

IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2003

No. 129

STATE OF MARYLAND,

Appellant

v.

CHARLES RAINES,

Appellee

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF *AMICUS CURIAE*
PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA
In Support of Appellee, Charles Raines, Urging Affirmance

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INTEREST OF AMICUS 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.* (West 2004), and the D.C. DNA Act, D.C. CODE ANN. § 22-4151 *et seq.* (2001) – which, collectively, are effectively identical to the Maryland DNA law – PDS clients have been subjected to the very same suspicionless law enforcement searches at issue in this case. In fact, PDS is currently representing one such client in a matter pending before the United States District Court for the District of Columbia, *Johnson v. Quander*, Civil Action No. 04-448 (RBW), and has participated in similar cases throughout the country, *e.g. United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003) (argued before en banc court on March 23, 2004). PDS therefore has substantial experience litigating the issues presented here as well as a substantial interest in the Court’s analysis. PDS has accordingly sought leave to participate as *amicus curiae*.¹

STATEMENT

This case raises important questions concerning the constitutionality of Maryland’s DNA Collection Act and its provisions compelling thousands of citizens to submit samples of biological materials for analysis and inclusion in both the Maryland state DNA database, MD.

¹ PDS was granted leave to file by this Court on April 20, 2004.

CODE ANN., Public Safety, § 2-502(b),² as well as the “CODIS” DNA database operated by the Federal Bureau of Investigation (FBI),³ MD. CODE ANN., Public Safety, § 2-502(c)(5).

Submission of DNA samples is mandatory for all eligible offenders under the DNA Act⁴ and any person who “fail[s] ... to provide [a] DNA sample” is deemed guilty of a probation violation, MD. CODE ANN., Public Safety, § 2-504(e). The undisputed purpose of collecting these samples – and, accordingly, the DNA Act itself – is to link individuals who have submitted DNA pursuant to the Act with evidence collected from the scenes of unsolved crimes. That is why law enforcement agencies throughout the county, including the FBI, trumpet DNA databanks as successful law enforcement tools. *See e.g.* “CODIS Success Stories” section of FBI website, *available at* <http://www.fbi.gov/hq/lab/codis/brochure.pdf> (illustrating DNA databank “success[es]” with a drawing of two handcuffed hands).

What the law enforcement celebrants do not say, and what the government entirely discounts, is the extent to which forced DNA collection invades the privacy of the individuals

² All cites to the Maryland Code are to the 2003 West edition and its supplements. In addition, it is noted that the Maryland DNA Act itself, currently located at MD. CODE ANN., Public Safety, § 2-501 *et seq.*, was formerly codified at MD. CODE ANN. Art. 88B, § 12A.

³ The “CODIS” (Combined DNA Index System) database contains DNA samples submitted by the federal government, the United States military, the District of Columbia and all 50 states.

⁴ As discussed below, unlike many other states, which target for mandatory DNA collection only those convicted of certain limited and specified crimes, the Maryland DNA Act mandates forced DNA collection from any person convicted of *any* felony offense as well as (1) persons convicted of Burglary in the Fourth Degree, (2) persons convicted of possessing a burglar’s tool with the intent to use or allow the use of the burglar’s tool in the commission of a crime involving the breaking and entering of a motor vehicle and (3) persons convicted of being in or on the motor vehicle of another with the intent to commit theft of the motor vehicle or property that is in the motor vehicle. MD. CODE ANN., Public Safety, § 2-501(g)(1).

See Appendices A (a chart summarizing the DNA collection statutes of all 50 states and the District of Columbia) and B (a similar chart created by the private firm of Smith Alling Lane and updated regularly at <http://www.dnaresource.com>) for information regarding the scope of other state DNA collection laws.

targeted by DNA statutes. In the absence of any individualized suspicion of wrongdoing, these statutes compel Maryland citizens to submit to extremely invasive law enforcement searches of their “persons.” These searches have the potential to reveal intimate personal information of a kind and on a scale that would have been unthinkable even a decade ago. Boiled to its essence, then, the government’s defense of the Maryland DNA Act amounts to an argument that the government is entitled to “search and seize” a certain group of citizens, in the most conceivably invasive way, without making any showing of individualized suspicion. Thus, for the government to prevail, this court must find that probationers, parolees and inmates enjoy no Fourth Amendment protections whatsoever. If suspicionless DNA sampling is to be condoned, in other words, so, too, must twenty-four-hour in-home camera surveillance or the attachment of a Global Positioning device onto every person ever convicted of any crime.

This, in brief, is why the Act is unconstitutional – because it compels sweeping, suspicionless searches conducted for law enforcement purposes. Judge Pincus therefore correctly granted the respondent’s suppression motion.

A. The Evolution of the Maryland DNA Database

Maryland’s first DNA collection law took effect in October of 1994. Heralded as an effort that would “improve significantly the crime solving capabilities” of “local, state and federal law enforcement agencies,” *State Police-Statewide DNA Data Base System and Repository: Hearing on House Bill 410 Before the Maryland House Judiciary Committee*, 1994 Sess. (Statement of U.S. Congressman Helen Delich Bentley), the “State Police-Statewide DNA Data Base System and Repository,” as it was then known, was nonetheless a relatively limited provision. In fact, the Maryland Assembly made clear at the time that the state’s DNA database, as originally conceived, was to “contain samples only from persons convicted of certain sexual

offenses.” Staff of Maryland Senate Judicial Proceedings Committee, Department of Legislative Reference, 1994 Sess., Bill Analysis of House Bill 410 (hereinafter “Bill Analysis”).

Today, Maryland’s DNA collection laws are among the most extensive in the country, mandating DNA collection from *all* convicted felons and even from persons convicted of certain misdemeanor offenses. MD. CODE ANN., Public Safety, § 2-501(g)(1). Much of this expansion has occurred in recent years and shows no sign of slowing down. After adding robbery as a qualifying offense in 2000, Senate Bill 591 (2000 Sess.)(enacted), the General Assembly extended the Act to all felonies in 2002, House Bill 136 (2002 Sess.)(enacted), and also added certain misdemeanor offenses that same year, Senate Bill 486 (2002 Sess.)(enacted). Earlier this year, a proposal to collect the DNA of any person even *charged* with a crime of violence, Senate Bill 426 (2004 Sess.), garnered much support before being withdrawn for reasons that are unclear. In sum, Maryland’s current collection principles now render the reach of the Maryland DNA Act broader than most other states and broader even than the federal DNA Act.⁵

⁵ Congress first authorized the establishment of a federal, FBI-sponsored DNA databank via the DNA Identification Act of 1994, a subchapter of the Violent Crime Control and Law Enforcement Act of that same year. Pub. L. No. 103-322, 108 Stat. 1796 (1994)(codified in scattered sections of Title 42 of the U.S. Code). In 1996, after it was discovered that the 1994 legislation failed to specifically authorize a mechanism for *gathering* DNA samples, Congress “expand[ed]” the FBI’s databank to include “Federal crimes and crimes committed in the District of Columbia,” via the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. 104-132, 110 Stat. 1214 (1996)(codified in scattered sections of Titles 5, 8, 18, 19, 21, 22, 28, 40, 42, 49, 50 of the U.S. Code). After the passage of AEDPA, however, the Department of Justice determined that federal officials *still* did not possess sufficient statutory authority to conduct the constitutionally sensitive searches and seizures at issue. The DNA Analysis Backlog Elimination Act of 2000 was then enacted to finally fill that gap.

Thus, the fact that the federal DNA Act did not, as a practical matter, take effect until the year 2000 accounts for the lack of federal cases on this issue prior to that time and explains why the battle regarding the constitutionality of forced DNA sampling has only recently been joined on the national stage.

B. The Purpose of the Maryland DNA Act

The manifest purpose of the Maryland DNA database is to create “an information clearing house for State [criminal] investigations.” *State Police-Statewide DNA Data Base System and Repository: Hearing on House Bill 410 Before the Maryland House Judiciary Committee and on Senate Bill 298 Before Maryland the Senate Judicial Proceedings Committee*, 1994 Sess. (Statement of Kevin Hughes, Maryland Governor’s Legislative Office, and Col. Larry Tolliver, Superintendent, Maryland State Police (hereinafter “Statement of Hughes & Tolliver”); *see also* 42 U.S.C. § 14132 (describing CODIS as an “index to facilitate law enforcement exchange of DNA identification information”). In fact, legislative history makes clear not only that the DNA Act was designed to assist law enforcement but also that DNA data collected pursuant to the Act “may *only* be made available in the furtherance of an official investigation of a criminal offense.” Statement of Hughes & Tolliver (emphasis added).⁶ Not surprisingly, both the DNA Act itself, originally entitled “*State Police-Statewide DNA Database System and Repository*” (emphasis added), and its implementing regulations, located in the Department of State Police subsection of the Code of Maryland Regulations (i.e. title 29), are unquestionably law enforcement measures. Indeed, it is the Secretary of the Maryland State Police and the Director of the State Police Crime Laboratory who are charged by the statute with developing and implementing all appropriate DNA sampling regulations, policies and procedures. MD. CODE ANN., Public Safety, § 2-503(a) (“[a]fter consulting with Director [of Department of State Police Crime Laboratory], Secretary [of State Police] shall adopt appropriate regulations”); MD.

⁶ The DNA Act does also authorize the use of DNA information for identification of human remains and missing individuals and for “research and administrative purposes.” MD. CODE ANN., Public Safety, §§ 2-505(a)(2)-(5). Without question, however, the primary purpose of the Maryland DNA Act is, and always has been, to assist law enforcement.

REGS. CODE tit. 29 § 05.01.02.A (West 2004) (“[t]he Secretary, after consulting with the Director, shall establish policies and procedures”); *see also* MD. REGS. CODE tit. 29 §§ 05.01.01.B(6),(14) (for purposes of Statewide DNA Data Base System and Repository, “‘Director’ means the Director of the Department of State Police Crime Laboratory,” ‘Secretary’ means the Secretary of the State Police”).

Similarly, the FBI’s CODIS database, to which Maryland sends DNA information pursuant to the requirements of the DNA Act, considers its “mission” to be providing law enforcement with “an effective tool for solving violent crimes.” *See* FBI Website describing “Program Mission Statement and Background” of CODIS, *available at* <http://www.fbi.gov/hq/lab/codis/program.htm>. In fact, CODIS, like the Maryland database, is to “be used *solely* for law enforcement purposes,” H.R. Rep. No. 106-900(I), *25 (emphasis added), and every iteration of the federal Act has accordingly been codified as a federal law enforcement provision.⁷ The federal DNA Act also describes the state grants available thereunder as funds “to conduct or facilitate DNA analyses of those samples that relate to [investigation of] crimes.” 42 U.S.C. § 14135(c).

C. DNA Databases: The Practical Reality

The government portrays forensic DNA as an unqualified public good – a failsafe method for identifying and convicting perpetrators of crime. In reality, however, dangers inherent in the collection and dissemination of personal information, as well as chronic imperfections in

⁷ As noted above, the 1994 federal DNA legislation was contained within the Violent Crime Control and Law Enforcement Act of that year. In 1996, the DNA database provisions were contained within the “Funding for Law Enforcement” section of AEDPA. The DNA Act of 2000 appears within the State and Local Law Enforcement subchapter of the Violent Crime Control and Law Enforcement chapter of Title 42 of the U.S. Code.

forensic DNA practice, significantly undermine the both strength and the purity of the governmental interests represented by forced DNA sampling.

1. DNA Databases Are Rapidly Expanding.

While Maryland’s DNA Act is, as discussed above, broader than nearly all of the DNA acts currently in place around the country, the steady growth of collection-eligible offenses seen in Maryland is of a piece with general trends nationwide. Attempts to rely on the relatively limited nature of current DNA databases to diminish the threat to personal privacy represented by forced DNA collection are, therefore, increasingly unavailing. Indeed, almost every DNA database currently in existence seems to be inexorably expanding and calls to expand these databases further grow louder every day. *See generally* Rebecca Sasser Peterson, Note, *DNA Databases: When Fear Goes Too Far*, 37 Am. Crim. L. Rev. 1219, 1224, 1227 (2000). As the Maryland experience amply demonstrates, although most forensic DNA databases were originally quite circumscribed – requiring samples only from adults convicted of felony sex offenses and a handful of other violent crimes – many DNA databases now include DNA from individuals convicted of (or, in some cases, merely accused of) many other offenses. Thus, the federal DNA Act now compels DNA collection from federal offenders convicted of, for example, attempted damage to property, *Regulations Under the DNA Analysis Backlog Elimination Act of 2000*, 68 Fed. Reg. 74855, 74856-7 (December 29, 2003) (discussing extension of federal DNA collection requirements to all crimes covered by 18 U.S.C. § 16⁸), and the District of Columbia now collects DNA from offenders convicted of certain types of

⁸ 18 U.S.C. § 16 establishes federal “crimes of violence,” specifically defining such crimes as “(a) an offense that has as an element the use, *attempted use*, or threatened use of physical force against the person *or property of another*, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense” (emphasis added).

insurance fraud, D.C. Code Ann. § 22-4151(2). Various state laws likewise require collection of DNA samples from people convicted of such non-violent crimes as possession of food stamps, ALA. CODE ANN. §§ 36-18-24, 13A-9-91 (2003), and false swearing, GA. CODE ANN. § 16-10-71, 24-4-60 (2000).

In addition, a number of states, like Maryland, are expanding their database laws to require DNA extraction from misdemeanants⁹ and even from individuals merely *arrested* for certain offenses.¹⁰ *See, e.g.*, LA. REV. STAT. ANN. § 15:609(A) (West Supp. 2003); TEX. GOV'T CODE ANN. § 411.1471(a)(2) (West 2003); VA. ST. § 19.2-310.2:1 (2003). *See also* D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case For Population-Wide Coverage*, 2003 Wisc. L. Rev. 413, 430-435 (2003). More than half of the states now also collect samples from juvenile offenders.¹¹

But even these developments do not represent the outer limit of contemplated database expansion. Legislators, commentators, and even the President, are every day promoting expansion of collection laws to include more misdemeanants and more arrestees¹² and “the strong trend in State law reform is towards [ever] broader sample collection.” *Funding Forensic Sciences DNA and Beyond: Testimony Before the Committee on Senate Judiciary*, 108th Cong. (2003) (statement of The Honorable Sarah V. Hart, Director, National Institute of Justice),

⁹ *See* Appendices A & B.

¹⁰ *See* Appendices A & B.

¹¹ *See* Appendices A & B.

¹² *See* Govt. Br. at 19, n.4, (noting that “the Department of Justice has proposed expanding the [federal] DNA collection law to cover all felons (citing H.R. 3214, 108th Cong. § 103(b) (2003), S1700, 108th Cong. § 103(b) (2003), S1828, 108th Cong. § 103(b) (2003)). *See also* Richard Willing, *FBI May Collect Juveniles’ DNA*, USA Today, Nov. 17, 2003, available at 2003 WL 5323471 (discussing federal legislation to add juvenile offenders and arrestees to CODIS).

available at 2003 WL 56336510. Someday soon, the same public policies animating Georgia's attempt to perform drug tests on candidates for political office, *Chandler v. Miller*, 520 U.S. 305, 305 (1997), will likely prompt requests for DNA samples from other public officials, including even officers of this Court. Indeed, the state of Louisiana has just recently enacted legislation requiring DNA samples from all police officer applicants. LA. REV. STAT. ANN. §2405.4 (West 2004).

Ultimately, in this era of pervasive national security concerns, it may not be long before someone proposes to import into a criminal justice database the 282 million DNA samples currently sitting in tissue repositories in the United States, National Bioethics Advisory Commission, *Research Involving Human Biological Materials: Ethical Issues and Policy Guidance* 13 (1999), available at http://www.georgetown.edu/research/nrcbl/nbac/hbm_exec.pdf, or the DNA information now routinely extracted by hospitals from newborn babies, Kaye & Smith, *supra*, at 444-45. Or, insofar as database collection principles are premised on behavior that has some nominal predictive value with respect to future crime, DNA collection based on social characteristics even more highly correlated with involvement in the criminal justice system, such as family dysfunction, economic status, unemployment, neighborhood, gender, age or race. *Id.* at 420-421 (citing 9 *Prediction and Classification: Criminal Justice Decision Making* (Don Gottfredson & Michael Tonry eds., 1987); *Prediction in Criminology* (David Farrington & Roger Tarling eds., 1985); Jack F. Williams, *Process and Prediction: Return to a Fuzzy Model of Pretrial Detention*, 79 Minn. L. Rev. 325 (1994); Daniel S. Goodman, Note, *Demographic Evidence in Capital Sentencing*, 39 Stan. L. Rev. 499 (1987)).

Finally, given this evolution, it seems “inevitable,” as one commentator has observed, that at some point “there will be calls for a universal DNA law enforcement data bank with

samples from every resident in the country.” Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 Brook. L. Rev. 127, 129 (2001). In fact, DNA sampling of the entire population – for law enforcement use – has already been recommended by more than one reputable source. *See, e.g.*, Kaye & Smith, *supra*, at 452-59; John P. Cronan, *The Next Frontier in Law Enforcement: A Proposal for Complete DNA Databanks*, 28 Am. J. Crim. L. 119 (2000); National Commission for the Future of DNA Evidence, National Institute of Justice, U.S. Dep’t of Justice, *The Future of Forensic DNA Testing: Predictions of the Research and Development Working Group*, NCJ 183697 (November 2000), available at <http://www.ncjrs.org/pdffiles1/nij/183697.pdf>.

2. DNA Databases are Vulnerable to Misuse and Abuse.

Unlike some other state DNA laws, which expressly provide for the destruction of biological samples after DNA typing has been completed,¹³ neither the Maryland DNA Act nor the related regulations, specify how, where, by whom or at what point, collected DNA samples are to be disposed of.¹⁴ Such omission is particularly notable given the promulgation of extensive regulations regarding storage procedures for these same DNA samples. *See, e.g.*, MD. REGS. CODE tit. 29 §§§ 05.01.07 (detailing methods for storing records of DNA samples); .08 (detailing methods for storing DNA samples); .09 (detailing methods for storing DNA typing results). Maryland therefore collects, and then indefinitely retains, the private genetic

¹³ *See, e.g.*, WIS. STAT. § 165.77(e)(2003).

¹⁴ This lack of disposal procedures is also contrary to the recommendations of the National Academy of Sciences, which, more than a decade ago, advised that DNA samples be destroyed “promptly” after analysis. Comm. on DNA Tech. In Forensic Science of the Nat’l Acad. Of Science, *DNA Technology in Forensic Science* 122 (Nat’l Acad. Press 1992).

information of thousands of its citizens, potentially retaining access to those citizens' biological secrets for however long, and to whatever end, state authorities see fit.

While intentional misuse of such information is prohibited by law,¹⁵ recent high profile examples of database insecurity and unauthorized data sharing demonstrate that when private information is collected by the government, such information is vulnerable to exposure and abuse. Just a few months ago, for example, the governor of Georgia was alarmed to discover that information accumulated by the state regarding the private lives of ordinary, law-abiding citizens – including marriage and divorce records as well as fingerprints – had been shared with “Matrix,” a privately-owned multi-state law enforcement databank. Dick Pettys, *Georgia Stayed With Database Despite Governor's Statement*, Associated Press, January 30, 2004, available at 1/30/04 APWIRE 20:43:04. Even more alarming, other states apparently continue to affiliate with Matrix, demonstrating just how dangerous it has become to allow government entities access to private information, no matter how regulated such access may, on paper, be. Indeed, insofar as the Maryland DNA Act provides that responsibility for the state's DNA analyses may be contracted out to private entities, MD. CODE ANN., Public Safety, § 2-502(e), there is even more cause for concern regarding the government's ability to control access to and use of the biological information it collects.¹⁶

¹⁵ The Maryland DNA Act provides a misdemeanor penalty for “willful disclosure” of DNA information to, or the “willful[] obtain[ing]” of such information by, “unauthorized individuals.” MD. CODE ANN., Public Safety, § 2-512(c).

¹⁶ It appears that the contracting out of DNA analyses to private laboratories is more than a theoretical possibility in Maryland. According to a March 9, 2004 report from the Maryland State Police, attached hereto as Appendix C, of the 28,072 DNA tests that have been conducted pursuant to the Maryland DNA Act to date, fully 22,466 of those tests have been conducted by the for-profit laboratory Bode Technologies.

Database insecurity and evolving standards for database use have been, in fact, the topic of considerable controversy across Europe in the wake of the Icelandic Parliament's endorsement of a private company's plan to collect DNA samples from the country's entire population. Although the Icelandic database is intended – at the moment – for use solely by genetic researchers, the porousness of government files, the voraciousness of law enforcement databases, and the increasing development of “second use” rationales for retroactively re-writing database disclosure principles have rendered privacy advocates extremely concerned. *See, e.g.*, Gary Taubes, *Your Genetic Destiny For Sale*, 104 M.I.T. Tech. Rev. 3 (2001); Editorial, *Privacy Precedent*, The Boston Globe, March 7, 2001, available at 2001 WL 3922738; John Schwartz, *For Sale in Iceland: A Nation's Genetic Code; Deal With Research Firm Highlights Conflicting Views of Progress, Privacy and Ethics*, The Washington Post, January 12, 1999, available at 1999 WL 2193418.

Closer to home, we have seen exactly how the federal government proposes to square the inevitably competing interests of law enforcement and medical privacy in the on-going efforts of the Department of Justice to subpoena, from six major metropolitan hospitals, the medical histories of every woman who has undergone an abortion procedure performed by the doctor-plaintiffs challenging the breadth of the Partial Birth Abortion Ban Act of 2003. *See* Eric Lichtblau, *Ashcroft Defends Subpoenas*, The New York Times, February 12, 2004, available at 2004 WL 59683051; *See also Northwestern Memorial Hosp. v. Ashcroft*, --- F.3d ----, 2004 WL 601652 (7th Cir. Mar 26, 2004) (affirming trial court's order quashing subpoenas in question); *National Abortion Federation v. Ashcroft*, 2004 WL 555701 (S.D.N.Y. Mar 19, 2004)(same). It is apparently the position of the government's leading law enforcement authorities that neither state privacy protections nor the federal strictures recently imposed under the Health Insurance

Portability & Accountability Act of 1996, Pub. L. 104-191, 110 Stat 1936 (1996), can or should impede its prosecutorial efforts.

As for an American example of the “second use” phenomenon – where initial or official database standards are modified or eroded over time – there are the military offender provisions of the federal DNA Act, which, in conjunction with the National Defense Authorization Act for Fiscal Year 2003, Pub. L. 107-314, 116 Stat. 2458 (2002), now authorize law enforcement use of a Defense Department DNA repository initially designed solely for the identification of soldiers lost on the battlefield. *Id.* at Sec. 1063 (entitled “Use for law enforcement purposes of DNA samples maintained by Department of Defense for identification of human remains”); Patricia A. Ham, *An Army of Suspects: The History and Constitutionality of the U.S. Military’s DNA Repository and Its Access For Law Enforcement Purposes*, 2003-AUG Army Law. 1. The Defense Department regulations that originally implemented this repository indicated plainly that “[t]he data collected and stored” would “not be analyzed until needed for the identification of human remains.” 62 Fed. Reg. 51835, *51835 (Oct. 3, 1997). Similar legislative fiat could easily transform the Maryland DNA databank into a paternity testing service or a mechanism for tracking the incidence of HIV in the offender population. This is especially true as the DNA Act expressly allows use of DNA information for unspecified “research and administrative purposes.” MD. CODE ANN., Public Safety, §§ 2505(a)(5)(i)–(iii) (providing that “DNA samples shall be collected and tested ... for research and administrative purposes, including [but not limited to] development of a “population data base,” forensic “research and protocol development” and “quality control”).

In addition, even ostensibly limited databases are still subject to abuse by overzealous officials. The residents of nearby Charlottesville, Virginia have recently been leaning this lesson

the hard way as police investigate a sexual assault case by “requesting” that hundreds of local African American men “volunteer” DNA samples for the state’s DNA database. Maria Glod, “DNA Dragnet” Makes Charlottesville Uneasy: Race Profiling Suspected in Hunt for Rapist, *The Washington Post*, April 14, 2004, available at 2004 WL 74479539. Similarly, just months ago, 1,200 citizens were “asked” to submit to DNA sampling by the Louisiana State Police. Those who resisted were allegedly told by state authorities that any failure to cooperate would result in public identification as a suspected serial killer. Keith O'Brien, *Men Seek Return of DNA From Serial Killer Search: Some Claim Police Bullied Them For Swabs*, *Times-Picayune*, December 28, 2003, available at 2003 WL 60084616; Alan Sayre, *Tool of DNA Offers Potential for Abuse*, *The Baton Rouge Advocate*, December 22, 2003, available at 2003 WL 4895631; see also Peterson, *supra*, at 1227 (citing Richard Willing, *Privacy Issue Is the Catch for Police DNA “Dragnets,”* *USA Today*, Sept. 16, 1998 (discussing DNA dragnet employed in Ann Arbor, Michigan in 1998)). Indeed, if the temptation and the ability to improperly collect and improperly disseminate DNA material were not so powerful, there would be no need to criminally proscribe misuse of database information.

Finally, it is important to understand that even the relatively limited information contained in DNA databanks is subject to abuse, despite assertions by databank proponents that DNA profiles contain no significant personal information. *See. e.g.*, Govt. Br. at 15 (“The DNA profile ...uniquely identifies and individual but does not contain any other information about the person.”) In fact, many geneticists believe that the “non-coding” portions of the DNA strand used to create forensic profiles will someday yield the same kind of personal biological details

held in currently “coded” DNA.¹⁷ See, e.g., Sophia Kazmi, ‘Junk’ DNA Has Purpose, *East Bay Researchers Say*, Contra Costa Times, October 17, 2003, available at 2003 WL 65736421; *An Ancient Helper - Useful “Junk” DNA: Some ‘Junk’ DNA May Have a Function*, The Economist, September 6, 2003, available at 2003 WL 58583958; Tina Hesman, *Human Genome Sequencing Project: Scientists Say Map May Lead to New Medical Frontiers*, St. Louis Post-Dispatch, April 20, 2003, available at 2003 WL 3572097. In fact, while “much biomedical research and clinical care threatens subjects’ or patients’ privacy ... information derived from DNA can do so to a significantly greater extent” given the “information-rich nature of DNA.” Ronald M. Green & A. Matthew Thomas, *DNA: Five Distinguishing Features for Policy Analysis*, 11 Harv. J.L. & Tech. 571, 579 (1998). Even now, a DNA sample can provide “insights into many intimate aspects of a person and their families [sic] 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/HumanGenome/elsi/forensics.html>. The risks of DNA-related discrimination, in variety of contexts, are therefore both very real and very frightening. Green, *supra*, at 573, 577 (citing E. Virginia Lapham et al., *Genetic Discrimination: Perspectives of Consumers*, 274 Science 621 (1996)).

3. Forensic DNA Is Not Infallible.

Notwithstanding the popular perception that DNA evidence is essentially infallible (and regardless of the quality or integrity of the DNA tests actually conducted in this case), expert study has repeatedly revealed that DNA evidence is far from flawless; it can – and does – result

¹⁷ “Coded” DNA is the section of the DNA molecule whose functions are currently known and understood by scientists. “Junk,” or “non-coding” DNA is simply that portion of the molecule not yet associated with a particular biological function.

in the implication of innocent people. Indeed, early statements regarding the “impossibility” of erroneous forensic “matches” have been repudiated and retracted even by those who initially uttered them. William C. Thompson et al., *How the Probability of a False Positive Affects the Value of DNA Evidence*, Vol. 8, No. 1 J. of Forensic Sci. 1 (2003) (citing K. Roeder, *DNA Fingerprinting: A Review of the Controversy*, 9 Stat. Sci. 263, 269 (1994); D. Kaye, *DNA Evidence: Probability, Population Genetics and the Courts*, 7 Harv. J. Law Technology, 101, 172 (1993); see also R.N. Jonakait, *Stories, Forensic Science and Improved Verdicts*, 13 Cardozo L. Rev. 343 (1991)). Nonetheless, courts, litigants and jurors continue to labor under the layperson’s misconception that DNA evidence can never be wrong,¹⁸ compounding significantly the horrifying consequences of an erroneous DNA “match.”

Moreover, concerns regarding forensic DNA “matches” are especially troubling in the “cold hit” context where, potentially, the DNA “match” constitutes the bulk, or even the entirety,¹⁹ of the prosecution’s case. For this reason, the general scientific community has

¹⁸ See Appendix D, a recent poll of 1000 potential District of Columbia jurors conducted on December 8-14, 2003 by Lake Snell Perry & Associates. The poll reveals that many potential jurors consider DNA evidence to be unassailably reliable; nearly a third of those surveyed expressed the opinion that DNA evidence could never be wrong or mistaken.

¹⁹ The government’s brief may be read to imply that DNA information collected and analyzed pursuant to the DNA Act may only be introduced in a criminal case to the extent that that other non-DNA evidence corroborates identification of the defendant. See .e.g. Govt. Br. at 24 (DNA evidence “can only be used against the person [whose DNA was collected pursuant to the DNA Act] to the extent that independent evidence indicates that a crime has been committed”); Govt. Br. at 30 (“searches authorized by the DNA Act are...for the purpose of obtaining information that can be used in the event *independent evidence* demonstrates that a crime has been committed”)(emphasis in original). In fact, there is nothing in the Maryland DNA Act to prevent a conviction based on an Act-authorized DNA match alone. What the government means, then, when arguing that DNA Act evidence may only be introduced in a criminal case following the predicate introduction of “independent evidence,” is merely that the DNA sample from the crime scene with which the defendant’s DNA has allegedly been associated must also be introduced in order to complete the forensic “match.” In other words, there is no requirement that DNA evidence be supplemented with non-DNA-related inculpatory

become increasingly wary of DNA databanks and of cases built upon such evidence. *See generally* Thompson, *How the Probability of a False Positive Affects the Value of DNA Evidence*, *supra* at 1 (noting that “the potential for a false positive [DNA ‘match’] can lead to serious errors of interpretation, particularly when [a] ... suspect is identified through a ‘DNA dragnet’ or database search”). As a threshold matter, the scientific community has increasingly noted that the standards which pertain in forensic laboratory practice differ significantly from the standards applied to non-partisan scientific endeavor. Indeed, it was recently observed that “[m]edical standards for the diagnosis of strep throat are more stringent than those for laboratories conducting DNA testing for the criminal justice system.” Veronica Valdivieso, Note, *DNA Warrants: A Panacea for Old, Cold Rape Cases?* 90 *Geo. L.J.* 1009, 1023, n.118 (2002).

In addition, and more specifically, scientists examining the use of DNA evidence warn of the “false positive” results born of problems inherent in forensic DNA practice generally²⁰ and in the procedures followed by the FBI²¹ in particular. Such errors have been documented in both

information – such as a confession, identifying witnesses or other tangible evidence – in order for a conviction to stand. DNA evidence is thus treated exactly as any other piece of evidence in a criminal case – it must be linked to the crime at issue in order to be relevant but it is not subject to any special or additional confirmatory safeguards.

²⁰ Two types of erroneous “matches” are discussed in the context of forensic DNA typing: (1) “coincidental matches,” which occur when two different people have the same DNA profile and (2) “false positive matches,” which occur as a result of errors in collection, errors in sampling, errors in data interpretation and/or errors in the reporting of test results.

²¹ Experts have expressed the following concerns, among others, about the FBI’s DNA practices: (1) the FBI’s reluctance to conduct blind proficiency testing, *see* Joseph L. Peterson et al., National Institute of Justice, *Developing Criteria for Model External DNA Proficiency Testing* xi (2001); (2) the FBI’s refusal to disclose its DNA testing error rates, *see* Richard Lempert, *After the DNA Wars: Skirmishing with NRC II*, 37 *Jurimetrics J.* 439 (1997); William C. Thompson, *Accepting Lower Standards: The National Research Council’s Second Report on Forensic DNA Evidence*, 37 *Jurimetrics J.* 405, 419-21 (1997); (3) the lack of independent “peer review” of FBI

law enforcement crime labs²² and in “independent” laboratory²³ testing. False positives are also generated with disturbing frequency in the few published “proficiency” (or practice) tests run by reputable DNA labs. *Subjective Interpretation, Laboratory Error and the Value of Forensic DNA Evidence: Three Case Studies*, 96 *Genetica* 153, 168 (1995); Jonathan J. Koehler, *DNA Matches and Statistics: Important Questions, Surprising Answers* 76 *Judicature* 222, 229 (1993); see also Jonathan J. Koehler, *The Random Match Probability in DNA Evidence: Irrelevant and Prejudicial?* 35 *Jurimetrics* 201 (1995).

In addition, current criminal justice statistics indicate that while only 2% of white adults will ever be subject to correctional supervision, fully 9% of African Americans can expect to be

procedures, Jaiprakash G. Shewale et al., *Anomalous Amplification of the Amelogenin Locus Typed by AmpFLSTR Profiler Plus Amplification Kit*, *Forensic Science Communications* Vol. 2, No. 4 (Oct. 2000); and (4) the FBI’s practice of “manufacturing” peer review by its own scientists in advance of litigation, U.S. Dep’t of Justice Office of Oversight and Review, *Memorandum of Investigation*, Case No. C & R 2002003 (May 1, 2002).

²² The Philadelphia City Crime Laboratory “accidentally switched” the reference samples of the defendant and the complainant in a recent sexual assault case. This error led the laboratory to label the defendant a “potential contributor” of what the lab had misidentified as a “seminal stain” on the complainant’s clothing. Thompson, *How the Probability of a False Positive Affects the Value of DNA Evidence*, *supra*, (citing L. Brenner & B. Pflieger, *Investigation of the Sexual Assault of Danah H.*, Philadelphia Police Department DNA Identification Laboratory, Sept. 24, 1999).

Sample contamination was also apparently the source of a recent erroneous DNA “match,” reported by officials in New Zealand, of biological material collected from the clothing of a murdered child and a reference DNA sample submitted by the victim in an unrelated sexual assault case. See generally, *DNA contamination likely*, *The Cairns Post*, February 7, 2004, available at 2004 WL 64380051.

²³ In 1995, Cellmark Diagnostics “accidentally switched” two reference samples and consequently reported an erroneous “match” between a defendant and an evidentiary swab from a crime scene. Thompson, *How the Probability of a False Positive Affects the Value of DNA Evidence*, *supra*, (citing R.W. Cotton & C. Word, *Cellmark Diagnostics: Amended Report of Laboratory Examination Case No. F951078* (1995)).

incarcerated or placed on probation or parole during their lifetime.²⁴ “There can be no doubt,” therefore, “that any database of DNA profiles will be dramatically skewed by race, if the sampling and typing of DNA becomes a routine consequence of criminal conviction.” Kaye & Smith, *supra*, at 452-59. There can also be no doubt, then, that the tragic consequences of flawed forensic DNA practice are inordinately visited upon minority communities.

In the end, however, even if the absolute number of erroneous DNA “matches” is relatively low, the implication of even one innocent person, via seemingly infallible evidence, is extremely troubling. Just a few years ago, a false positive error was discovered in Oklahoma via post-conviction DNA re-testing,²⁵ an avenue of vindication simply not possible in many cases. The defendant in that matter had been sentenced to 3000 years in jail.²⁶

ARGUMENT

The trial court was correct when it concluded that the Maryland DNA Act violates the Fourth Amendment.²⁷ Indeed, the privacy invasions created by the Act’s attempt to capitalize on modern medical science – for the express purpose of assisting law enforcement officials – could have scarcely been imagined, let alone endorsed, when the Fourth Amendment was drafted more

²⁴ U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Correctional Populations in the United States, 1997* (Nov. 2000) iii, 5 available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpus97.pdf>

²⁵ Of course, the analysis involved in DNA exoneration is considerably more reliable than the procedures involved in declaring a DNA “match,” where subjective “eyeball” comparisons can lead to the erroneous “calling” of very similar DNA profiles as identical. When DNA evidence is used to prove innocence, however, the DNA profile of the defendant and of the evidence sample are often completely and unquestionably distinct.

²⁶ Thompson, *How the Probability of a False Positive Affects the Value of DNA Evidence, supra* (discussing false conviction of Timothy Durham).

²⁷ In pertinent part, the Fourth Amendment 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” U.S. Const. amend. IV (emphasis added).

than 200 years ago. Although more recent Supreme Court cases have recognized the serious privacy concerns inherent in scientific analysis of biological materials, *Schmerber v. California*, 384 U.S. 757, 767-68 (1966), and have warned that such analysis “can reveal a host of private medical facts,” *Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 616-17 (1989),²⁸ even those cases have not fully confronted the overwhelming privacy concerns created by the rapid advancement of modern technology. In fact, DNA science has now heightened the government’s ability to glean information from a blood sample to an extent that would have been inconceivable, even at the time of *Schmerber*. It is only in the context, however, of the tremendous impact that forced DNA sampling has on protected privacy interests that the Court can appreciate the true nature and extent of the Fourth Amendment implications of the Maryland DNA Act.

A. The Maryland DNA Act Mandates Searches that Invade Significant Protected Privacy Interests.

Without any requirement of individualized suspicion, the DNA Act compels thousands of people to submit to a medical procedure with the potential to reveal their most intimate genetic secrets.²⁹ Though the Framers of the Constitution could scarcely have imagined the bounty of

²⁸ See also *Chandler*, 520 U.S. at 313 (“collection and testing of urine” constitutes a “search” for Fourth Amendment purposes); *Davis v. Mississippi*, 394 U.S. 721, 727 (1969) (“detentions for the sole purpose of obtaining fingerprints are . . . subject to the constraints of the Fourth Amendment”).

²⁹ Many appellate courts considering this issue have misapprehended the nature of the privacy interests implicated by forced DNA collection by focusing on the extent of the initial *seizure* of the sample rather than on the extent of subsequent (and potential) *searches*. See e.g., *Green v. Berge*, 2004 WL 42498 (7th Cir. Jan. 9, 2004) (“DNA collection is less invasive than a search of one’s home”) (Easterbrook, J., concurring). The government makes this same error. See, e.g., Govt. Br. at 12 (“The taking of a saliva sample constitutes a modest intrusion”); *id.* at 14 (citing *Breithaupt v. Abram*, 352 U.S. 432 (1954), a case regarding blood alcohol testing that

personal information collected by the DNA Act, they would have immediately recognized the motivations behind it, as the Framers well understood the temptation to invade the privacy of citizens for the purpose of solving crimes. From the Star Chamber to the Revolutionary War, Anglo-American history had been replete with attempts to fight crime by allowing law enforcement officials to invade protected spheres of privacy in the absence of any particularized evidence of wrongdoing. It was precisely that history that led the Framers to adopt the Fourth Amendment, which was designed as a safeguard against both the widespread use of suspicionless “general warrants” in England and the use of “writs of assistance” against the American colonists. *See* LaFave, *Search and Seizure*, § 1.1(a) (3d ed. 1996).

In addition, the privacy interests at stake in this case are not at all diminished by law enforcement promises not to look – for now – at various portions of the DNA sample. As the Supreme Court has made clear in the context of home searches, the government cannot belittle the severity of a privacy invasion on the ground that law enforcement officials averted their eyes and thus failed to “detect private activities occurring in private areas.” *Kyllo v. United States*, 533 U.S. 27, 37 (2001). By parity of reasoning, the government cannot lessen the privacy invasion caused by its forcible procurement of a DNA specimen containing an individual’s genetic secrets on the ground that it does not currently plan to discover or divulge those secrets. Indeed, the Defense Department’s initial pledge to use the DNA samples that it collected from over three million American service members solely for the purpose of identifying battlefield remains is cold comfort to the military personnel whose DNA has now been made available to law enforcement. *See*, discussion Sec. 2, *supra*.

far pre-dates the advent of DNA typing, for the proposition that “blood testing constitutes a ‘slight...intrusion ...to which millions of Americans submit as a matter of course nearly every day’”).

B. The Fourth Amendment Requires that All Reasonable Searches Involve Individualized Suspicion Unless Such Searches are “Divorced” From Law Enforcement Interests.

In light of the origins of the Fourth Amendment, it is hardly surprising that the Supreme Court has, in a recent trilogy of cases – *Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000); *Ferguson v. City of Charleston*, 532 U.S. 67, 79-80 (2001); and *Illinois v. Lidster*, 124 S.Ct. 885 (2004) – interpreted the Fourth Amendment as requiring *all* “reasonable” searches and seizures to involve individualized suspicion unless such searches are “divorced” from the state’s general interest in law enforcement.

Under the rubric established by these cases, the most critical inquiry in determining whether a regime of suspicionless searches can survive Fourth Amendment scrutiny is thus whether the scheme’s “primary purpose [is] to detect evidence of ordinary criminal wrongdoing.” *Edmond*, 531 U.S. at 41. The Supreme Court has, in fact, “never approved” of suspicionless law enforcement searches because, as the Court explained in *Edmond*, 531 U.S. at 41, 44, “the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life,” if they could be “justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given [person] has committed some crime.”

1. The Maryland DNA Act is Not “Divorced” From Law Enforcement Interests.

The search at issue in this case was not “divorced” from law enforcement interests – the entire point of the Maryland DNA Act is to aid law enforcement. Indeed, as the government candidly admits, DNA databanks are designed to “help law enforcement solve unresolved and future cases.” Govt. Br. at 29. *See also id.* at 5 (citing Michelle Hibbert, *DNA Databanks: Law*

Enforcement's Greatest Surveillance Tool, 34 Wake Forest L. Rev. 767 (1999)); *id.* at 5 (“The principal purpose of such [DNA] acts is to assist future criminal law enforcement.”); *id.* at 6 (“In the present case, [where a criminal prosecution was initiated based on a DNA sample collected pursuant to the Act] the statute’s provisions were followed and its purpose was effectuated.”); *id.* at 11 (citing *United States v. Knights*, 534 U.S.112 ,121 (2001), for the proposition that the governmental interest at issue in this case is “the state’s ‘interest in apprehending violators of the criminal law’”); *id.* at 18 (identifying governmental interest at issue as “interest in prosecuting crimes accurately and ... assist[ing] more effectively in investigation of crimes”); *id.* at 18, n. 2 (citing to John P. Conan, *The Next Frontier of Law Enforcement: A Proposal for Complete DNA Databanks*, 29 Am. J. Crim. L. 119 (2000)). The Maryland DNA Act clearly charges law enforcement officials with obtaining evidence about unspecified, unsolved crimes for use in subsequent criminal prosecutions. In the process, the DNA Act also clearly creates a class of people – one whose demographics are extremely skewed³⁰ – who become “the usual suspects” in every crime for the rest of their lives.

Moreover, with regard to the government’s location of a permissibly non-law enforcement basis for the DNA Act in its novel argument regarding “combating recidivism,” the government’s own explication of the term “combating recidivism” – i.e. prosecution for future crimes – makes clear that “combating recidivism” *is* a law enforcement purpose. In fact, the government essentially concedes this point by referencing, in support of this purportedly non-law enforcement justification for the Act, the criminal investigations and prosecutions that have been generated by CODIS DNA “hits.” Govt. Br. at 29.

In addition, if the hypothetical deterrence value of DNA collection is determined to

³⁰ See discussion, Sec. C.3., *supra*.

provide a supervisory rationale sufficient to override the clear law enforcement purpose of such action, *every* search or seizure of parolees or probationers will inevitably pass constitutional muster because the government will always be to spin out some argument as to why *any* law enforcement procedure may also deter someone’s inclination to break the law. If DNA collection – and subsequent criminal investigation and prosecution based on the collected information – can be squared with the Fourth Amendment by reference to a nominal supervisory component, then so, too, could the attachment of a Global Positioning System onto every convicted offender, in perpetuity, or the use of twenty-four-hour in-home surveillance. Indeed, if spurious deterrence claims are enough to escape the strictures of the Constitution, it is hard to imagine any limits on the government’s ability to search and seize for “deterrence” purposes.

The trial court thus correctly saw the Maryland DNA Act for what it was: an unconstitutional use of modern technology to significantly narrow the broad realm of privacy that the Framers of the Constitution sought to protect with the inclusion of the Fourth Amendment in the Bill of Rights. Thus, if the government’s arguments are to prevail, this Court must find that individuals subject to the DNA Act have no Fourth Amendment protections whatsoever.

2. Probationers, Parolees and Prisoners Are Entitled to Fourth Amendment Protections.

While the government correctly notes that “probationers do not enjoy absolute liberty,” Govt. Br. at 11, citing *United States v. Knights*, 534 U.S. 112, 119 (2001), it is not the case that such persons have no rights under the Fourth Amendment at all. It makes absolutely no difference, in fact, that the DNA Act mandates suspicionless invasions into the realm of guaranteed privacy only for probationers, parolees and prisoners; even for citizens like these, the Supreme Court has held firm to the individualized suspicion requirement as a necessary

component of a “reasonable” search. In fact, the Court has never permitted any general law enforcement searches or seizures of such persons – much less the sort of sweeping privacy invasions permitted by the DNA Act. Instead, the Supreme Court has required both some form of individualized suspicion and a genuine need either to closely *supervise* probationers and parolees, *Griffin v. Wisconsin*, 483 U.S. 868, 875-79 (1987); *United States v. Knights*, 534 U.S. 112, 120-21 (2001), or to maintain effective prison operations, *Hudson v. Palmer*, 468 U.S. 517, 523 (1984); *Lee v. Washington*, 390 U.S. 333, 334 (1968)(per curiam). Thus, even “prisons are not beyond the reach of the Constitution.” *Hudson*, 468 U.S. at 523.

The Maryland DNA Act, of course, gets no Fourth Amendment pass on either of these grounds. Its searches are not conducted in the name of “prison security and discipline” *Lee*, 390 U.S. at 334, (in contrast to, for example, searches of prisoners’ cells) and the Act has nothing at all to do with community supervision. The DNA information collected by the Act does not aid in observation of the behavior of probationers or parolees – as, for example, more stringent home searches or drug testing requirements might do. There are absolutely no provisions of the DNA Act aimed at – or even contemplating – the role that forced DNA extraction could supposedly play in day-to-day community oversight. In fact, supervision is neither identified as one of the “purposes” of the Act, MD. CODE ANN., Public Safety, § 2-505, nor considered a legitimate basis for access to DNA information, MD. CODE ANN., Public Safety, § 2-508. Indeed, the DNA Act specifies that DNA information may be made available *only* to law enforcement and prosecutorial entities. *Id.* (providing that “DNA database system may be made available to: (i) federal, State, or local law enforcement agencies; (ii) crime laboratories that have been approved by the Director and that serve federal, State, and local law enforcement agencies; (iii) a State’s Attorney’s office or other prosecutorial office; and (iv) a person participating in a judicial

proceeding in which the data base information may be offered as evidence”). The Act was therefore unquestionably conceived, designed and implemented entirely as a law enforcement measure and was accordingly located in the Public Safety portion of the Maryland State Code and not the “Probation and Parole” provisions of Title 6. In fact, this “supervision” rationale is so entirely absent from both the statute itself and the relevant legislative history as to appear almost manufactured for litigation purposes.

3. The DNA Act Contains No Element of Consent.

In addition, the DNA Act also contains absolutely no element of consent,³¹ an aspect which Justice Kennedy has recently described as an “essential, distinguishing feature” of a permissible suspicionless search. *Ferguson*, 532 U.S. at 90-91 (Kennedy, J. concurring in the judgment).³² This case is therefore very different from a case in which the person being searched has at least impliedly consented by voluntarily engaging in some regulated activity or profession. *Compare Skinner*, 489 U.S. at 615 (discussing drug testing of railway employees for railroad safety purposes); *Treasury Employees v. Von Raab*, 489 U.S. 656, 660-61 (1989) (discussing drug testing of customs employees to prevent corruption); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 650-51 (1995) (discussing drug testing of high school student-athletes). Rather,

³¹ Of course, DNA testing under the Act is mandatory for eligible offenders. MD. CODE ANN., Public Safety, §§ 2-504(a)(1)(i)-(ii)(eligible offenders “shall” provide DNA samples); § 2-504(e) (failure provide a DNA sample constitutes violation of probation). Indeed, conviction-eligible individuals are not asked to provide a DNA sample under the Maryland law but are instead issued a “Notification,” attached hereto as Appendix E, which informs them of the submission requirements of the DNA Act and of a number of serious consequences for failure to submit.

³² *See also Ferguson*, 532 U.S. at 77 (“Because the hospital seeks to justify its authority to conduct drug tests and turn the results over to law enforcement *without the knowledge or consent of the patients*, this case differs from the four previous cases in which we have considered whether comparable drug cases ‘fit within the closely guarded category of constitutionally permissible suspicionless searches.’”)(emphasis added).

this is a case where testing is involuntary and unavoidable and where resistance is effectively futile: even those on probation or parole who fail to cooperate will be remanded to prison where correctional authorities will conduct the testing anyway. MD. CODE ANN., Public Safety, § 2-504(e)(providing that failure to submit a DNA sample constitutes a violation of probation).

The compulsory nature of the DNA Act, moreover, is completely unnecessary with respect to what the government claims is another potential purpose of the Act – the exoneration of the innocent. Maryland law already permits prisoners for whom DNA exoneration is a possibility (i.e. those convicted of offenses likely to involve forensically significant biological materials) to voluntarily submit a DNA sample for testing, MD. CODE ANN., Criminal Procedure, § 8-201; *see also*, MD R. CR. Rule 4-331 (providing that “motion [for new trial] may be filed at any time [notwithstanding one-year-from-date-sentencing time limit that would otherwise apply] if the motion is based on DNA identification testing”). This voluntary scheme fulfills any legitimate interest in exoneration (as would a database populated solely by the DNA profiles of those who had voluntarily invoked their right to DNA testing but not been exonerated) while at the same time protecting the rights of those who do not wish to submit to intrusive bodily searches.

CONCLUSION

The sweeping privacy intrusions compelled by the Maryland DNA Act violate the Fourth Amendment because they are conducted entirely without individualized suspicion and primarily – if not entirely – for the purpose of assisting law enforcement. This Court should so hold, and should affirm the suppression order of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 26th day of April, 2004, a copy of the foregoing motion was been served, by Federal Express, upon:

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