reduced.”¹¹⁶ Therefore, an arrestee has a lesser expectation of privacy than that of an average citizen who has committed no wrong.¹¹⁷ A buccal swab of the inside of a person’s cheek to obtain a DNA sample requires very little intrusion on the person.¹¹⁸ It simply involves rubbing the tip of a cotton swab for a brief second on the inside of a person’s cheek.¹¹⁹ Because of this, the Court stated that, “[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.”¹²⁰ The Court decided that the minimal intrusion that King underwent as a result of collecting his DNA was not significant enough to warrant Fourth Amendment exclusion.¹²¹

3. *Constitutionality of the Maryland Act*

When applying this reasonableness standard to the Act at issue in *King*, the Court concluded that taking and analyzing a cheek swab is similar to fingerprinting and photographing, and it is consequentially a legitimate booking procedure for police officers that is reasonable under the Fourth Amendment.¹²² The Court reasoned that the legitimate government interest of accurately identifying criminals, and the potential that DNA has to

112. *Id.* at 1977.

113. *Id.*

114. *Id.* at 1978.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 1979.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 1980.

advance this interest, outweighed the minimal privacy interest that an arrestee possesses.¹²³ While arrestees do possess a right to privacy, this right is greatly reduced after being brought into custody, and the taking and analysis of an arrestee's DNA is a minimal intrusion that is no different than taking fingerprints or photographs.¹²⁴ The Act was upheld as being constitutional, and the Court of Appeals of Maryland decision was reversed.¹²⁵

B. JUSTICE SCALIA'S DISSENT

Justice Scalia dissented, disagreeing with the majority in both its reasoning and outcome.¹²⁶ Scalia argued that the Court's reasoning was faulty because searches without suspicion should never be allowed if the main goal of the search has to do with crime-solving.¹²⁷ In other words, the reasonableness standard that the Court used only applies when the purpose of the search was something other than establishing criminal activity.¹²⁸

Justice Scalia also challenged the Court's argument that the main purpose of collecting King's DNA was for investigative purposes.¹²⁹ According to Scalia, the search in this case was not used to identify King by the normal meaning of the word identify, but rather to search for evidence that he may have committed past crimes,¹³⁰ "unless what one means by 'identifying' someone is searching for evidence that he has committed crimes unrelated to the crime of his arrest."¹³¹ He argued that if King's DNA sample was to primarily be used for identification purposes, then law enforcement officials would have searched his DNA in the database immediately to determine that it was him.¹³² However, this was not done because Maryland law prohibits it.¹³³

Rather, Scalia argued that the normal processes of fingerprinting and photographing were used to identify King, while his DNA sample was kept

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* (Scalia, J., dissenting).

127. *Id.* at 1982.

128. *Id.* at 1981-82.

129. *Id.* at 1983. For example, the Court explained that they have never approved a checkpoint policy or program whose primary purpose was to detect evidence of criminal wrongdoing. *City of Indianapolis v. Edmond*, 531 U.S. 32, 38 (2000). Such checkpoints or programs are proper for other reasons, but absent individualized reasonable suspicion of criminal wrongdoing, investigation of crime cannot be the primary purpose of the checkpoint. *Id.* at 39-40.

130. *Id.*

131. *King*, 133 S. Ct. at 1983 (Scalia, J., dissenting).

132. *Id.* at 1984.

133. *Id.*

for future use once it could legally be put in the system.¹³⁴ Once it was put in the system, and a match was found, it was not used to “identify” King.¹³⁵ King’s identity had already been determined.¹³⁶ The DNA was used to connect him to previous crimes.¹³⁷ According to Scalia, this destroyed the Court’s “identification theory” for the collection of DNA samples.¹³⁸

Justice Scalia also criticized the Court’s comparison of DNA to fingerprinting. As he stated, “[f]ingerprints of arrestees are taken primarily to identify them (though that process sometimes solves crimes); the DNA of arrestees is taken to solve crimes (and nothing else).”¹³⁹ He disagreed that DNA testing is no different than collecting the fingerprints of a person who has been arrested.¹⁴⁰ For these reasons, Justice Scalia believed that King’s Fourth Amendment rights had been violated when his DNA was collected and used.¹⁴¹

IV. IMPACT

In overturning the Maryland Court of Appeals, the Supreme Court decided an emerging and unsettled area of law. By allowing such DNA collection, the Court has created an exception to Fourth Amendment standards for developing technology. States can now affirmatively put this exception into law.¹⁴²

A. DEPARTURE FROM TRADITIONAL FOURTH AMENDMENT REQUIREMENTS

By allowing the DNA of an arrestee to be collected and analyzed pre-conviction, the warrant and individualized suspicion requirements that the Fourth Amendment mandates are lost.¹⁴³ The Court has consistently held that a search, absent reasonable suspicion or a warrant, is unconstitutional.¹⁴⁴ The Court will set aside these requirements only where the government has provided a reasonable justification for doing so, such as when the individual’s status warrants a lesser expectation of privacy.¹⁴⁵

134. *Id.* at 1985.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* (explanatory parenthetical appearing in original text).

139. *Id.* at 1987.

140. *Id.*

141. *Id.* at 1989.

142. Respondent’s Brief, *supra* note 35, at 17.

143. *Id.* at 40.

144. *See Samson v. California*, 547 U.S. 843, 848-50 (2006).

145. *Id.* at 852.

For example, this often comes into play in the context of DNA testing for criminals convicted of serious felonies.¹⁴⁶ Many states now mandate the DNA collection of these convicted criminals.¹⁴⁷ In *King*, however, the Court decided that because an arrestee, who has not yet been convicted, has a diminished expectation of privacy, and because probable cause existed for their arrest, a search performed to obtain their DNA and place it in state and national databases does not violate the Constitution.¹⁴⁸ The Court justified this by claiming that the governmental interests are great, while the individual privacy intrusion is quite small.¹⁴⁹

This decision represents a departure from how the Court has ruled in the past. In *Arizona v. Hicks*,¹⁵⁰ the Court ruled that any intrusion, no matter how minimal, requires the protections and rules of the Fourth Amendment.¹⁵¹ In *Hicks*, police officers entered a residence based upon exigent circumstances where they observed stereo equipment that they believed to be stolen property.¹⁵² The officers moved the equipment to obtain the serial numbers and found that it was, indeed, stolen.¹⁵³ The Court ruled that this search was unreasonable because by moving the stereo equipment, the officers overstepped their valid entry under the exigent circumstances exception.¹⁵⁴ Even though the intrusion was extremely slight, it was, nonetheless, an intrusion.¹⁵⁵

Similarly, in *King*, the intrusion on King's privacy was relatively slight. Obtaining a cheek swab is a very brief and painless process.¹⁵⁶ However, law enforcement did not have a warrant to obtain King's DNA for investigative purposes. Nor did they have any reasonable suspicion that his DNA was linked to other crimes.¹⁵⁷ Police did have probable cause to arrest King for assault—but nothing else.¹⁵⁸ King had been arrested for a crime but had not yet been convicted, and his DNA was collected solely from the probable cause of his arrest.¹⁵⁹ Probable cause did not exist which

146. *King*, 133 S. Ct. at 1968.

147. *Id.*

148. *Id.* at 1980.

149. *Id.*

150. 480 U.S. 321 (1987).

151. *Id.*

152. *Id.* at 323-24.

153. *Id.* at 323.

154. *Id.*

155. *Id.* at 325.

156. *Maryland v. King*, 133 S. Ct. 1958, 1968 (2013).

157. Respondent's Brief, *supra* note 35, at 11.

158. *Id.*

159. *Id.*

would implicate him in any other crimes.¹⁶⁰ Based off of the Court's own ruling in *Hicks*, it would be expected that this would be considered an unreasonable search.

B. IMPACT IN NORTH DAKOTA

The state of North Dakota has similar statutes on this issue. The relevant law states:

The court shall order any individual convicted after July 31, 2001, of a felony offense . . . or any individual who is in the custody of the department after July 31, 2001, as a result of a conviction for one of these offenses to have a sample of blood or other body fluids taken by the department for DNA law enforcement identification purposes and inclusion in the law enforcement identification databases.¹⁶¹

In *State v. Leppert*,¹⁶² the North Dakota Supreme Court upheld this law stating, “[t]hat purpose is rationally related to legitimate government purposes of apprehending and identifying perpetrators of future sex-related and violent crimes, exonerating the innocent, and increasing cost efficiencies . . . and satisfy the rational basis standard of review.”¹⁶³ They also made clear that the law authorizes DNA testing of persons convicted of certain felonies and establishment of DNA databases to test the results of persons so convicted.¹⁶⁴ Therefore, the law in North Dakota requires collection from an individual *convicted* of certain felonies.¹⁶⁵

This is distinguishable from the Act at issue in *King*, which allows collection from an arrestee, pre-conviction. While the decision in *King* does not have a direct impact on North Dakota law, the Court's ruling provides precedent for amending the North Dakota statute. Currently, the state's law complies with the traditional requirements that the Fourth Amendment mandates. Collection of a DNA sample post-conviction is very different from collection pre-conviction, without probable cause. Based on the Court's ruling in *King*, lawmakers in North Dakota may be able to amend the current statute similar to that of Maryland's, implicating several privacy rights of those brought into police custody.

160. *Id.*

161. N.D. CENT. CODE § 31-13-03(2) (2001).

162. 2003 ND 15, 656 N.W.2d 718.

163. *Id.* ¶ 18, 656 N.W.2d at 725.

164. *Id.*

165. *Id.* (emphasis added).

Because an arrestee is presumed to be innocent when it comes to the government's authority to search that person for investigative purposes outside of the individual's arrest, the arrestee should receive full Fourth Amendment protections.¹⁶⁶ This is what distinguishes an arrestee from a convicted individual. In this way, the Court in *King* has departed from its previous rulings, and has effectively created a blanket exception to the Fourth Amendment requirements when dealing with arrestees.

V. CONCLUSION

In *King*, the United States Supreme Court held that mandatory collection of DNA of a person who has been arrested, but not yet convicted, for a serious crime pursuant to the Maryland DNA Collection Act is constitutional.¹⁶⁷ The Court decided that DNA collection is similar to fingerprinting and photographing, which indicates that such collection is a legitimate booking procedure.¹⁶⁸ With this holding, the Supreme Court decided an emerging area of law and created a slight exception for the Fourth Amendment requirements involving search and seizure. This decision is sure impact many of the decisions that both federal and state courts will make regarding the privacy rights of those brought into police custody.

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166. Respondent's Brief, *supra* note 35, at 11.

167. *King*, 133 S. Ct. at 1980.

168. *Id.*

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