No. 12-207

In the
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

ALONZO JAY KING, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF MARYLAND CHIEFS OF POLICE ASSOCIATION, INC., MARYLAND SHERIFFS' ASSOCIATION, INC., POLICE CHIEFS' ASSOCIATION OF PRINCE GEORGE'S COUNTY, MARYLAND, INC., MARYLAND MUNICIPAL LEAGUE, INC., POLICE EXECUTIVE ASSOCIATION, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., MAJOR CITIES CHIEFS ASSOCIATION, MAYOR AND CITY COUNCIL OF BALTIMORE AND MONTGOMERY COUNTY, MARYLAND AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Maryland Chiefs of Police Association, Inc., Maryland Sheriffs' Association, Inc. ("MSA"), Police Chiefs' Association of Prince George's County, Maryland, Inc., Maryland Municipal League, Inc. Police Executive Association, the International Association of Chiefs of Police ("IACP"), and Major Cities Chiefs Association ("MCC"), along with the Mayor and City Council of Baltimore ("City of Baltimore" or "City") and Montgomery County, Maryland write in support of the Petitioner, State of Maryland.

The Maryland law enforcement associations are non-governmental business associations that represent professional law enforcement officers with a membership of more than 350 chiefs of police, sheriffs, other law enforcement members, directors of private security entities, and interested parties in related professions. Within their collective membership, most of the 130 law enforcement agencies in Maryland are represented. MSA also separately represents the State's elected sheriffs, who, in addition to standard law enforcement services, are responsible for maintaining county detention centers and correctional facilities.

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[1] The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk, pursuant to Rule 37.2 of the Supreme Court of the United States. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

IACP is the premier organization of police executives and front-line officers in the world. Founded in 1893, IACP, with more than 21,000 members in 101 countries, is the world's oldest and largest association of police executives. IACP's mission, throughout the history of the association, has been to identify, address, and provide solutions for urgent law enforcement issues.

IACP represents the interests of law enforcement agencies at the state and local levels. Association members include law enforcement officers and law enforcement administrators who are charged with the responsibility of protecting citizens from criminals, both nationally and internationally.

MCC is a professional association of Police Chiefs and Sheriffs representing the largest cities in the United States and Canada. MCC membership is comprised of Chiefs and Sheriffs of the sixty-three largest law enforcement agencies in the United States and seven largest in Canada. Its members serve over 76.5 million people (68 US - 8.5 Canada) with a sworn workforce of 177,150 (159,300 US, 17,850 Canada) officers and non-sworn personnel. MCC provides a forum for law enforcement executives to share ideas, experiences and strategies for addressing the challenges of policing large urban communities. Additionally, MCC works to influence national public policy on law enforcement matters; enhance the development of current and future leaders; and encourage and sponsor research to improve law enforcement practices.

These associations support law enforcement officers by providing opportunities for training, networking, strategic planning, advocacy, and mutual support to better serve and protect the citizens in the communities they serve.

City of Baltimore is the largest (by population) municipal corporation in the State of Maryland. As an urban center, the City faces tremendous criminal justice challenges and relies heavily on innovative policing methods and investigative techniques to maintain public safety. Resolving sexual assault investigations, appropriately charging and convicting sexual perpetrators, and ultimately deterring sexual assaults are all high priorities of Mayor Stephanie Rawlings-Blake and the use of DNA science is a critical tool for achieving those priorities.

Montgomery County, Maryland shares a geographic border with Washington, D.C., the nation's capital. Within the highly-populated and highly diverse county are many federal employers, employees, and residents who demand a high level of efficiency and effectiveness in the County police force. The police force must and does use all appropriate law enforcement mechanisms to maintain public safety in Montgomery County.

Amici address the Court on behalf of the law enforcement community and local governments to urge that the decision of the Court of Appeals of Maryland be reversed, and that Mr. King's conviction be reinstated. The collection of DNA from individuals who have been arrested is a critical and effective modern tool that assists law enforcement in solving crimes, identifying perpetrators, eliminating

errors, and helping to protect local communities. The Court of Appeals of Maryland failed to adequately recognize these vital governmental interests.

Amici are in a position to assist the Court in this case because its importance is not limited to the parties. The outcome of the case will affect all law enforcement agencies and localities not only in Maryland, but across the country. The nation's crime-risk communities legitimately demand effective law enforcement and look to the *Amici* to provide the highest quality law enforcement services through the most effective means available.

STATEMENT OF THE CASE

Alonzo Jay King was arrested in April 2009 and charged with first and second degree assault. Pursuant to Maryland's DNA Collection Act, Md. Code Ann., Pub. Safety § 2-504, *et seq.* (LexisNexis 2011 Repl. Vol.), law enforcement authorities required Mr. King to submit to a buccal swab of his inner cheek to obtain a DNA sample. In accordance with the State's regulations, the sample was submitted to the Combined DNA Index System ("CODIS") for a comparison to other unknown samples on file. [2]

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[2] Petitioner and other *amici* in this case have provided the Court with detailed explanations of the operation of the CODIS database as well as the scientific basis underlying the analysis of DNA evidence for purposes of identification. *See, e.g.,* Petitioner's Brief at 3–4, 15–16. A number of appellate cases also summarize this important information. *See, e.g., United States v. Mitchell*, 652 F.3d 387, 399–402 (3d Cir. 2011); *Boroian v. Mueller,* 616 F.3d 60, 65–66 (1st Cir. 2010). For these reasons, we do not further explain these matters here.

The analysis showed a match between Mr. King's DNA sample and a sample retrieved from the investigation of an unsolved rape that had occurred in 2003. Based on this match, King was charged with the rape and robbery.

After failing to have the DNA evidence suppressed before trial, King agreed to waive his right to a jury trial and agreed to be tried on an undisputed statement of facts. He was convicted of first degree rape, and appealed his conviction. The conviction was overturned by the Court of Appeals of Maryland, the State's highest court, which held that the taking of Mr. King's DNA evidence was unreasonable under the Fourth Amendment, and should have been suppressed by the trial court.[3]

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[3] The Maryland Court gave no consideration to applying the "good faith" exception to the remedy of suppression. *See United States v. Leon*, 468 U.S. 897, 920–21 (1984); *see also Davis v. United States,* ___ U.S. ___, 131 S. Ct. 2419, 2433 (2011) (stating that the exclusionary rule is not a "personal constitutional right" . . . it is a "judicial sanction" and concluding that when the police rely in good faith on binding precedent, the exclusionary rule does not apply. The court further stated "[i]t is one thing for the criminal 'to go free because the constable has blundered'. . . It is quite another to set the criminal free because the constable has scrupulously adhered to governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs.") (citation omitted); *Illinois v. Krull,* 480 U.S. 340 (1987) (recognizing the good faith exception to the exclusionary rule when an officer reasonably relied on a statute authorizing a warrantless search that was subsequently declared unconstitutional). It appears that the exception would have applied to the facts of this case since there was no allegation of police misconduct. The sole basis for suppression was the *post hoc* determination that the enabling statute was unconstitutional, as applied to Mr. King.

The State of Maryland filed a petition for *certiorari* review with this Court and moved the Court to stay enforcement of the Court of Appeals' decision. The Court granted both requests.

INTRODUCTION AND SUMMARY OF ARGUMENT

Each law enforcement officer in this country takes an oath to uphold the United States Constitution and the constitution and laws of the various states. In support of this oath and to serve the public safety needs of their communities, officers are tasked with conducting investigations that have a dual goal: to exonerate the innocent and to arrest and lay the investigative groundwork that will ensure conviction of the guilty. DNA evidence makes a substantial contribution toward achieving this dual goal because it provides an accurate means of suspect identification.

In addition, public safety agencies and correctional facilities have a strong interest in ascertaining the true identity of those in custody for safety and management purposes. In many states, including Maryland, pre-trial detainees and arrestees may be held in local correctional facilities for up to several months before trial, and proper management of these individuals requires firm identification of who they are and what backgrounds they have.

The prompt identification of arrestees allows law enforcement to narrow the focus of criminal investigations and effectively solve cases, new and old, more quickly. DNA collection and testing support the efficiency of this process, while

protecting innocent individuals, and shields officers from potential civil liability for wrongful detentions. By contrast, an arrestee has minimal privacy interests in protecting against discovery either of true identity or of past crimes.

The issue in this case is whether the Fourth Amendment, U.S. Const. amend. IV, allows Maryland to collect and analyze DNA evidence, without a warrant, from a person who was lawfully arrested and taken into custody.

Traditional Fourth Amendment analysis resolves this issue by requiring a court to determine the "reasonableness" of a search in light of the "totality of the circumstances" and to weigh the legitimate interests of the government against the privacy interests of the person who has been subjected to a search or seizure. *United States v. Knights,* 534 U.S. 112, 118–19 (2001); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989); *accord Samson v. California,* 547 U.S. 843, 848–57 (2006); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

In this case, the Court of Appeals of Maryland undervalued the significant governmental law enforcement interests at stake, and inflated the privacy interests of the arrestee, Mr. King, erroneously tipping the balance in his favor. As a result, the Court improperly and unnecessarily limited the ability of law enforcement to confirm the identity of arrestees. This restriction on the operation of Maryland's statute substantially limits the effectiveness of law enforcement investigations and undermines the administration of pre-trial detention facilities. Thus the search of Mr. King, if it was a search at all, was reasonable because

legitimate law enforcement interests far outweighed his minimal privacy interests. The Maryland court's decision must therefore be reversed.

Amici further assert that the minimally intrusive DNA sampling undertaken by the police in this case also survives scrutiny under two alternative constitutional justifications: (1) that if the sampling was a search, it was valid as incident to a lawful arrest; and (2) that the DNA sampling was not a search at all within the meaning of Fourth Amendment jurisprudence.

This case offers this Court the opportunity to establish a "bright-line" rule for constitutional analysis by acknowledging that the non-invasive taking of a DNA sample incident to a lawful custodial arrest is, in and of itself, reasonable under the Fourth Amendment, and these *amici* urge the Court to so rule.

ARGUMENT

Assuming that a non-invasive swab of an arrestee's mouth is a "search," *see Skinner*, 489 U.S. at 616 (when government seeks to obtain physical evidence from a person, Fourth Amendment is implicated); *accord Boroian v. Mueller,* 616 F.3d 60, 65 (1st Cir. 2010), this search was reasonable and thus constitutionally permissible because only unreasonable searches are prohibited by the Fourth Amendment. *See Knights,* 534 U.S. at 118–19; *Skinner,* 489 U.S. at 619.

Reasonableness in the Fourth Amendment context is determined by weighing the privacy interests of the individual against the legitimate government interests advanced by the search.

Samson v. California, 547 U.S. 843, 848–57 (2006) (on balance, police officer's warrantless, suspicionless search of a parolee was reasonable under the Fourth Amendment); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (when balancing interests a court must consider the scope of the intrusion, where and how it was conducted, as well as its justification.) The DNA buccal swab incident to arrest of search of Mr. King was reasonable because legitimate law enforcement interests far outweigh his minimal privacy interests in that context.

I. THE GOVERNMENT HAS WEIGHTY INTERESTS IN THE PROMPT IDENTIFICATION AND PROSECUTION OF PERPETRATORS OF CRIME AND THE EXONERATION OF THE INNOCENT.

The government's interests in utilizing DNA material as evidence in the administration of justice are numerous and significant. Many states, in addition to Maryland, have enacted DNA collection laws to enhance the ability of federal, state, and local criminal justice and law enforcement agencies to identify individuals in criminal investigations, to detect recidivist acts and actors, to identify and locate missing and unidentified persons, and to identify and manage individuals kept in custody. *See, e.g.*, Fla. Stat. Ann. § 943.325 (LexisNexis 2012); Va. Code § 19.2-310.2–.7 (LexisNexis 2012).

In *District Attorney's Office v. Osborne,* 557 U.S. 52, 55 (2009), this Court recognized that DNA testing "has the potential to significantly improve both the criminal justice system and police investigative practices." The federal courts of appeal have recently acknowledged that law

enforcement has "a strong and important interest in apprehending and prosecuting those who have committed violent crimes...." *United States v. Davis,* 690 F.3d 226, 249 (4th Cir. 2012); *Haskell v. Harris,* 669 F.3d 1049, 1062–65 (9th Cir. 2012) (government has an interest in identifying arrestees, solving past crimes, and exonerating innocent individuals), *reh'g en banc granted,* 686 F.3d 1121 (2012); *see also United States v. Mitchell*, 652 F.3d 387, 413 (3d Cir. 2011) (the government has a compelling interest in identifying arrestees), *cert. denied,* 132 S. Ct. 1741 (2012); *accord Anderson v. Commonwealth*, 650 S.E.2d 702, 706 (Va. 2007) (government has an interest in absolute identification of an arrestee, including whether he is otherwise wanted); *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992) (referring to DNA as a "dramatic new tool for the law enforcement effort to match suspects and criminal conduct").

Early use of conclusive DNA evidence prevents faulty investigative thinking by law enforcement agents and helps to prevent investigative failures. The ability of the police to respond to unsolved crimes, seize unapprehended offenders, and prevent wrongful convictions is enhanced by the use of DNA collection.

In connection with these goals, the government has a compelling interest in entering and maintaining DNA information in CODIS in order to fully realize its efficacy as a law enforcement tool. *See Davis*, 690 F.3d at 249 (citing *Haskell,* 669 F.3d at 1062). Moreover, it is important for the government to obtain this information sooner rather than later because the early use of DNA evidence

can "speed both the investigation of the crime of arrest and the solution of any past crime for which there is a match in CODIS." *Mitchell,* 652 F.3d at 415.[4]

Law enforcement officials who are responsible for the safe management of pre-trial detainees also depend heavily on the accurate identification of those in their custody. In this setting, it is particularly significant that the officials know not only the individual's name but also whether "a suspect is wanted for another offense, or has a record of violence or mental disorder." *Hiibel v. Sixth Judicial Dist. Court,* 542 U.S. 177, 186 (2004). This information "is critical to the determination of whether or not [a court should] order detention pending trial." *Mitchell,* 652 F.3d at 414. Jail officials also need this information to properly segregate prisoners once detained.

In addition, there is a strong governmental and societal interest in helping crime victims cope with what has happened to them. The government has a "monumental" interest in "bring[ing] closure to countless victims of crime who long have languished

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[4] When a law enforcement officer has lawful custody of an arrestee, even for a minor offense, the officer has a rich opportunity to investigate whether the individual may be responsible for other crimes. One may reflect on the ancient adage that "He is a fool who leaves things close at hand to follow what is out of reach." Plutarch (A.D. 46–120), *reprinted in* John Bartlett, *Bartlett's Familiar Quotations* 107 (16th ed. 1992), or the slightly more modern iteration: "Better a bird in the hand than ten in the wood." John Heywood, *Proverbs* pt. 1, ch. 2 (1546), *reprinted in Bartlett's Familiar Quotations* 107 (16th ed. 1992). *See also* Petitioner's Brief at 24.

in the knowledge that [their] perpetrators remain at large." *United States v. Kincade*, 379 F.3d 813, 838–39 (9th Cir. 2004) (en banc).

A case revealing that the use of DNA evidence yields concrete, effective results in this realm was described in *The Washington Post* on December 15, 2012. This article describes how, after two years of investigation, a DNA match led to the arrest of a perpetrator alleged to have murdered a 19-year old woman.[5] The victim's family and friends expressed "tremendous relief" at his apprehension. Justin Jouvenal, *Arrest in 2010 Va. Killing Came After Hope Almost Gone,* Wash. Post, Dec. 15, 2012, at B1, B4.

Supporting and assisting the victims of crimes further aid law enforcement in its community relations and criminal prosecutions. Prompt and effective criminal investigation enhances the public's confidence in its police agencies and leads to more citizen cooperation in law enforcement efforts and more effective policing.

News reports of successful investigations and prosecutions also serve the government's interest in deterring crime. DNA evidence aids law enforcement in this effort, preventing investigations from going "in the wrong direction, [allowing] the true perpetrator to remain free to prey on new victims." Michael D. Ranalli, *Wrongful Convictions and*

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[5] *The Washington Post* later reported that a fingerprint match led police to the killer. Justin Jouvenal, *Fingerprint Match Led to Suspect in 2010 Slaying*, Wash. Post, Dec. 19, 2012, at B3. Since DNA was collected at the crime scene, police will now use the DNA to confirm a match from DNA collected from the suspect.

Officer Safety: Shifting the Focus to the Process, The Police Chief, Jan. 2012 at 26, 28. On the other hand, deterrence efforts and public confidence are undermined when criminals like Mr. King, who was convicted of a violent rape, are allowed to walk free.[6] *See Davis,* 690 F.3d at 256 (declining to exclude even improperly obtained DNA evidence so as not to allow "a person convicted of a deliberate murder to go free").

DNA evidence has also played a key role in identifying arrestees and convicted individuals who were in fact innocent. There can be no more compelling interest in a modern democracy. Law enforcement and local communities have a strong interest in preventing, and when appropriate, helping to overturn wrongful convictions. Law enforcement officers recognize that their "ethical obligation of exonerating the innocent is equally matched by the obligation of arresting the guilty." Michael D. Ranalli, *Wrongful Convictions and Officer Safety: Shifting the Focus to the Process,* The Police Chief, Jan. 2012 at 26.

Indeed, IACP has identified the problem of wrongful convictions as one of its signature issues to address. Walter A. McNeil, *President's Message: Our Recommitment to Addressing Wrongful Convictions*, The Police Chief, June 2012, at 6. Key to IACP's

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[6] The Court of Appeals of Maryland's decision received significant public attention in the local press. A front page article from the *Baltimore Sun* highlighted the potential impact of the decision on innocent victims. In one case, a man convicted of raping a 13-year-old girl in 2010 could be set free in light of the Court of Appeals' decision. Yvonne Wenger, *DNA Call Could Undo Rape Case*, Balt. Sun, June 10, 2012, at 1.

effort is "the increased use of DNA evidence and increased DNA laboratory resources to aid in the exoneration of those wrongfully convicted . . . ." *Id.*

On a near constant basis, media headlines document that DNA evidence contributes significantly to the exoneration of arrestees, even in the early stages of an investigation. On June 30, 2012, *The Washington Post* reported that DNA results exonerated two Prince George's County, Maryland teenagers who had been charged with rape. Investigators indicated that the charges had been based "on the faulty word of an acquaintance of theirs," an accusation that in years past could have lead to a wrongful conviction and imprisonment. Matt Zapotosky, *DNA Results Exonerate Two Teens in Rape Case*, Wash. Post, June 30, 2012, at B3. Instead, the teenagers were released.

DNA exoneration unfortunately came much later for another Maryland man who served fifteen years in prison before being cleared. His case was reported by *The Washington Post* on October 31, 2010. Dan Morse, *After 15 Years in Prison, Montgomery Man is Cleared of Murder*, Wash. Post, Oct. 31, 2010, at C4. On December 15, 2012, *The Washington Post* reported that a man "who spent 28 years in prison for a murder he didn't commit was formally declared innocent by a Superior Court judge. . . ending his long fight for exoneration." The judge's order noted that the "new DNA evidence conclusively shows. . . that he did not commit the crimes he was convicted of at trial." Spencer S. Hsu, *After Lengthy Prison Term, D.C. Man is Exonerated,* Wash. Post, Dec. 15, 2012 at B1.

One of the most poignant exoneration stories of note appeared in the *Baltimore Sun* on December 19, 2012 in its remembrance of Judge S. Ann Brobst of the Circuit Court for Baltimore County. Before her elevation to the bench, Judge Brobst was a highly regarded and successful prosecutor who had twice convicted Kirk Bloodsworth of the murder and rape of a nine year old child. In her estimation, the evidence against Mr. Bloodsworth was "absolutely damning." Frederick N. Rasmussen, *Judge S. Ann Brobst, Longtime Baltimore County Prosecutor*, Balt. Sun, Dec. 19, 2012, at A18. However, after he had spent almost a decade in prison, some of that time on death row, Mr. Bloodsworth was exonerated by DNA evidence. Judge Brobst, a "tireless advocate for justice," visited and apologized to Mr. Bloodsworth and forever "wished [the wrongful conviction] never happened." *Id.* Ultimately, the same DNA evidence that exonerated Mr. Bloodsworth was used to convict the real perpetrator. *Id.*

The Innocence Project reports that the government has financially compensated 65% of the three hundred one (301) individuals who have been exonerated by post-conviction DNA analysis since 1989. Those innocent individuals served an average of 13.6 years in prison; eighteen of those individuals had been sentenced to death. As a result of the post-conviction DNA testing, in one hundred forty-six (146) of the cases, the true perpetrators were later identified. *Facts on Post-Conviction DNA Exonerations*, Innocence Project, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Dec. 6, 2012).

The exoneration of innocent individuals early in a crime investigation enhances officer safety, protects law enforcement officers from civil liability, protects the government fisc, and allows innocent individuals to be freed while those guilty of crimes are brought to justice. Extensive and expensive litigation ensues when the wrongfully arrested or convicted sue officers for constitutional and common law claims. The government has a strong interest in preventing potential liability for itself and its employees while at the same time supporting a process that convicts the guilty and not the innocent. *See, e.g.*, *Winslow v. Smith,* 696 F.3d 716 (8th Cir. 2012) (protracted litigation based on "reckless investigation" where DNA evidence ultimately exonerated suspect.)

II. THE PRIVACY INTERESTS OF ANY ARRESTEE ARE MINIMAL AND THE NON-INVASIVE METHOD USED TO TAKE A DNA SAMPLE IS NOT OFFENSIVE TO THE FOURTH AMENDMENT.

A. An Arrestee Has No Significant Privacy Interest In Maintaining Anonymity Or Preventing Discovery Of Other Crimes He Has Committed.

When a police officer has lawfully arrested an individual upon probable cause, the individual "has a grossly diminished privacy expectation." *King v. State of Maryland,* 42 A.3d 549, 583 (2012) (Barbera, J., dissenting). It is indisputable that an officer has the authority to arrest an individual and take him or her into custody if there is probable cause to believe that the individual has committed or is committing an offense. *Michigan v. DeFillippo,* 443 U.S. 31, 36 (1979). Once an individual is suspected by the

quantum of probable cause to have violated society's standards, the individual has, by his or her actions, undermined his own privacy interest. *Jones,* 962 F.2d at 306 (basis of probable cause and a subsequent arrest leads to loss of liberty and the loss of "at least some, if not all, rights to personal privacy . . ."); *see also United States v. Robinson,* 414 U.S. 218, 237 (1973) (Powell, J., concurring) ("I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person.")

Indeed, this Court and others have held that an arrestee has no privacy right to his identity and no right to remain anonymous. *Hiibel* 542 U.S. at 186–87; *accord Mitchell,* 652 F.3d at 412 (once arrested, an individual has a diminished expectation of privacy in his own identification, as has traditionally justified the taking of photographs and fingerprints); *Anderson,* 650 S.E. 2d at 705 (there is a government interest in knowing for an "absolute certainty the identity of the person arrested"). Likewise, the individual has no meaningful expectation of privacy in concealing other crimes that the individual committed. *Rakas v. Illinois*, 439 U.S. 128, 143, n.12 (1978) ("[A] 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered.").

DNA comparisons offer substantial aid to law enforcement agents in establishing who an individual is and what else the individual may have done in violation of the law. *See Jones* 962 F.2d at 307. Once Mr. King was arrested, he had no privacy right in withholding his DNA identification.

Given the totality of the circumstances, the taking and use of DNA evidence as authorized by Maryland law is reasonable and does not violate the Fourth Amendment. Accordingly, the decision of the Court of Appeals of Maryland must be reversed.

B. If It Is A Search, The Taking Of A DNA Sample Is A Reasonable Search Sanctioned By The Doctrine Of Search Incident To Arrest.

Once a law enforcement officer takes an individual into custody based on the probability that he has committed a crime, the officer undertakes certain administrative functions to insure the officer's own safety, and that of the arrestee, as well as that of other pre-trial detainees and prison staff. The officer seeks to identify with certainty who the arrestee is and to preserve any evidence that may be on or near the arrested person. For this reason, as part of that custodial situation, arrestees are subject to a number of physical intrusions by law enforcement officers, including being handcuffed, forcibly transported to another location, subjected to fingerprinting and photographs, and searched about their persons, including a strip search. *King v. State of Maryland*, 42 A.3d at 583 (citing *Robinson*, 414 U.S. at 235 (search of person and possessions); *Florence v. Cnty. of Burlington*, ___ U.S. ___, 132 S. Ct. 1510 (2012) (warrantless strip search of arrestee permitted); s*ee also* Petitioner's Brief at 16–19. Recognizing these legitimate law enforcement necessities, the Court has authorized the police to undertake searches "incident to arrest."

The Court first referred to an officer's right to search the individual incident to arrest in *dictum* in *Weeks v. United States,* 232 U.S. 383, 392 (1914) (describing the right of the government "to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime"), *overruled on other grounds by Elkins v. United States*, 364 U.S. 206 (1960) (holding that federal courts could not receive evidence obtained by state officers if the evidence was obtained by a means prohibited to the federal government). In subsequent decades, the principle of searching the individual – and the place where the individual was arrested – underwent an evolution and it is now firmly established that law enforcement has wide latitude to search an individual incident to arrest, and somewhat less latitude to search the place an individual is arrested. *See Arizona v. Gant,* 556 U.S. 332 (2009) (warrantless search of arrestee's vehicle is only reasonable as to areas that arrestee might access at the time of search or that might contain evidence of the crime for which arrest was made); *United States v. Edwards,* 415 U.S. 800, 808–09 (1974) (distinguishing between privacy of premises and privacy of person at time of legal arrest); *Chimel v. California*, 395 U.S. 752, 755–59 (when suspect is arrested in the suspect's home, search of the home must be limited in scope to areas where the suspect has access to a weapon or ability to destroy evidence); *accord Knowles v. Iowa*, 525 U.S. 113 (1998) (warrantless search of a vehicle is unconstitutional where offender is charged by citation and not arrested).

With respect to searches of persons law enforcement has had wide latitude since at least 1973. In *United States v. Robinson*, the Court first held that when there is a lawful custodial arrest, an officer may conduct a full search of the person incident to that arrest as both an exception to the warrant requirement, and also as a reasonable search under the Fourth Amendment since the lawful arrest essentially establishes the authority to search. 414 U.S. 218, 229, 235 (1973).

In *Cupp v. Murphy,* 412 U.S. 291 (1973), the Court approved the constitutionality of the government's compelled taking of fingernail scrapings from a murder suspect because the police had probable cause to arrest the suspect, even though the suspect had not actually been formally arrested. The limited intrusion into the accused's personal privacy incident to the accused's detention in the station house rendered the search reasonable. *Id.* at 296.

The next year, in *Edwards,* the Court recognized that the "prevailing rule under the Fourth Amendment that searches and seizures may not be made without a warrant is subject to various exceptions. One of them permits warrantless searches incident to custodial arrests." 415 U.S. at 802 (citation omitted). As such, the Court confirmed that these searches may be of the individual and the property in the arrestee's immediate possession, and that the police had the authority to search the arrestee's clothing, even though they did not examine the clothing until ten hours after the arrest.

In 1979 *Michigan v. DeFillippo* further extended this doctrine to encompass a search incident to arrest, even if the ordinance on which the arrest was based is later declared unconstitutional. The fact of a presently lawful arrest, standing alone, authorizes the search. 443 U.S. at 36–37.

In *Illinois v. Lafayette,* 462 U.S. 640 (1983), the Court relied extensively on the principles articulated in *Robinson* when it upheld the inventory search of an arrestee's personal effects as incident to the arrest for reasons similar to those attendant to the search incident to arrest exceptions: officer and suspect safety, the protection of property, the discovery of potential evidence and the identification of the suspect. *Id.* at 645–46.

In 2008 the Court decided *Virginia v. Moore,* 553 U.S. 164 (2008) in which it upheld a search of the individual incident to arrest even though the arrest was not authorized by state law. In that case, the individual was arrested for driving on a suspended license, a relatively minor traffic offense, for which Virginia law dictated issuance of a citation. However, because the arrest was based on probable cause, and was thus constitutionally reasonable, the Court found that the search of the person incident to arrest was also lawful. *Id.* at 176–77. *See also United States v. Pope,* 686 F.3d 1078, 1083 (9th Cir. 2012) (search of person upheld because "search was supported by probable cause to arrest . . . "), *cert. denied,* 2012 U.S. Lexis 8769 (Nov. 13, 2012).

Indeed, this Court has approved searches of the person incident to arrest that are much more invasive than the minimally intrusive DNA swab in the present case. For example, in *Schmerber v. California,* 384 U.S. 757 (1966), the Court permitted the non-consensual drawing of a suspect's blood sample as incident to the suspect's arrest for driving under the influence. In *Schmerber,* the Court recognized that both the extraction and "the test chosen to measure petitioner's blood-alcohol level" were reasonable. *Id.* at 771. DNA sampling is eminently reasonable as a search incident to arrest, even assuming it is a search.

C. The Taking Of A DNA Sample Upon Arrest Is Not A Search Within The Meaning Of The Fourth Amendment.

Alternatively, the Court may find that DNA sampling of those taken into custody is administrative in nature and does not even constitute a search as defined by the Fourth Amendment. As discussed above, arrested persons have a diminished expectation of privacy from the outset. A search in Fourth Amendment terms occurs when the government invades or infringes on a subjective expectation of privacy that is recognized as reasonable. *Katz v. United States,* 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring); *see also Davis,* 690 F.3d at 232 n.11 (recognizing that an action is a "non-search" for Fourth Amendment purposes where no privacy interests are implicated); *but see also Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. at 616 (when government seeks to obtain

physical evidence from a person, Fourth Amendment is implicated); *accord Boroian v. Mueller,* 616 F.3d at 65.

Members of society have known since *United States v. Robinson* was decided in 1973 that an arrest itself authorizes the police to conduct an extensive search of their persons without any additional justification. The Court was quite clear: "It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the individual is not only an exception to the warrant requirement of the Fourth Amendment, but is also a reasonable search under that Amendment." 414 U.S. at 235. Indeed, Justice Powell took the analysis one step further in his concurrence: "The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest." *Id.* at 235–36 (Powell, J., concurring).

For at least the last twenty years, members of the public have likewise been aware through media reports and court decisions that DNA samples can reveal the true identity of individuals and that such processes are used by law enforcement agents for legitimate governmental purposes. Indeed, it is surely common knowledge that DNA samples may be used much like fingerprints and may be taken as part of the "routine booking process" following arrest. Like the taking of fingerprints and photographs, the searches of the person and of

his belongings, the taking of a DNA sample is another of the "processing" activities that is reasonable in light of the arrest and thus should not even be regarded as a search. No reasonable arrestee should harbor an expectation of privacy in the limited amount of DNA information that is taken by the government through the buccal swab sampling.[7]

As the Court expressed in *Virginia v. Moore,* administering Fourth Amendment law is best done with "bright-line" rules. 553 U.S. at 175–177. This case presents the opportunity for the Court to announce such a bright line rule by holding that the taking of a sample of DNA by a non-invasive means and for the weighty governmental purposes advanced by Maryland's statute from an individual who has been lawfully arrested is a constitutional search incident to arrest, or not a search at all, and that the Maryland statute is therefore constitutional.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals of Maryland should be reversed.

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[7] Certainly, there is no expectation of privacy in the same type of DNA evidence that may be left behind at a crime scene, on discarded clothing, or at the police station. *See, e.g., Raynor v. State*, 29 A.3d 617, 625 (Md. App. 2011) (DNA swabbed from a chair appellant sat in at the police station was admissible because "even if appellant could demonstrate a *subjective* expectation of privacy in his DNA, he nonetheless had no *objectively reasonable* expectation of privacy in it because it was used for identification purposes only") (emphasis in original), *cert. granted*, 52 A.3d 978 (Md., 2012).

Respectfully submitted,

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