

SUPREME COURT UPHOLDS DNA COLLECTION OF ARRESTEES

By Christopher Mallios, JD¹

In *Maryland v. King*, 133 S.Ct. 1958 (June 3, 2013), the United States Supreme Court held that states may obtain and test DNA samples of defendants arrested for violent crimes. This decision resolved conflicting holdings in state and federal courts² and clarified that this procedure does not violate the Fourth Amendment to the United States Constitution. It also sanctioned the expanded use of arrestee DNA profiles to solve cold cases in which there is DNA evidence that can prove the identity of a perpetrator.

CASE FACTS

In 2003, Alonzo King committed a gunpoint burglary, rape, and robbery of a 53-year-old woman in Salisbury, Maryland.³ During the attack, King wore a scarf over his face and a hat pulled over his head, and ordered the victim not to look at him. He raped the victim in her bedroom while holding a handgun to her head. The victim immediately called her daughter for help and filed a police report. She was able to give a general description of the perpetrator but could not make an identification. The victim underwent a sexual assault forensic examination, which yielded semen on a vaginal swab. Forensic testing produced a DNA profile of the offender, which was uploaded to the Maryland DNA database.

King escaped detection until 2009, when he was arrested in another Maryland county for menacing a group of people with a shotgun and charged with first- and second-degree assault. As part of a routine booking procedure when suspects are arrested for serious offenses, police obtained King's DNA sample⁴ by applying a buccal swab⁵ to the inside of his mouth. His DNA profile was then uploaded into a statewide DNA database, which matched it to the DNA taken from the 2003 Salisbury rape victim.

Once the DNA from the 2003 rape case was matched to King, detectives presented the evidence to a grand jury, which indicted him on rape, burglary, robbery, and related charges.⁶ Detectives also obtained a search warrant and took a second DNA sample from King, which confirmed that it matched the evidence from the 2003 Salisbury rape. King moved to suppress the DNA match on the grounds that Maryland's DNA collection law violated the Fourth Amendment to the United States Constitution. The trial court upheld the statute as constitutional. King pleaded not guilty and was convicted of rape based on stipulated facts⁷ and sentenced to life in prison without the possibility of parole.

King appealed to the highest state court in Maryland, the Court of Appeals, which reversed his conviction and held that obtaining King's DNA sample when he was booked for the 2009 charge was an unreasonable search of his person and unlawful seizure of his DNA sample under the Fourth Amendment to the United States Constitution. The U.S. Supreme Court granted certiorari to determine the constitutionality of the Maryland DNA Collection Act.

HOLDING

The majority opinion⁸ relied primarily on the role of DNA technology in identifying arrestees to uphold the constitutionality of Maryland's DNA collection law. In so doing, it downplayed the most widespread and significant use of DNA tech-

nology, which is to solve crimes and prove their commission in court. The Court's rationale begins with a determination that obtaining a DNA sample from arrestees by using a buccal swab in the inside of the mouth is a search and seizure pursuant to the Fourth Amendment. Noting that a buccal swab of an arrestee already in custody is a relatively negligible intrusion, the Court stated that its constitutional analysis should focus on reasonableness, and not whether there was sufficient individualized suspicion to believe that the arrestee has committed other crimes. In determining reasonableness, the Court applied a balancing test weighing governmental interests against the degree to which the search intruded upon individual privacy.

The Court held that the government has a legitimate interest in properly identifying arrestees and accurately determining their criminal history, potential risks to police officers and inmates, and factors that could impact bail determinations such as flight risks, danger to the public, and commission of prior unsolved crimes that could be solved with DNA identification. Drawing parallels to the widespread use of arrestee fingerprints in the criminal justice system, the Court noted that DNA technology far exceeds fingerprints and photographic comparison for this purpose due to its "unparalleled accuracy."⁹

The Court balanced this significant governmental interest in identifying arrestees against the minimal intrusion of a buccal swab and an arrestee's reduced expectation of privacy. The Court also noted that the 13 DNA loci used to compile a CODIS identification profile does not reveal an arrestee's genetic traits or other private medical information. Thus, the Court concluded that the search was reasonable and that the Maryland DNA collection law did not violate the Fourth Amendment.

In his dissenting opinion,¹⁰ Justice Scalia argued that the Maryland law is unconstitutional and that the true purpose of collecting DNA samples from arrestees is actually to investigate whether arrestees have committed other crimes and not to determine their identity for processing after being arrested. The dissenters argued that the framers of the Constitution would not have sanctioned such widespread suspicionless searches to solve crimes and that the majority opinion will eventually lead to the collection of DNA from all arrestees in all cases.

IMPACT OF THIS CASE

It is not unusual for the Supreme Court to decide cases that balance the needs of law enforcement with privacy interests. But this decision is especially noteworthy because the Court's approval of expanded collection of DNA sample from arrestees will prevent rape. Research on sex offenders shows that most rapes are committed by serial offenders who commit multiple crimes but escape detection,¹¹ and expanded use of DNA databases to solve crimes of sexual violence will result in law enforcement solving more cases, increasing offender accountability and improving access to justice for victims.

All 50 states have statutes that require the collection of DNA from defendants after felony convictions, while only twenty-eight states and the federal government have also enacted laws similar to the Maryland DNA Collection Act authorizing the collection of DNA from some or all arrestees. Now that the Supreme Court has sanctioned the practice of obtaining DNA samples from arrestees, there will likely be an increase in the number of states that adopt this procedure.

Policy makers in the remaining 22 states must decide whether to amend their DNA collection laws to include arrestees, and only time will tell whether any state courts will decide to grant arrestees greater protections under their state constitutions than the U.S. Supreme Court has recognized under the U.S. Constitution. While the Maryland DNA collection law currently requires that DNA buccal swabs be obtained from arrestees charged with serious offenses, it remains to be seen whether similar procedures would withstand constitutional muster if routinely applied to arrestees charged with less serious crimes such as misdemeanor or even summary offenses.

ENDNOTES

- 1 Christopher Mallios is an Attorney Advisor for AEquitas: The Prosecutors' Resource on Violence Against Women.
- 2 The U.S. Courts of Appeals for the Third and Ninth Circuits and the Virginia Supreme Court had previously upheld statutes similar to Maryland's DNA Collection Act, Md. Pub. Saf. Code Ann. §2-50-2-514. See *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) *cert. denied*, 566 U.S. ----, 132 S.Ct. 1741, 182 L.Ed.2d 558 (2012); *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012), *reh'g en banc granted*, 686 F.3d 1121 (9th Cir. 2012); *Anderson v. Commonwealth*, 274 Va. 469, 650 S.E.2d 702 (2007), *cert. denied*, 553 U.S. 1054, 128 S.Ct. 2473, 171 L.Ed.2d 769 (2008). The Maryland Court of Appeals struck down Maryland's DNA Collection Act when it issued its opinion in this case in *King v. State*, 42 A.3d 549 (Md. 2012). (Md. 2012).
- 3 This summary of the facts of the case was supplemented with additional information drawn from the opinion of the Court of Appeals of Maryland. *King*, 42 A.3d 549. 4The Maryland DNA Collection Act was enacted in 1994. In 2008, it was amended to include arrestees charged with committing or attempting to commit violent crimes or burglary. MD. PUB. SAF. CODE ANN. §2-501-2-514.
- 5 A buccal swab is a piece of cotton or filter paper on a stick, similar to a cotton swab, designed to collect cells from the inside of the cheek.
- 6 Police charged King with first-degree burglary, third-degree burglary, first-degree rape, attempted first-degree rape, second-degree rape, attempted second-degree rape, armed robbery, robbery, handgun use in a violent crime, and carrying a handgun.
- 7 The record suggests that King used this procedure to avoid a trial while still preserving his right to challenge the constitutionality of the search and seizure on appeal. *King*, 42 A.3d at 555.
- 8 Justice Kennedy wrote the majority opinion, in which Chief Justice Roberts and Justices Thomas, Breyer, and Alito joined.
- 9 *King*, 133 S.Ct. at 1964.
- 10 Justices Ginsburg, Sotomayor, and Kagan joined the dissenting opinion.
- 11 David Lisak & Paul Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS, 73 – 84 (2002). This study, which used self-reporting by 1,882 male participants on a sexual experiences questionnaire, revealed that 120 of the participants admitted to committing rape or attempted rape. Sixty-three percent of those admitted rapists were serial offenders who admitted to raping an average of six victims but were never reported to law enforcement. They also admitted to another eight victimizations, including child abuse and domestic violence. Of the 483 rapes committed by the men in this study, 91% were perpetrated by admitted serial rapists.

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