



# The Future of Forensic Evidence and Fourth Amendment Jurisprudence

International Association of Chiefs of Police  
*Legal Officers Section*  
October 2013

# Presenters

Karen J. Kruger  
Funk & Bolton, P.A.  
Baltimore, MD

Brian S. Kleinbord  
Chief, Criminal Appeals Division  
Office of the Attorney General  
Baltimore, MD

Michael Garvey  
Director, Office of Forensic Science  
Philadelphia Police Dept.  
Philadelphia, PA



# Presentation Itinerary

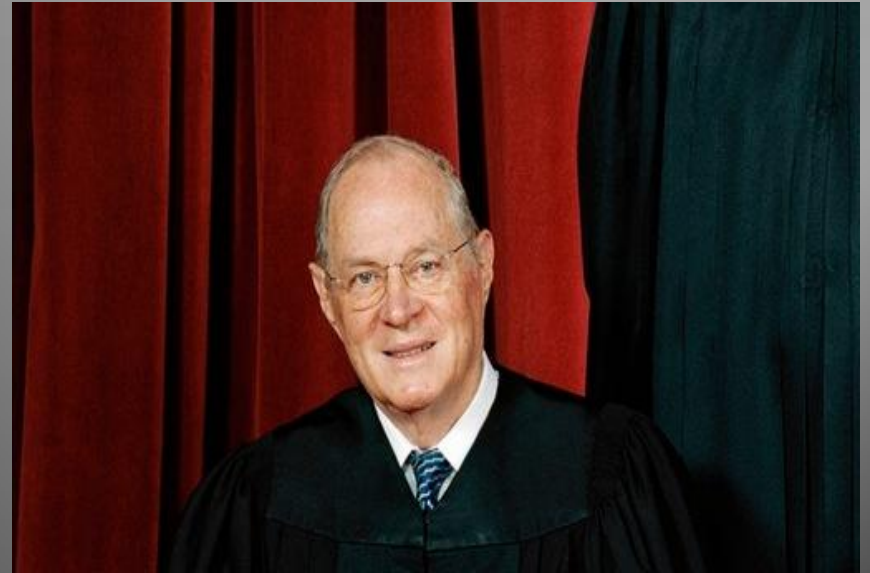
- ▶ *Maryland v. King* – the constitutionality of taking of DNA sample at arrest.
- ▶ The interests presented by law enforcement in the *amicus curiae* brief.
- ▶ The impact, if any, of *Missouri v. McNeely* and the compelled taking of biological evidence
- ▶ The future of collection, use and preservation of biological evidence.

# *Maryland v. King*

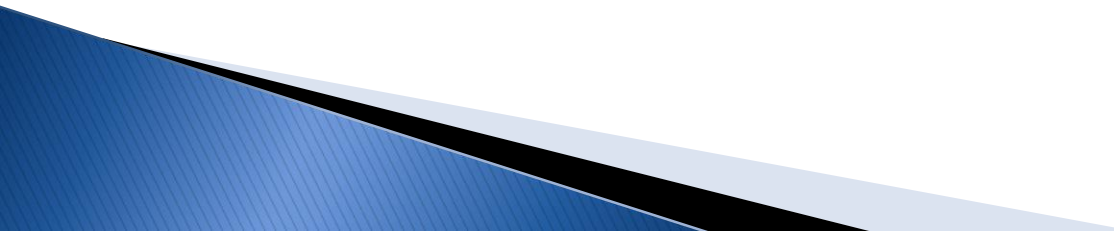


# SCOTUS OPINION

- ▶ 5–4 decision, not along traditional ideological lines.
- ▶ Majority opinion written by Justice Kennedy, joined by Chief Justice, Thomas, Breyer, Alito.



# *Maryland v. King*

- ▶ First case to reach Supreme Court testing constitutionality of DNA collection.
  - ▶ “The most important criminal procedure case to reach the Court in the decades.”
  - ▶ “Hugely important as a practical matter.”
- 

# Or . . .

- ▶ The worst “incursion upon the Fourth Amendment” in history.
- ▶ “Perhaps the construction of such a genetic panopticon is wise.”
- ▶ “But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.”

# Dissenting Opinion

- ▶ Justice Scalia authored the dissenting opinion. He was joined by Justices Ginsburg, Sotomayor, and Kagan.





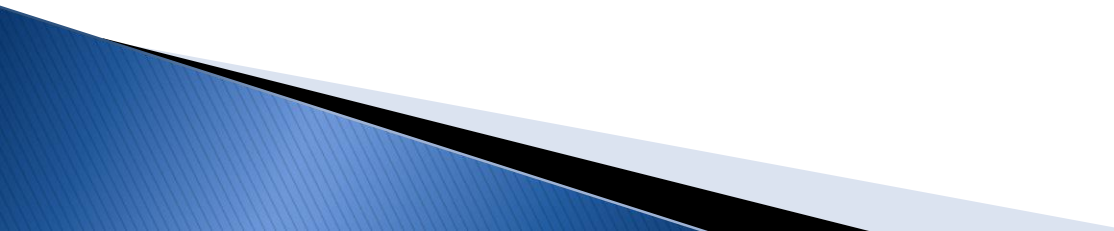
# Maryland v. King



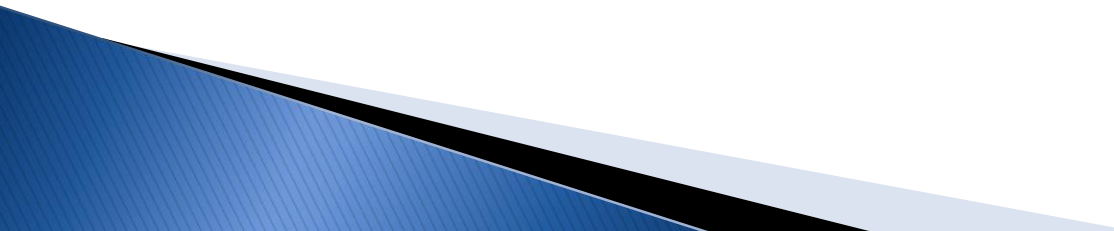
**Have it  
Your  
Way!!**

*Justice Scalia  
Opening His  
Mouth For  
Royal  
Inspection*

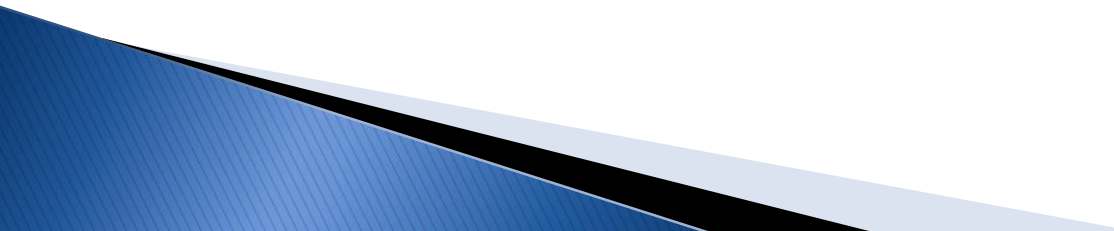
# *King* – Factual Background

- ▶ Case started with an unsolved home invasion rape/robbery in 2003 in Wicomico County, MD.
  - ▶ Victim unable to identify assailant.
  - ▶ Police recovered DNA sample from rape kit.
- 

# *King* – Factual Background

- ▶ King arrested in 2009 and charged with first and second degree assault
  - ▶ Maryland's DNA Collection Act was expanded in 2008 to include those charged with crimes of violence and burglary offenses
  - ▶ Police took buccal swab based on 2009 arrest
- 

# *King* – Factual Background

- ▶ King's DNA profile was uploaded to the Maryland DNA database.
  - ▶ King's profile matched crime scene sample collected from 2003 unsolved rape case.
  - ▶ King indicted on rape charge.
- 

# *King* – Procedural History

- ▶ King moved to suppress the DNA match on grounds that the Maryland DNA Collection Act violated the Fourth Amendment.
- ▶ Trial court denied King's motion, jury convicted him of rape, and court sentenced King to life without parole.

# *King* – Procedural History

- ▶ King appealed to Maryland Court of Special Appeals.
- ▶ Maryland's highest court, Court of Appeals, granted certiorari review on its own initiative, prior to consideration by intermediate appellate court.

# King – Maryland Court of Appeals

- ▶ In a 5–2 decision, the Maryland Court of Appeals struck down the statute.



# King – Maryland COA

- ▶ Majority (Harrell, J.) says DNA is a “vast genetic treasure map.”
- ▶ Arrestee’s reasonable expectation of privacy outweighs State’s interest in identification, solving cold cases.





# King – Maryland COA

- ▶ Dissenting opinion by Judge Barbera (now Chief Judge).
- ▶ Arrestee has significantly reduced exp. of privacy, State has “compelling” interests.
- ▶ Act forecloses any sort of “genetic piracy.”



# Stay and *Certiorari* granted

- ▶ Chief Justice issued a stay of Maryland Court of Appeals' decision on July 30, 2012.
- ▶ Court granted cert. on November 9, 2012.

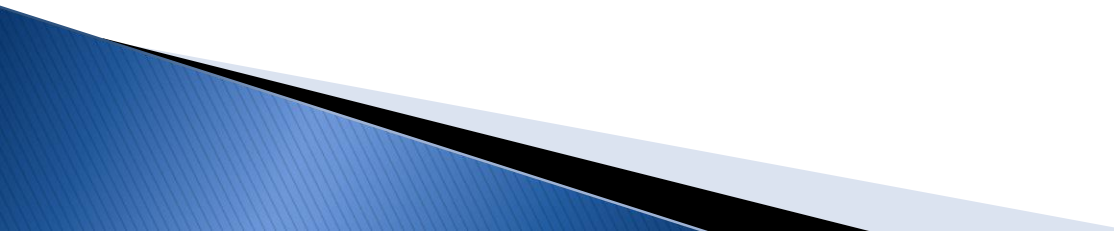
# *Amicus* Support

- ▶ **All 50 States** in agreement on arrestee DNA collection, and signed on to California's brief in support of Maryland on the merits.
- ▶ In all, a dozen *amicus* briefs were filed in support of Maryland (including an excellent brief filed on behalf of the Maryland Chiefs of Police and IACP).

# SCOTUS OPINION -- HOLDING

- ▶ "When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment."

# SCOTUS OPINION

- ▶ Kennedy's kitchen sink approach to Fourth Amendment jurisprudence:
  - ▶ Search Incident to Arrest?
  - ▶ Routine Booking Exception?
  - ▶ Special Needs Exception?
- 

# SCOTUS OPINION

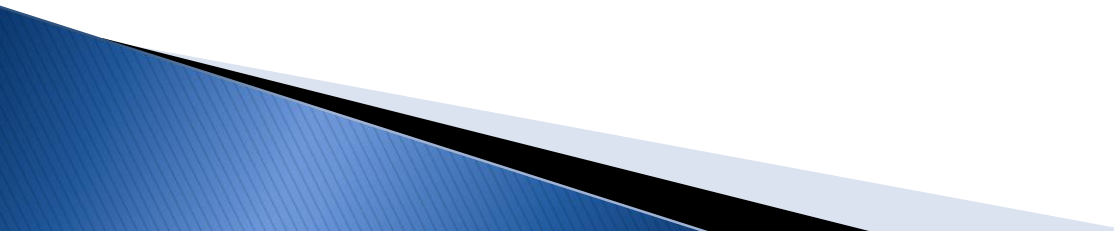
- ▶ Key aspects of Court's holding:
  1. Reasonableness / Balancing Applies
  2. Identification (including a suspect's criminal history) is critical State interest
  3. DNA is modern equivalent of traditional identification techniques (fingerprinting, photographing)
  4. Buccal swab is minimal intrusion

# Balancing Decidedly in State's Favor

- ▶ Arrestee's expectation of privacy minimal
- ▶ Non-coding DNA; Test reveals nothing beyond identification
- ▶ Act provides statutory protections



# Remand to Maryland COA

- ▶ On remand, Maryland high court rejects King's remaining arguments.
  - ▶ King attacked DNA Collection Act on statutory and state constitutional grounds.
  - ▶ Court found these arguments unpreserved and/or meritless and affirmed King's rape conviction.
- 

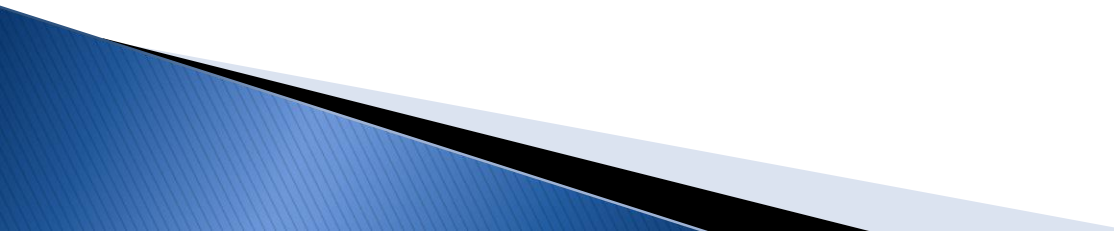


# Law Enforcement Interests

- ▶ Prosecuting current cases
- ▶ Solving cold cases
- ▶ Establishing suspect's identification – Who he is and what he has done



# Law Enforcement Interests

- ▶ Preserving safety & security  
correctional institutions
  - ▶ Exoneration of the innocent
  - ▶ Instill public confidence and deter  
crime
- 

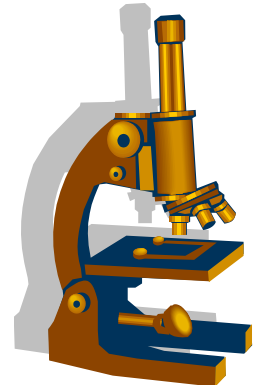
# Implications / Unanswered Questions

- ▶ Need for enabling statute if analog to fingerprints?
- ▶ “Abandoned” DNA – same as fingerprints left behind, trash put out?
- ▶ Acquisition of evidence v. use of evidence
- ▶ Retention & storage issues



# Confrontation Clause Cases

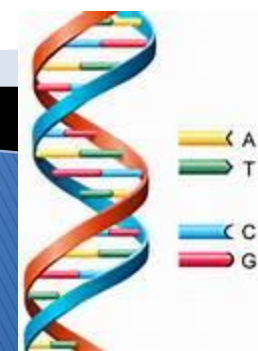
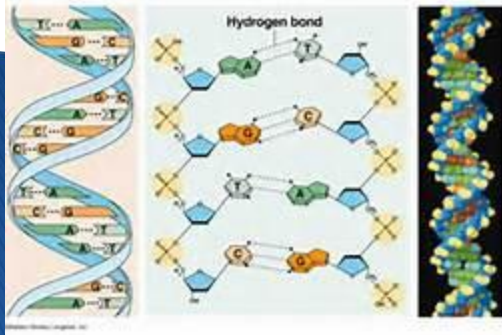
- ▶ *Williams v. Illinois*, 132 S.Ct. 2221 (2012) – 5 votes in favor of Government, but no majority rationale
- ▶ Bottom line result: State's DNA expert did not violate Conf. Clause when testifying about the results of DNA testing conducted by non-testifying expert
- ▶ 4-1-4 split leaves many questions





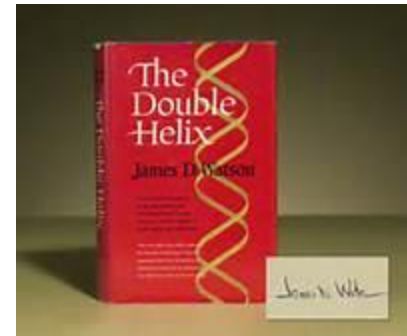
# DNA: Life after *King*

What are the next challenges?

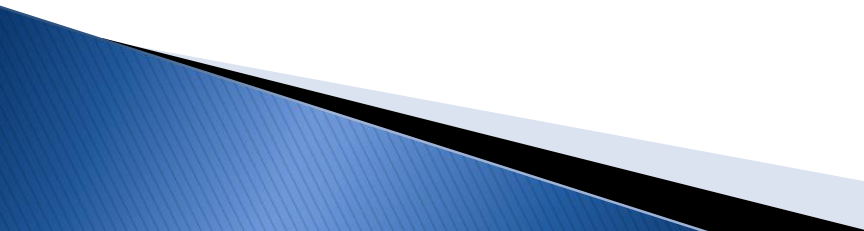


# Arrestee Collections

- ▶ Resources
  - Staffing
  - Costs
  - Both field and lab
- ▶ Retention
  - How long?
    - Identification vs. Investigative argument
- ▶ Expungement
- ▶ Expansion

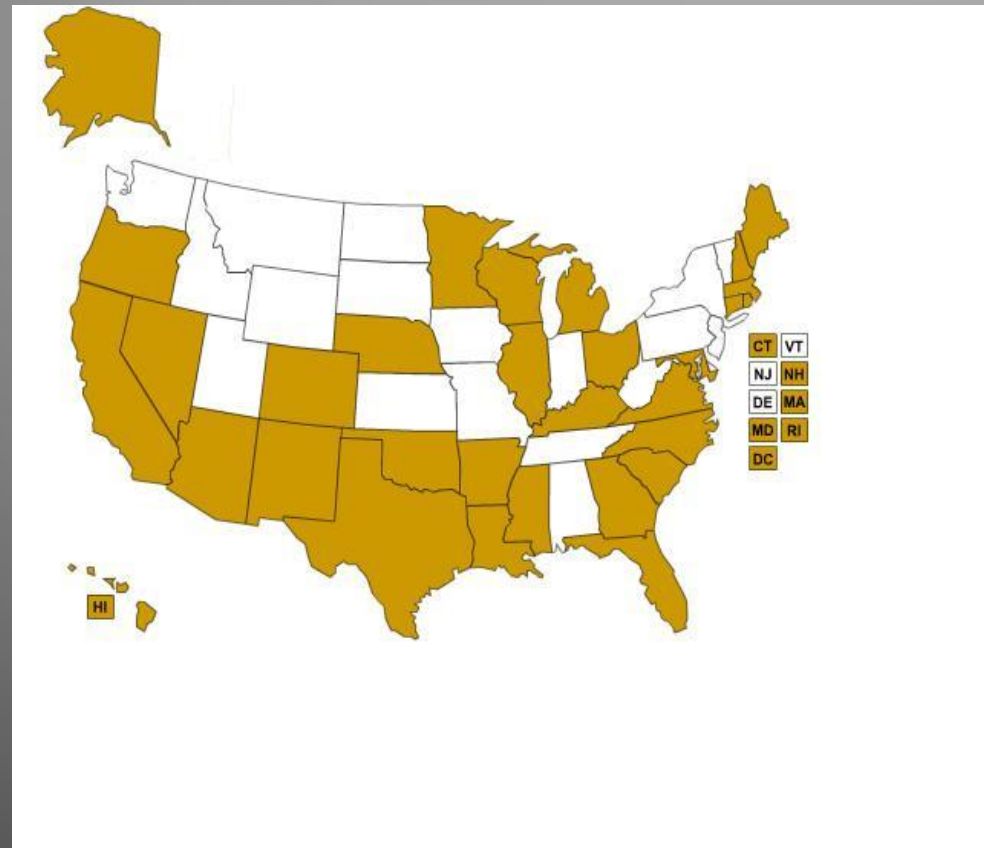


# *Missouri v. McNeely*, 133 S.Ct.1552 (2013)

- ▶ Court holds that the natural metabolization of alcohol in the bloodstream is not a per se exigency justifying an exception to the warrant requirement.
  - ▶ Will this holding become an obstacle?
  - ▶ What does the opinion mean for implied consent laws across the country?
- 

# DNA Preservation

- Legislation in about half the country requiring preservation of evidence for possible and future forensic analysis
- Varies by state
  - Type of evidence
  - Type of crimes
  - Types of storage
  - Length of storage





# DNA Preservation



# Kinship/Familial DNA Searches

- ▶ California, Colorado, Texas, Virginia, and ???
- ▶ Routine in the UK
- ▶ Resources
  - Investigative
  - Scientific



# Voluntary Informed Consent – DNA

- ▶ Do you have a policy?
  - Is it clear?
- ▶ Do you have a form?
  - Is it clear?
- ▶ Do you have an expungement procedure?
  - Is it clear?



# Voluntary Informed Consent – DNA

I, \_\_\_\_\_, hereby **freely and voluntarily provide consent** to the Philadelphia Police Department (PPD) to collect an oral swab specimen from me. I fully understand that the DNA taken from the oral swab will be analyzed and **can be introduced into evidence against me in any criminal proceedings.**

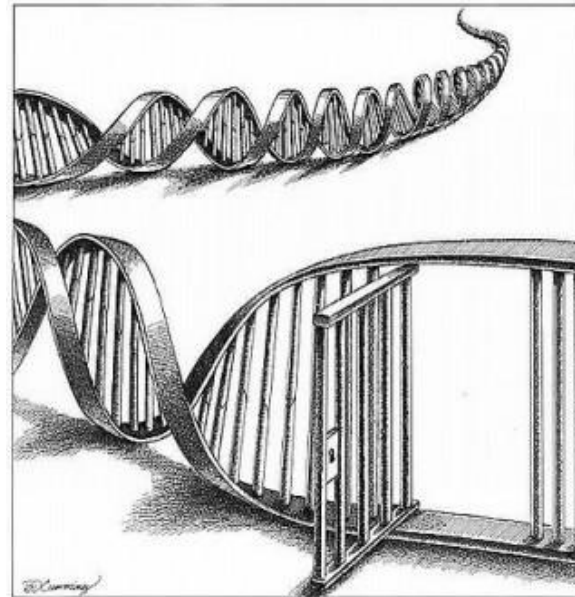
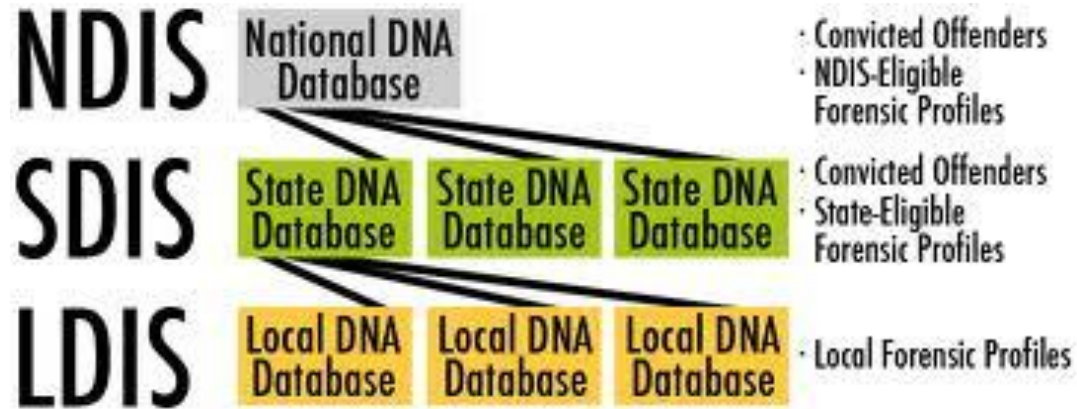
I have also been fully informed that the DNA from this specimen **will be entered into a DNA database and will be used for current and future criminal investigations.** However, I understand that, despite providing my consent on this date, I retain the **right to request the DNA profile developed from the oral swab to be expunged** or deleted from the DNA database. I understand that the expungement process must be initiated by me and that I have been provided with instructions on the expungement procedures.

I understand that the **PPD does not have a search warrant** for my DNA and that I have the absolute right to refuse to provide the oral swab.

I certify that I am not under the influence of any drugs or alcohol to a degree that would hinder or otherwise diminish my ability to read and understand the consent being given. I further certify that I have, in fact, read the above statement and I am providing my consent willingly and without any threats or promises having been made to me by the PPD.

# Local Databases & Non CODIS Databases

- ▶ Are there any limitations?
  - Who do you keep?
  - How long do you keep them?
  - Do you even know?
- ▶ Non-CODIS
  - What are you missing?
  - What do we need to fix this?



# Rapid DNA

- ▶ DNA in the field
  - Reference Samples
  - 90 minutes
- ▶ Is it ready?
  - Not validated
  - Not CODIS compliant
  - REALLY Close
- ▶ When it is, it will be a powerful investigative tool.
  - When to use?
  - End user?
  - Policies and protocols?



# Phenotypic and Ancestry DNA

- ▶ Future...but, not that distant.
  - Genetic ancestry markers
  - Physical characteristics
  - DNA facial composite
- ▶ What else?

