

IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2011

NO. 2118

ALONZO JAY KING, JR.,

Appellant

v.

STATE OF MARYLAND,

Appellee

APPEAL FROM THE CIRCUIT COURT FOR WICOMICO COUNTY
(THE HONORABLE KATHLEEN L. BECKSTEAD PRESIDING)

BRIEF OF *AMICI CURIAE*
PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AND
AMERICAN CIVIL LIBERTIES UNION OF MARYLAND
In Support of Appellant, Alonzo Jay King, Jr., Urging Reversal

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INTERESTS OF *AMICI CURIAE*

The Public Defender Service for the District of Columbia (PDS) represents indigent criminal defendants in Washington, D.C. Since the passage of the federal DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. § 14135 *et seq.*, and the D.C. DNA Act, D.C. Code Ann. § 22-4151 *et seq.*, PDS clients are subject to a DNA collection regime that is effectively identical to the one that was in place in Maryland prior to the most recent expansion of the state’s DNA statute. As such, PDS is concerned with the trend in expansion of DNA databases nationwide and especially in Maryland, a neighboring state. PDS has also had substantial experience litigating the issue of suspicionless DNA searches of convicted offenders, having submitted amicus briefs to the Maryland Court of Appeals in *State v. Raines*, 857 A.2d 19 (Md. 2004)—the direct precursor to the issues presented in the instant case—and in similar cases across the country.

The American Civil Liberties Union of Maryland is the state affiliate of the American Civil Liberties Union (ACLU), a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in this nation’s Constitution and civil rights laws. Since its founding in 1931, the ACLU of Maryland, which is comprised of approximately 14,000 members throughout the state, has worked to protect and defend the civil liberties of all Maryland residents, including the right of all persons “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” as guaranteed by the Fourth Amendment to the United States Constitution. The ACLU of Maryland also was instrumental in the effort to oppose the 2009 expansion of Maryland’s DNA collection statute that is at issue in the present case, and has frequently appeared as both *amicus* and as direct counsel in this Court.

STATEMENT

This case raises important constitutional questions regarding the most recent expansion of Maryland's DNA Collection Act. Once limited solely to convicted sex offenders, the Act now authorizes Maryland law enforcement to sample and profile the DNA of anyone *charged* with committing certain enumerated offenses, for inclusion in both the Maryland state DNA database as well as the "CODIS" DNA database operated by the Federal Bureau of Investigation.¹

The unmistakable purpose of this expansion is to assist Maryland law enforcement in linking the individuals from whom DNA samples have been taken to evidence collected from the scene of unsolved crimes. As evidenced by similar expansions in the federal DNA collection statute and other similar state statutes, this goal is shared by many, if not all, other state and federal law enforcement agencies.

What advocates of DNA database expansion ignore is that the forced collection of DNA—the repository of our most intimate genetic information—infringes upon the Fourth Amendment rights of arrestees. When Maryland's DNA Collection Act was first extended in 2002 to all convicted felons, that expansion was upheld on the grounds that DNA collection was minimally intrusive, that felons have a diminished expectation of privacy relative to ordinary citizens and that the government has a greater need to identify individuals already in its custody. This reasoning simply has no force with respect to those merely suspected of committing crimes. Arrestees, who are entitled to the presumption of innocence and who have received no legal process from the courts,² do not have the same "diminished expectation of privacy" as do

¹ The "CODIS" (Combined DNA Index System) database contains DNA profiles submitted by the federal government, the United States military, the District of Columbia and all 50 states.

² Unlike some other states, Maryland does not limit DNA collections to arrestees who have been given a determination of probable cause by a magistrate judge. Though samples are not tested

convicted offenders. Moreover, the collection of DNA from arrestees has no actual connection in practice to their identification. The language used by legislators in passing the DNA Act—and indeed, the language of the Act itself—demonstrates that the true purpose of DNA collection is *investigation*. Fourth Amendment jurisprudence is clear, however, that investigation alone is not enough to justify a suspicionless search.

The Maryland Act, then, compels sweeping, suspicionless searches of arrestees in order to aid law enforcement in solving past or future crimes unrelated to the conduct alleged to justify arrest. The Act’s expansion to arrestees, therefore, is unconstitutional. This Court should so hold, and reverse the judgment of the trial judge.

A. The Act and DNA Collection From Arrestees

Maryland’s DNA Collection Act was originally enacted in 1994, with the limited purpose of collecting DNA from persons convicted of certain sexual offenses. Since then, the Act has undergone two dramatic expansions: once in 2002, when it was extended to anyone convicted of a felony or of certain misdemeanor offenses, and most recently in 2009, when it was extended to anyone charged with a crime of violence, attempt to commit a crime of violence, burglary, or attempted burglary. MD. CODE ANN., PUBLIC SAFETY, §§ 2-504(a)(3)(i)(1)-(2). The Act now compels thousands of citizens, including many who have never been subject to a judicial finding of probable cause, to submit samples of biological materials for analysis and inclusion in both the Maryland state DNA database, *id.* § 2-502(b), and the “CODIS” DNA database operated by the Federal Bureau of Investigation, *id.* § 2-502(c)(5).

The Act’s primary purpose is to assist law enforcement in investigating crimes. The “statewide DNA data base system” that it creates is located “in the Crime Laboratory,” *id.* § 2-

prior to arraignment, MD. CODE ANN., PUBLIC SAFETY § 2-504(d)(1), the sample is taken at the time the arrestee is charged.

502(a), and it charges the Secretary of the Maryland State Police and the Director of the State Police Crime Laboratory with developing and implementing appropriate DNA sampling regulations, policies and procedures, *id.* § 2-503(a). Prominent among the Act’s several enumerated purposes is collection and testing of DNA samples “as part of an official investigation into a crime.” *Id.* § 2-505(a)(2). While the Act does also authorize the use of DNA information for identification of human remains and missing individuals and for “research and administrative purposes,” *id.* §§ 2-505(a)(3)-(5), the identification of individuals in custody—such as arrestees—is not one of the Act’s enumerated purposes.

Given the depth of the privacy intrusion that it works, the Act is surprisingly non-specific with respect to precisely how collected DNA samples will be used. While it prohibits intentional misuse of DNA information, *id.* § 2-512(a), the statute allows samples to be used for unspecified “research and administrative purposes,” including, but apparently not limited to, “development of a population data base,” forensic “research and protocol development,” and “quality control.” *Id.* § 2-505(a)(5). Moreover, it allows for collected samples to be maintained indefinitely unless they are expunged. *Id.* § 2-506(b).

B. The Maryland Court of Appeals’ Decision in *State v. Raines*

In *State v. Raines*, 857 A.2d 19 (Md. 2004), the Maryland Court of Appeals narrowly upheld the 2002 expansion of the DNA Collection Act to persons convicted of any felony and certain misdemeanors. The reasoning that controlled in *Raines* rested on the unique factors involved with overseeing convicted offenders, and on the premise that collecting DNA is essentially no different from the practice of fingerprinting—a premise that, as discussed *infra*, has come under fire in several recent court decisions.

In *Raines*, there was no dispute that the forced collection of DNA constitutes a search under to the Fourth Amendment and thus effects a constitutionally significant intrusion of privacy.³ Over a vigorous dissent about the applicable Fourth Amendment framework, the plurality (consisting of Judges Cathell and Battaglia) found that the relevant inquiry was merely whether the intrusion is “reasonable.” The plurality used a totality of the circumstances test to weigh the convicted offender’s privacy interests against law enforcement’s interest in extracting the offender’s DNA.⁴

In downplaying the convicted person’s privacy interests, the plurality noted that the *physical* intrusion of the buccal swab is minimal, *id.* at 31, and that in any event probationers have a diminished expectation of privacy, *id.* at 29. The plurality then looked to the governmental interests in “identifying persons involved with crimes, accident victims, [and] ‘John Doe’ bodies” and concluded that these considerations outbalanced the probationer’s privacy interest. *Id.* at 31. The plurality was especially persuaded by the identification rationale for DNA collection, stating that “[t]he DNA profile . . . serves the purpose of increasing the efficiency and accuracy in identifying individuals within a certain class of convicted criminals” and that this purpose is “akin to that of a fingerprint.” *Id.* at 33. Finding that the “primary purpose” of the Act was “identify[ing] individuals with lessened expectations of privacy”—despite the fact that identification was not enumerated as a statutory purpose—the Court

³ The State conceded that the statutorily-mandated buccal swab for appellee’s DNA was a search for Fourth Amendment purposes. *Raines*, 857 A.2d at 27.

⁴ Fundamentally, the dissent disagreed with the majority’s application of a “free floating ‘totality of the circumstances’ balancing test” that pits the government’s interests against the diminished privacy interest of the convicted offender. *Id.* at 57. As the dissent pointed out, searches are ordinarily unreasonable in the absence of individualized suspicion of wrongdoing, and the type of balancing employed by the majority is only appropriate where the search falls into a well-established exception to the Fourth Amendment, such as “special needs.” *Id.* The dissent found no “special need” served by the DNA statute because, as discussed above, the express purpose of the statute was to aid law enforcement in solving crimes.

distinguished the DNA searches required by the Act from a “search of ordinary individuals for the purpose of gathering evidence against them in order to prosecute them for the very crimes that the search reveals.” *Id.*

The two concurring judges took issue with the plurality’s characterization of the privacy intrusion. Judge Raker stated that “absent more specific justification, invasion of an inmate’s body cannot be supported by a lessened expectation of privacy alone,” while Judge Wilner observed that the analysis of the degree of intrusion needed to account for the “massive amount of deeply personal information that is embodied in the DNA sample.” *Id.* at 45; 48. Ultimately, however, they agreed with the plurality that the government’s interests outweighed the appellant’s, because of the nature of overseeing convicted offenders serving sentences. Indeed, Judge Raker wrote that “the statute is constitutional on the narrow grounds that DNA sampling is an acceptable means of *identifying prisoners*, and on this basis alone, is reasonable.” *Id.* at 44 (emphasis added). Judge Raker found compelling the analogy between DNA and fingerprints, noting that the “State has an interest in the accurate identification” of a person who has been convicted of certain crimes, and that fingerprinting was a long-accepted means of achieving that goal. *Id.* at 47. Arguing that DNA sampling is a more precise method of identification than fingerprinting, Judge Raker found that it “better serve[d] the State interest in accurately identifying prisoners.” *Id.* at 48. Judge Wilner agreed that fingerprinting and DNA collection serve the “same governmental interest,” but acknowledged that that interest went beyond mere identification, to “provid[ing] evidence of criminality, evidence that will allow the police to establish probable cause to collect precisely the same evidence for use in court.” *Id.* at 49. Nonetheless, DNA collection was justified because evidence showed that “convicted criminals tend to be recidivists” who “constitute a special potential threat to public safety” and who as a

group “defined by their own judicially-determined conduct” have a “much reduced expectation of privacy.” *Id.*

In upholding the DNA Collection Act, a majority of the judges in *Raines* thus relied both on what it saw as the unique characteristics of convicted offenders—their reduced expectation of privacy and higher rates of recidivism—and on the idea that DNA collection, like fingerprinting, was useful for identifying offenders under government supervision. As Chief Judge Bell (joined by Judges Harrell and Greene) pointed out in dissent, however, “[i]t is simply wrong to say that the interest being served by the search is identification”; indeed, this was “belied. . . by the statute itself,” which expressly states that the “purpose of collecting and testing DNA samples” is in service of “official investigation into a crime.” *Id.* at 61. The dissent also rejected the analogy between fingerprints and DNA relied on by the majority, noting that the collection of fingerprints is less physically intrusive, that the “information fingerprints convey is obtained, and exhausted, when the prints are taken,” and that unlike DNA, fingerprints actually are used for identification. *Id.* at 63 n.12.

The dissent’s questioning of the DNA-fingerprint analogy has proved to be prescient. *Raines* was decided at the tail end of a wave of state and federal court decisions affirming the constitutionality of collecting DNA from convicted felons. Soon after, aided by federal funds⁵ and by the passage of a federal statute extending DNA collection to individuals arrested on suspicion of committing crimes, states began to pass their own arrestee laws. Central to the justification for these statutes is the argument that taking an arrestee’s DNA is no different from taking his fingerprint.

⁵ See, e.g., 42 U.S.C. § 14135 (2006) (establishing federal grants to fund state and local DNA analysis programs).

C. The Legal Debate Over DNA Collection From Arrestees

Maryland's 2009 expansion of its DNA statute is of a piece with the nationwide trend: to date, the federal government and twenty-four states have passed laws extending DNA collection to arrestees. *See* DNA Fingerprint Act of 2005, 42 U.S.C. § 14135a(a)(1)(A); DNAresource.com, *States That Have Passed Arrestee DNA Database Laws, available at* <http://www.dnaresource.com/documents/statequalifyingoffenses2011.pdf>. The expansion of DNA databases shows no sign of abating. Indeed, in addition to the states that have mandated DNA collection from arrestees for violent offenses, states have passed laws requiring DNA samples to be given by people arrested for non-violent felonies such as being present in the country illegally,⁶ forgery,⁷ and perjury.⁸

As legal challenges to these statutes have begun working their way through the courts, a clear split has emerged.⁹ Two state courts have struck down their arrestee collection statutes on

⁶ 2009 Okla. Sess. Law Serv. 218 (codified as amended at Okla. Stat. tit. 22, § 991a(I) (2009)); *see also* Brian Gallini, *Essay: Step Out of the Car: License, Registration, and DNA Please*, 62 Ark. L. Rev. 475, 478 (2009).

⁷ In Kansas, all felony arrestees are subject to DNA collection. *See* National Conference of State Legislatures, *State Laws on DNA Data Banks, Qualifying Offenses, Others Who Must Provide Sample*, <http://www.ncsl.org/issuesresearch/civilandcriminaljustice/statelawsondnadatabanks/tabid/12737/default.aspx> (last visited August 30, 2011). Forgery is a felony under KAN. STAT. ANN. § 21-3710 (2011).

⁸ In North Dakota, all felony arrestees are subject to DNA collection. *See* National Conference of State Legislatures, *State Laws on DNA Data Banks, Qualifying Offenses, Others Who Must Provide Sample*, <http://www.ncsl.org/issuesresearch/civilandcriminaljustice/statelawsondnadatabanks/tabid/12737/default.aspx> (last visited August 30, 2011). Perjury is a felony under N.D. LAWS 12.1-11-01 (2011).

⁹ The split mirrors the internal division within even those courts that upheld the first wave of DNA statute expansions to convicted offenders. *See, e.g., United States v. Weikert*, 504 F.3d 1 (1st Cir. 2007); *United States v. Kriesel*, 508 F.3d 941 (9th Cir. 2007); *United States v. Sczubelek*, 402 F.3d 175 (3d Cir. 2005); *United States v. Kincaide*, 379 F.3d 813 (9th Cir. 2004) (*en banc*); *State v. Raines*, 857 A.2d 19 (Md. 2004). *See also* *People v. Buza*, No. SCN207818,

Fourth Amendment grounds, while one has upheld its arrestee collection statute. *See People v. Buza*, No. SCN207818, 2011 Cal. App. LEXIS 1006 (Cal. Ct. App. Aug. 4, 2011) (striking down California’s arrestee DNA collection statute); *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. Ct. App. 2006) (striking down portions of Minnesota statute directing law enforcement personnel to collect DNA from arrestees); *Anderson v. Commonwealth*, 650 S.E.2d 702 (Va. 2007) (affirming Virginia’s arrestee statute). The federal DNA statute’s extension to arrestees has a similarly mixed record in the courts. It was upheld in a deeply divided decision by the Third Circuit in *United States v. Mitchell*, 2011 U.S. App. LEXIS 15272, at *65 (3d Cir. July 25, 2011), and by the Northern District of California in *Haskell v. Brown*, 677 F. Supp. 2d 1187 (N.D. Cal. 2009); it was struck down by the Eastern District of Washington in *United States v. Frank*, No. CR-09-2075-EFS-1 (E.D.Wa. March 10, 2010). And while a panel of the Ninth Circuit upheld the federal Act, that opinion has been withdrawn in light of the recent grant of *en banc* rehearing, *United States v. Pool*, 2011 U.S. App. LEXIS 11146 (9th Cir. June 2, 2011).¹⁰

The California court’s opinion in *Buza* is especially relevant, as the court employed the same “totality of the circumstances” test used by the *Raines* majority. The court in *Buza* recognized that the Fourth Amendment balance for arrestees is different than that for convicted offenders: arrestees are entitled to the presumption of innocence, and the government does not have the same security and administrative concerns as it does with supervising the incarcerated. *Buza*, 2011 Cal. App. LEXIS 1006, at *20-21.

2011 Cal. App. LEXIS 1006, at *22-*25 (Cal. Ct. App. Aug. 4, 2011) (discussing issues of “significant debate and disagreement among the judges” who decided convicted offender DNA cases).

¹⁰ The Ninth Circuit’s opinion in *Pool* is notably in tension with its previous decision in *Friedman v. Boucher*, 580 F.3d 847, 858 (9th Cir. 2009), in which it held that the forcible taking of a DNA sample from a pretrial detainee violated the Fourth Amendment. *See* Section B(1), *infra*.

On the other hand, those courts upholding the forced extraction and profiling of arrestee DNA have held that, like convicted offenders, arrestees have a diminished privacy interest and that the government has a strong interest in correctly identifying arrested individuals. In adopting this rationale, the courts that have upheld arrestee statutes have once more relied on the supposed analogy between DNA collection and fingerprinting during booking upon arrest. *See, e.g., United States v. Mitchell*, 2011 U.S. App. LEXIS 15272, at *65 (3d Cir. July 25, 2011) (concluding, in upholding constitutionality of DNA collection from arrestees, that “a DNA profile is used solely as an accurate, unique, identifying marker—in other words, as fingerprints for the twenty-first century”). Indeed, it is fair to say that “[t]he legitimacy of the comparison between the fingerprinting process and DNA sampling is at the heart of the case law on DNA testing.” *Buza*, 2011 Cal. App. LEXIS 1006, at *41.¹¹

ARGUMENT

As discussed above, the notion that DNA is merely the “fingerprint of the twenty-first century” is at the core of the debate over the constitutionality of arrestee DNA statutes. Courts have deployed this fallacy on both sides of the Fourth Amendment reasonableness balancing test: as a reason for arrestees’ diminished expectation of privacy, and as an explanation for law enforcement’s interest in collecting DNA.

The analogy between DNA and fingerprints is flawed, however, for three reasons. First, courts holding that DNA collection and fingerprinting implicate identical privacy interests have focused on the similar physical intrusions worked by the techniques, while ignoring the fact that DNA reveals much more information, and more private information, than fingerprints. It is that *informational* intrusion—not the physical one—that is the source of the heightened privacy

¹¹ For this reason, the *Buza* court devoted a significant portion of its opinion to debunking the DNA-fingerprint analogy. *See id.* at *41-*51.

imposition of DNA collection. Second, those courts also miss the fact that because DNA collected after arrest, unlike fingerprints, is not a useful means to identify the arrestee, but is instead useful primarily as an *investigative* tool, its collection crosses a Fourth Amendment boundary that fingerprinting does not. And third, in contrast to fingerprint databases, DNA databases are prone to expansive use and therefore present ongoing, and ever-broadening, privacy concerns.

A. Arrestees Have a Strong Privacy Interest in Their DNA.

Courts comparing the privacy invasion of DNA sampling to that of fingerprinting have observed that the one is not significantly more physically invasive than the other. *See, e.g., Nicholas v. Goord*, 430 F.3d 652, 671 (2d Cir. 2005) (“The collection and maintenance of DNA information, while effected through relatively more intrusive procedures such as blood draws or buccal cheek swabs, in our view plays the same role as fingerprinting.”); *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992) (holding, in analogizing DNA collection to fingerprinting, that “the minor intrusion caused by the taking of a blood sample is outweighed by [the government’s] interest . . . in determining inmates’ identification characteristics” (quotation marks omitted)).¹²

It is true that the physical intrusion of DNA collection is minimal relative to types of intrusions historically held to violate the Fourth Amendment.¹³ However, by focusing on the privacy interests implicated by the *physical* extraction, courts analogizing DNA sampling to fingerprinting have elided the distinction that actually gives rise to a heightened privacy interest

¹² Today, it is more common to take a DNA sample using a “buccal swab,” or the collection of inner cheek cells of the mouth with a small stick. *See, e.g., Buza*, 2011 Cal. App. LEXIS 1006, at *8. This is the practice with respect to arrestees in Maryland. *See Raines*, 857 A.2d at 31 (discussing minimal intrusion of buccal swab).

¹³ *See Schmerber v. California*, 384 U.S. 757 (U.S. 1966) (finding extraction of blood reasonable under Fourth Amendment).

in the DNA context: DNA contains much more information, and information that is much more private, than fingerprints. As the dissenters in *Raines* observed:

While the DNA profile is often referred to as a type of genetic “fingerprint,” this analogy is far too simplistic. . . . Unlike an individual’s fingerprint, which use is limited to identification, information potentially contained in a DNA profile may subject an individual to embarrassment, humiliation, public hostility, and even financial harm.

Raines, 857 A.2d at 62-63 (quoting Jeffrey S. Grand, Note, *The Bleeding of America: Privacy and the DNA Dragnet*, 23 CARDOZO L. REV. 2277, 2288 (2002)).

Nonetheless, some courts have continued to be blind to the informational distinction between fingerprints and DNA. The Third Circuit in *Mitchell*, for instance, held that just as “arrestees possess a diminished expectation of privacy in their own identity, which has traditionally justified taking their fingerprints,” DNA collection from arrestees is likewise tolerable because it contains similarly limited information: “[B]ecause DNA profiles . . . function as ‘genetic fingerprints’ used only for identification purposes, arrestees and pretrial detainees have reduced privacy interests in the information derived from a DNA sample.” 2011 U.S. App. LEXIS 15272 at *70-71. See also *Haskell*, 677 F. Supp. 2d at 1197-98 (“Plaintiffs have not articulated how DNA differs in a legally significant way from other means of identification. . . . [T]he information derived from the blood sample is substantially the same as that derived from fingerprinting.” (quotation marks omitted)).

What these courts ignore is that DNA collection of arrestees implicates at least two different Fourth Amendment searches: one, the extraction and storage of the arrestee’s DNA *sample*,¹⁴ and two, the creation of the DNA *profile* that is then uploaded to the state law enforcement database and CODIS. The profile, which is created by mining the data contained in

¹⁴ This sample is stored in Maryland’s state laboratory indefinitely unless expunged. MD. CODE ANN., PUBLIC SAFETY, § 2-506(b).

the sample, consists of thirteen *loci* (locations on the human genome) known as single tandem repeats, or “STRs.” At each locus, people have two “alleles,” or repeating sequences of DNA base pairs; one is maternally inherited, one paternally, and the numbers of repeats vary across individuals. “A DNA profile, which is what is stored in a DNA database, is simply a list of the number of repeats found in each of the two copies of the repeating sequence for each locus.”

Simon Cole, *Is the “Junk DNA” Designation Bunk?*, 102 NW. U. L. REV. COLLOQUY 54, 56 (2007).

Decisions affirming the constitutionality of arrestee DNA statutes have tended to focus solely on the DNA profile, reasoning that it contains less information than a DNA sample, as the profile consists of what is known as “junk DNA” or “non-genic stretches of DNA not presently recognized as being responsible for trait coding.” *Mitchell*, 2011 U.S. App. LEXIS 15272, at *35 (internal citations omitted). A DNA sample, on the other hand, contains “the entire human genome,” *Buza*, 2011 Cal. App. LEXIS 1006, at *42, including any and all genes responsible for hereditary traits. *See* John Butler, *FORENSIC DNA TYPING* 17 (2005) (“DNA provides a ‘computer program’ that determines our physical features and many other attributes.”). There is simply no dispute that the collection of the DNA sample involves the seizure and storage of a repository of highly sensitive, intimate information about a person and his or her family, including “susceptibility to particular diseases, legitimacy of birth, and perhaps predispositions to certain behaviors and sexual orientation.” U.S. Dep’t of Energy, Office of Science, DNA Forensics, Human Genome Project Information, *available at* http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml (last visited August 30, 2011). By focusing their attention on DNA profiles rather than samples, however, courts

upholding arrestee searches have ignored the full extent of the search that has taken place. *See Mitchell*, 2011 U.S. App. LEXIS 15272, at *32 (Rendell, J., dissenting).

Moreover, these courts have also failed to account for recent scientific debate over whether even DNA profiles, which contain allegedly “non-coding” or “junk” DNA, can in fact be mined for genetic information. For example, there is evidence that the “single tandem repeats” (STRs) used to produce forensic DNA profiles “may be useful for tracking which individuals have [] disease-causing genes.” *Cole, supra*, at 59 (citing John Butler, *Genetics and Genomics of Core Short Tandem Repeat Loci Used in Human Identity Testing*, 51 J. Forensic Sci. 253, 260 (2006)). As Professor Cole notes, in discussing the debate over the information contained in DNA profiles, “it is misleading to claim that forensic STRs have no medical significance, are devoid of information, or are completely innocuous from a privacy standpoint.” *Cole, supra*, at 59. It is also possible for police to draw a strong inference of the race of the owner of a DNA sample, based solely on “junk” DNA profile. *See Kincade*, 379 F.3d at 818 (“DNA profiles derived [from “junk DNA”] may yield probabilistic evidence of the contributor’s race or sex.”). And finally, as other courts have warned, future advances in science and technology will “undoubtedly increase the quantity and nature of information that can be extracted from [the] limited genetic information” contained in DNA profiles. *Buza*, 2011 Cal. App. LEXIS 1006, at *44.

Thus, while DNA samples undisputedly implicate a strong privacy interest on the part of an arrestee—the privacy interest in one’s most intimate biological information—even relatively limited DNA profiles contain far more information about an individual than a fingerprint. The U.S. Department of Energy’s Office of Science has itself acknowledged this: “DNA profiles are different from fingerprints, which are useful only for identification.” U.S. Dep’t of Energy,

Office of Science, DNA Forensics, Human Genome Project Information, *available at* http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml (last visited August 30, 2011). Courts that have struck the Fourth Amendment reasonableness balance in favor of the government have simply failed to account for an arrestee's significant privacy interest not merely in his identity, but in the highly sensitive genetic information contained in his very cells.

B. The Government's Interest in DNA Collection Is Investigation, Not Identification.

In assessing the government's interest in DNA collection, courts have accepted the flawed premise that DNA testing, like fingerprinting, is conducted primarily for purposes of identification.¹⁵ But while fingerprinting at booking has indeed traditionally been justified on the grounds that it is necessary to identify criminal suspects, courts have distinguished this use of fingerprints for identification purposes from their use for investigative purposes, which violates the Fourth Amendment.

1. Use of Fingerprints for Investigation Gives Rise to Fourth Amendment Concerns that Use for Identification Does Not.

Courts have long justified fingerprinting as necessary for identification. Though the Supreme Court has never directly addressed the constitutionality of fingerprinting arrestees, the practice has traditionally been justified by the government's legitimate need to identify

¹⁵ See, e.g., *Raines*, 857 A.2d at 25 (“The DNA profile . . . serves the purpose of increasing the efficiency and accuracy in identifying individuals within a certain class of convicted criminals.”); *Sczubelek*, 402 F.3d at 185-86 (“The governmental justification for [DNA] identification . . . relies on no argument different in kind from that traditionally advanced for taking fingerprints and photographs” (quoting *Jones*, 962 F.2d at 307)); *United States v. Pool*, 645 F. Supp. 2d 903, 910 (E.D. Cal. 2009) (reasoning, in upholding DNA collection from arrestees, that “[p]robable cause has long been the standard which allowed an arrestee to be photographed, fingerprinted and otherwise be compelled to give information which can later be used for identification purposes”) (*Aff'd* 621 F.3d 1213 (9th Cir. 2010); *reh'g en banc ordered by United States v. Pool*, 2011 U.S. App. LEXIS 11146 (9th Cir. June 2, 2011)).

individuals in custody.¹⁶ Law enforcement officials began fingerprinting arrestees for identification purposes in the late nineteenth and early twentieth centuries, when growing urbanization led to greater anonymity, making it easier for an arrestee to hide his identity. See Simon Cole, *Fingerprint Identification and the Criminal Justice System: Historical Lessons for the DNA Debate*, in *DNA AND THE CRIMINAL JUSTICE SYSTEM: THE TECHNOLOGY OF JUSTICE*, 63-64 (David Lazer ed., 2004).

Early courts considering the legality of fingerprinting at arrest made clear that its purpose was to identify the person in custody. For example, in *United States v. Kelly*, 55 F.2d 67, 69 (2d Cir. 1932), the Second Circuit reasoned,

Finger printing seems to be no more than an extension of methods of identification long used in dealing with persons under arrest . . . and [it] 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.

See also, e.g., *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963) (“[I]t is elementary that a person in lawful custody may be required to submit to . . . fingerprinting as part of routine identification processes.”) (internal citations omitted); *McGovern v. Van Riper*, 54 A.2d 469, 470 (N.J. Ch. 1947) (“[T]he taking of fingerprints, photographs and other measurements where the

¹⁶ No Supreme Court case directly considers the constitutionality of fingerprinting arrestees, and because “the great expansion in fingerprinting came before the modern era of Fourth Amendment jurisprudence ushered in by *Katz v. United States*, 389 U.S. 347 (1967), it proceeded unchecked by any judicial balancing against the personal right to privacy.” *Kincade*, 379 F.3d at 874 (9th Cir. 2004) (Kozinski, J., dissenting). See also *Buza*, 2011 Cal. App. LEXIS 1006, at *48 (“[T]he practice of fingerprinting on arrest, though routine, has never been subjected to Fourth Amendment analysis under the tests that must be used to analyze the constitutionality of DNA sampling”); Corey Preston, Note, *Faulty Foundations: How the False Analogy to Routine Fingerprinting Undermines the Argument for Arrestee DNA Sampling*, 19 WM. & MARY BILL OF RTS. J. 475, 509-10 (2010) (“There is no definitive case applying the totality of circumstances test because by the time that test was announced, fingerprinting had long been informally deemed ‘routine.’”).

purpose to be served is to identify the accused as the person charged with the offense for which he is indicted, or to facilitate his recapture should he become a fugitive from justice, is proper . . .”).

Although this primary purpose of fingerprinting—discerning the true identity of the individual in custody—has long been accepted as constitutional, courts have underscored an important Fourth Amendment distinction between fingerprinting for that purpose and fingerprinting for purposes of *investigation*, i.e., connecting a person with a crime to which he was not already connected. The latter use, when conducted without probable cause, has been held to violate the Fourth Amendment. In *Davis v. Mississippi*, 394 U.S. 721, 727-28 (1969), the Supreme Court held that fingerprints taken for investigatory purposes in the course of an illegal arrest should be suppressed as a violation of the Fourth Amendment. In *Hayes v. Florida*, 470 U.S. 811, 815 (1985), the Supreme Court reaffirmed “the holding in *Davis* that in the absence of probable cause or a warrant investigative detentions at the police station for fingerprinting purposes could not be squared with the Fourth Amendment.” The Ninth Circuit followed *Davis* in *United States v. Garcia-Beltran*, 389 F.3d 864 (9th Cir. 2004). There, the defendant had been fingerprinted pursuant to an illegal arrest. *Id.* at 865. The court held that, despite the illegal arrest, the defendant’s *identity* as determined by fingerprinting was admissible, because “fingerprints taken solely for *identification* purposes (*i.e.*, to verify that the person who is fingerprinted is really who he says he is) can be admitted, because evidence of ‘identity’ is never suppressible.” *Id.* at 867 (emphasis in original). However, the court explained that “if . . . the fingerprints were taken for an ‘investigatory’ purpose, *i.e.* to connect Garcia-Beltran to alleged criminal activity, then the fingerprint exemplars should be suppressed.” *Id.* at 865. *See also Buza*, 2011 Cal. App. LEXIS 1006, at *51 (same).

In *Friedman v. Boucher*, the Ninth Circuit extended the logic of the identification-investigation distinction to DNA collection. 580 F.3d 847 (9th Cir. 2009). *Friedman* involved a civil rights suit against a police officer and a deputy district attorney by a pretrial detainee whose DNA was taken for the sole purpose of being entered into a “cold case data bank.” *Id.* at 851. The court held that the forcible extraction of a buccal sample for DNA collection from a pretrial detainee in the absence of a warrant or individualized suspicion, for the express purpose of solving unrelated cold cases, violated the Fourth Amendment. *Id.* at 858. The Ninth Circuit quoted the United States Supreme Court’s admonition in *Schmerber v. California* that “[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained,” *id.* at 857 (quoting 384 U.S. 757, 769-70 (1966)), and observed that “[n]either the Supreme Court nor our court has permitted general suspicionless, warrantless searches of pre-trial detainees for grounds other than institutional security or other legitimate penological interests,” *id.* Because the desire to use the DNA sample to investigate “cold” cases did not constitute a “legitimate penological interest,” the court found in favor of the plaintiff. *Id.* at 860.

In *Buza*, the California Court of Appeals engaged in perhaps the most thorough analysis of the distinction between identification and investigation to date. The Court of Appeals explained that decisions upholding arrestee DNA statutes had conflated the concepts of identification and investigation. *Buza*, 2011 Cal. App. LEXIS 1006, at *41. For example, the court in *Haskell*, *supra*, had included within the definition of identification “what that person has done (whether the individual has a criminal record, whether he is the same person who committed an as-yet unsolved crime across town, etc.).” *Haskell*, 677 F. Supp. 2d at 1199. As the *Buza* court observed, “determining whether an arrestee has ‘committed an as-yet unsolved

crime across town’ entails an investigation into evidence of crime unrelated to the offense for which the arrestee has been arrested.” *Buza*, 2011 Cal. App. LEXIS 1006 at *61 (quoting *Haskell*.) And thus, a Fourth Amendment problem arises, because at the time the DNA is extracted and checked against a database for unsolved crimes, “there is no particularized suspicion that the arrestee committed any of those unsolved crimes; *the link to unsolved crime is created by use of the DNA sample.*” *Buza, id.*, at 61-62 (emphasis added). In other words, by “merging the ordinarily distinct concepts of verification of identity and criminal investigation, [California’s] DNA Act authorizes suspicionless criminal investigation of arrestees in the name of ‘identification.’” *Id.* at 67-68. In striking down the Act, the *Buza* court went so far as to call the upholding of DNA collection from arrestees on the theory that it is used for identification “delusory.” *Id.* at 68.

These cases make clear that DNA sampling for the purposes of investigating past or future crimes does not pass muster under the Fourth Amendment. In litigating the constitutionality of DNA collection statutes, the government quite understandably tends to assert only the identification rationale. In the case of Maryland’s statutory scheme, however, this rationale does not stand up to scrutiny.

2. Maryland Collects Arrestee DNA for Investigative, Not Identification, Purposes.

As is clear from the language and legislative history of the Maryland DNA database statute as well as the realities of DNA testing, Maryland collects arrestees’ DNA primarily for investigative, rather than identification, purposes. It therefore runs afoul of the Fourth Amendment in ways that mere fingerprint collection does not.

- a. The Plain Language and Legislative History of Maryland’s DNA Database Statute Make Clear that It Contemplates the Use of DNA Evidence for Investigation Rather than Identification.

The language of the Maryland DNA database statute makes clear that investigation is the chief goal of DNA collection from arrestees. Among the enumerated purposes of the statute is to collect and test DNA samples “as part of an official investigation into a crime.” MD. CODE ANN., PUBLIC SAFETY, § 2-505(a). *Identification of individuals in custody*, by contrast, is not one of those enumerated purposes. *Id.*¹⁷ As Judge Reinhardt of the Ninth Circuit observed regarding the federal DNA collection statute, “The unequivocal purpose of the searches performed pursuant to the DNA Act is to generate the sort of ordinary investigatory evidence used by law enforcement officials for everyday law enforcement purposes.” *Kincade*, 379 F.3d at 855 (Reinhardt, J., dissenting). *See also Mitchell*, 2011 U.S. App. LEXIS 15272, at *104 (Rendell, J., dissenting) (“The real purpose of collecting arrestees’ and pretrial detainees’ DNA samples and including the resulting DNA profiles in the federal CODIS database is not to ‘*identify*’ the arrestee . . . but to *use* those profiles and the information they provide as evidence in the prosecution and to solve additional past and future crimes.”) (emphasis in original).¹⁸

The statute’s legislative history confirms that the primary purpose of DNA collection is investigation. The record includes supporting statements from numerous law enforcement

¹⁷ Though Maryland’s DNA collection statute states that “[o]nly DNA records that directly relate to the identification of individuals shall be collected and stored,” MD. CODE ANN., PUBLIC SAFETY, § 2-505(b), it is clear that the statute uses the word “identification” to mean something much broader than merely establishing the true identity of an arrestee, since other provisions make clear that the DNA sample is to be kept in storage even after the profile is created and uploaded to state and federal databases. MD. CODE ANN., PUBLIC SAFETY, § 2-506(b) (“Each DNA sample obtained under this subtitle shall be stored securely and maintained only by the Crime Laboratory in the statewide DNA repository.”)

¹⁸ The fact that the Maryland statute allows for expungement of an arrestee’s DNA sample in the event that he is not convicted or his conviction is finally reversed or vacated, MD. CODE ANN., PUBLIC SAFETY, § 2-511, is yet another indication that the statute is not primarily concerned with identification—for, as a judge of the Third Circuit has pointed out with regard to the federal statute, “[i]f the Government’s real interest were in maintaining records of arrestees’ identities, there would be no need to expunge those records upon an acquittal or failure to file charges against the arrestee.” *Mitchell*, 2011 U.S. App. LEXIS 15272, at *106 (Rendell, J., dissenting).

agencies: the State's Attorney for Montgomery County; the Allegany County Sheriff; the President of the Fraternal Order of Police, Maryland Lodge; the Chief of the Hagerstown Police Department; the Chief of the Baltimore County Police Department; the Chief of the Frederick Police Department; and the Maryland Sheriffs' Association, among others.¹⁹ Every one hails the amendment as improving the state's *investigative* capacity.

The State's Attorney for Montgomery County, for instance, explained that the amendment "giv[es] local law enforcement a critical tool to aid them in criminal investigations." Letter from John J. McCarthy, State's Attorney, Montgomery County, and Ike Leggett, County Executive, Montgomery County, to Sen. Brian E. Frosh, Chairman, Senate Judicial Proceedings Committee (Mar. 7, 2008). The Allegany County Sheriff wrote that "collection of DNA Samples during the phase of inmate booking . . . will ensure thorough analysis and inclusive comparisons of suspects within a specific criminal investigation." Letter from David A. Goad, Sheriff, Allegany County, to Sen. Frosh (Jan. 30, 2008). According to the President of the Fraternal Order of Police, the amendment "makes it easier for law enforcement officers to do their job. Quite often, we are hindered by not having access to good DNA evidence and therefore, making it difficult to solve a crime and put the bad guys in jail." Letter from John "Rodney" Bartlett, Jr., President, Fraternal Order of Police, Maryland State Lodge, to Sen. Frosh (Feb. 27, 2008). Even Governor Martin O'Malley recognized the investigatory function of expanded DNA collection: "By expanding Maryland's DNA Database, law enforcement will be able to more efficiently resolve open criminal investigations. . . ." Stmt. of Martin O'Malley, Governor, to Senate Judicial Proceedings Comm. (Feb. 13, 2008).

¹⁹ All statements cited herein are on file with the Maryland Department of Legislative Services.

b. DNA Is Poorly Suited to Arrestee Identification.

In addition to the language and history of the statute, there is a very practical reason why the “identification” justification for DNA collection fails: the nature of DNA testing makes it inappropriate as a tool for identification of arrestees. DNA collected pursuant to the Maryland statute must be tested at certified laboratories. MD. CODE ANN., PUBLIC SAFETY, § 2-502. This off-site testing is time-consuming, such that it is not possible for police to use DNA to immediately identify the suspect in custody. In the California system, for example, the average processing time for arrestee DNA samples is 31 days. *Haskell*, 677 F. Supp. 2d at 1201; *Buza*, 2011 Cal. App. LEXIS 1006, at *55 (concluding that DNA sampling “is not an efficient means of establishing who a person is, because DNA taken upon arrest cannot be used immediately for that purpose. Before law enforcement can obtain information about an arrestee from DNA testing pursuant to the DNA Act, the DNA sample must be analyzed and a DNA profile created and run through a database.”). Fingerprinting, on the other hand, allows the police to identify an arrestee within minutes. See *Integrated Automated Fingerprint Identification System*, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis (“The average response time for an electronic criminal fingerprint submission is about 10 minutes.”).

Furthermore, the Maryland statute establishes procedures for analysis and use of DNA samples that definitively *foreclose* the use of DNA for immediate identification of an individual in custody. DNA samples taken from arrestees “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.” MD. CODE ANN., PUBLIC SAFETY, § 2-504(d)(1). If the samples are not tested until after an arrestee has been arraigned, their purpose cannot be to identify the arrestee while he is in custody.

DNA testing is so much less effective for identifying arrestees than is fingerprinting that any claim that DNA is being collected for identification, rather than investigation, must be pretextual: “DNA profiles are neither necessary nor helpful for verifying who a person is at the time of arrest. Indeed, the fact that DNA testing cannot be employed to verify a person’s true identity at the time of arrest demonstrates that collection of a DNA sample at this time has another purpose.” *Buza*, 2011 Cal. App. LEXIS 1006, at *59.

C. DNA Databases Can Be Used Expansively.

Finally, DNA collection is distinguishable from fingerprinting for Fourth Amendment purposes because DNA databases are prone to expanded use in ways that threaten the privacy of both those who are in the database and those who are not.

Unlike fingerprint databases, the information contained in DNA databases is vulnerable to exploitation. “[C]ommentators have discussed the potential for research to identify genetic causes of antisocial behavior that might be used to justify various crime control measures.” *Id.* at *44-46. And “some have predicted that the DNA profiles entered into CODIS will someday be able to predict the likelihood that a given individual will engage in certain types of criminal, or non-criminal but perhaps socially disfavored, behavior. . . . To say that CODIS profiles might actually be used for such purposes is hardly far-fetched.” *Kincade*, 379 F.3d at 850 (Reinhardt, J., dissenting). Given that the Maryland statute allows DNA samples to be used for vaguely defined “research and administrative purposes,” MD. CODE ANN., PUBLIC SAFETY, § 2-505(a)(5), such a scenario is not unthinkable.

The government will no doubt argue that Maryland’s DNA statute contains sufficient safeguards against misuse and abuse by state or federal officials.²⁰ But procedures put in place after the fact of the initial seizure do not immunize that seizure for the purposes of the Fourth Amendment. *See, e.g., Mitchell*, 2011 U.S. App. LEXIS 15272, at *108 (rejecting notion that “statutory safeguards concerning the post-collection use of the [DNA] samples validate, or justify, their earlier warrantless collection”) (Rendell, J., dissenting).

Even more importantly, the safeguards contained in the Act are simply inadequate. The fact that Maryland found it necessary to put these safeguards in place serves to highlight the strength of the privacy interests implicated by DNA collection and the dangers presented by misuse of the information collected pursuant to the Act. Nonetheless, none of the statutory safeguards prevents CODIS users in other jurisdictions (local, state or federal), some of which have fewer protections in place than Maryland, from accessing and misusing the DNA information of Maryland arrestees.²¹

The statute’s ban on “familial” searching of the state’s database, MD. CODE ANN., PUBLIC SAFETY, § 2-506(d), illustrates this problem. “Familial searching” is a process by which the state

²⁰ For instance, the Act requires the state to adopt regulations governing the methods used “to obtain information from the statewide DNA data base system and CODIS, including procedures to verify the identity and authority of the individual or agency that requests the information.” MD. CODE ANN., PUBLIC SAFETY, § 2-503(a)(2). The Act limits DNA access to federal, State, or local law enforcement agencies; approved crime laboratories; prosecutors; and parties to relevant judicial proceedings. *Id.* § 2-508(a)(1). Finally, it allows arrestees to, under very limited circumstances, have their samples removed from the database. The state will destroy an arrestee’s DNA sample “[i]f all qualifying criminal charges are determined to be unsupported by probable cause,” *id.* § 2-504(d)(2), and it will expunge an arrestee’s DNA information if he is not ultimately convicted, if he is convicted but the conviction is finally reversed or vacated and no new trial is permitted, or if he is granted an unconditional pardon, *id.* § 2-511(a)(1).

²¹ Though the statute provides that, upon expungement from the Maryland database, the “DNA record shall be expunged from every data base into which it has been entered, including local, State, and federal data bases,” § 2-511(c), it is unclear how Maryland can enforce the removal of profiles from CODIS.

attempts to use partial DNA matches that may inculcate close genetic relatives of an individual contained in the database, who themselves have never provided a DNA sample. Law enforcement, unable to find a perfect database match for a crime scene DNA sample, searches the database for a “partial match.” A person’s close relatives—parents, children, and siblings—share about half of his genetic variants, and his second-degree relatives—grandparents, aunts and uncles, and nieces and nephews—share about a quarter.²² A “partial match” or “familial” search, then, is one directed at *family member* of the person who left the sample, rather than the person himself. Commentators have catalogued the dangers of such searches:

[F]amilial searches should be forbidden because they embody the very presumptions that our constitutional and evidentiary rules have long endeavored to counteract: guilt by association, racial discrimination, propensity, and even biological determinism. . . . [T]hey unjustly distinguish between innocent persons related to convicted offenders and innocent persons unrelated to convicted offenders.

Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 304-05 (2010). Maryland legislators, clearly recognizing the danger posed by familial searches, have prohibited the use of Maryland’s state law database for such searches. But this provision does not prevent CODIS users in other jurisdictions—local, state or federal—from conducting familial searches based on samples from Maryland arrestees, and thus implicating relatives of arrestees for whom no probable cause exists. See Natalie Ram, *The Mismatch Between Probable Cause and Partial Matching*, 118 YALE L.J. POCKET PART 182, 184 (2009) (“As participants in CODIS, California and other states not only contribute genetic profiles to the national genetics database, but also have the ability to use it in their own law enforcement efforts.”). Ultimately,

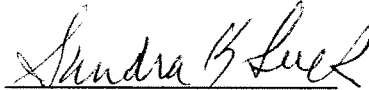
²² Henry T. Greely et al., *Family Ties: The Use of DNA Offender Databases to Catch Offenders’ Kin*, 34 J.L. MED. & ETHICS 248, 251-52 (2006).

this safeguard, like the other safeguards in the DNA Act, cannot prevent widespread erosions of privacy—even as their existence is testament to the legislature’s recognition of the risks.

CONCLUSION

The compelled extraction, storage and profiling of the DNA of mere arrestees violates the Fourth Amendment because it is conducted entirely without individualized suspicion, and because the rationale that taking an arrestee’s DNA is no different from taking his fingerprints does not withstand scrutiny. Accordingly, this Court should hold unconstitutional the expansion of the Maryland DNA Collection statute to arrestees, and reverse the judgment of the lower court.

Respectfully submitted,



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ALONZO J. KING, JR.,

Appellant

v.

STATE OF MARYLAND,

Appellee

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IN THE

COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2118

September Term, 2010

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of August, 2011, a copy of the foregoing motion and accompanying brief in the above-captioned case was delivered to:

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