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Comments on Maryland v. King in 'U.S. Supreme Court to Hear Arguments over Md. DNA Case: Justices' Decision Will Have National Implications on Future Crime-Fighting Procedures'

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U.S. Supreme Court to hear arguments over Md. DNA case

Justices' decision will have national implications on future crime-fighting procedures

February 24, 2013 | By Yvonne Wenger, The Baltimore Sun

In a Maryland case that's garnered the attention of the other 49 states, the federal Department of Justice and the national science community, the U.S. Supreme Court will hear arguments Tuesday over whether to restrict police in collecting DNA to solve crimes.

The justices will rule on a police practice common in Maryland: taking genetic information from individuals arrested — but not convicted — to link them to unsolved crimes. In the past, the court has acknowledged the power of DNA but has not allowed it to run afoul of fundamental American rights such as the Fourth Amendment's protection against unreasonable searches.

At the center of the case is a Salisbury man, Alonzo Jay King. Police took his DNA when he was arrested in 2009 on assault charges and linked him to the 2003 rape of a Wicomico County woman at gunpoint. King appealed his rape conviction, challenging the key DNA evidence.

The Baltimore-based Office of the Public Defender, which represents King, contends that taking DNA from a person before he or she is convicted of a crime tramples on the constitutional promise to be protected from warrantless searches. Maryland Attorney General Douglas F. Gansler argues that, once arrested for a crime, an individual is not entitled to the same expectation of privacy.

"There is a great deal at stake," Gansler said in an interview. "The use of DNA has really become commonplace in criminal investigations since the O.J. Simpson case.

"Not being able to use DNA would be a significant blow to law enforcement efforts," he said. "When you're using DNA evidence, you know exactly who committed a crime and who didn't."

Colin Starger, a University of Baltimore assistant professor of law, said a defendant, such as King, who has been found guilty of a violent crime doesn't necessarily draw much sympathy.

"It's not about him; it's about much broader concerns," he said.

Starger said allowing police to collect DNA samples in the name of solving crimes opens up the potential for the government's systematic invasion of privacy and the risk of exacerbating inherent racial and socioeconomic inequities in American criminal justice.

African-Americans made up 60 percent of the individuals for whom DNA was stored in Maryland's arrestee database in 2011, but blacks accounted for 30 percent of the population.

In 2011, the last year for which data are available, DNA was taken from more than 10,500 people arrested for committing or attempting to commit a violent crime. Those samples matched evidence for 78 unsolved crimes and led to nine convictions, so far. If the suspect is not convicted, the sample must be destroyed.

State lawmakers first established a DNA database in 1994 that included genetic information from individuals convicted of rape and sexual offenses, expanding the database in 2002 to include all felons. Samples from the arrestees were included in 2009.

In Maryland, the samples are collected by brushing a cotton swab on the inside of the arrestee's cheek.

Expanding the database was one of Gov. Martin O'Malley's early legislative victories. But last April, the state's highest court, the Court of Appeals, ruled that the practice was unconstitutional. Chief Justice John Roberts granted a stay in July, authorizing law enforcement to collect the samples pending the outcome of the Supreme Court case. After oral arguments Tuesday, it may be months before the court issues an opinion.

Twenty-seven other states and the federal government also can collect DNA samples from individuals arrested for violent crimes. Mitchell Morrissey, district attorney for Denver and an expert on DNA in the criminal justice system, said some of the 22 states without laws authorizing post-arrest DNA collection have held off passing legislation until the Supreme Court clears up the constitutional questions.

About two dozen briefs have been filed for the high court's review, including a 34-page argument written by the California attorney general on behalf of the other 49 states, Washington, D.C., and Puerto Rico in support of the court upholding state laws authorizing the practice.

Briefs were also filed in support of the law by crime victim advocates such as DNA Saves, a group created by the parents of a New Mexico woman who was murdered, the Los Angeles District Attorney, and the U.S. Department of Justice.

Opponents of the practice, including the American Civil Liberties Union, some genetic scientists and the Civil Rights Clinic at Howard University School of Law, filed briefs to caution the high court.

President Barack Obama favors the post-arrest collection of DNA, and the federal government has provided funding to

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encourage states to collect the genetic data. In January, the president signed a law that provides money for states to start the practice.

"The DNA databases are incredibly powerful, there is no doubt about it," said Starger, whose work with DNA at the Innocence Project helped exonerate individuals imprisoned but not guilty of committing crimes.

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"If we wanted to solve all of the crimes, make everybody in the country provide DNA," Starger said. "We would have the so-called universal database, but people would say instinctively, 'Well, I don't want that. That's an invasion of my privacy.'"

Gansler, who as state's attorney for Montgomery County used DNA evidence to prosecute a man who wore a mask, beat and raped a woman, said Supreme Court precedent is on the side of law enforcement. The high court allows individuals who are arrested to be handcuffed, patted down, and subjected to a body cavity search, he noted. Law enforcement "certainly can touch a cotton swab to the inside of the defendant's cheek for a second," he said.

Starger, however, notes that the Supreme Court in 2009 limited the use of DNA by ruling that prisoners do not have the constitutional right to use their genetic information to prove their innocence after a conviction. At the heart of the case was the guarantee of due process, access to DNA evidence and the limited rights available to a criminal proved guilty at a fair trial.

The high court left up to the states and Congress the determination of who has a right to the post-conviction testing. Every state, except Oklahoma, as well as Congress, now allows the testing.

In the 5-4 decision, Roberts, the chief justice, acknowledged the "challenges DNA technology poses to our criminal justice systems and our traditional notions of finality," which he said should be left in the hands of elected officials, rather than judges.

To many advocates, the matter is as simple as seeing DNA as a 21st-century fingerprint, used in crime-fighting since the late 1800s.

Maryland wrote in its brief, "Indeed, even absent a Fourth Amendment seizure, a person has no right to refuse to disclose identifying physical traits" such as voice, handwriting or hair samples.

"A person who is arrested for a violent crime has no right to withhold his identity from the police, and under the statute, the only information being analyzed by the state goes to the arrestee's identity," the state said in the brief. "Whether that identifying information is a photograph, series of whorls and ridges on a fingerprint, or the string of numbers resulting from a DNA profile, the collection of that information as a part of routine booking procedures is reasonable.

"King could give a false name; he could even change his appearance. But what King could not do is change the 26-number sequence derived from his DNA."

But King's public defender argued in a brief filed to the high court that law enforcement did not take King's genetic information to identify him in the 2009 assault; "it did so to determine whether he was implicated in any other offenses."

Attorneys for King, now 30, contend that the primary purpose of fingerprinting a person during their booking is to identify them, not investigate them for unsolved crimes. Giving the government access to "a vast genetic treasure map," as DNA has been called, on the promise it won't be misused is unheard of, they wrote.

"This court has never blessed a search that would otherwise violate the Fourth Amendment simply because law enforcement has promised not to review the information it obtains from the search in a particular manner," the public defenders wrote.

Baltimore Sun reporter Ian Duncan contributed to this article.

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By the numbers

Maryland law enforcement began collecting DNA samples from individuals after their arrest in January 2009.

•**225** Number of matches returned from a search of the evidence database for a previously unsolved crime

•**73** Of those matches, number of offenders arrested for a subsequent crime:

•**43** Of those arrests, number of convictions for the previously unsolved crime (including 29 burglaries and thefts, eight rapes and sex crimes, and four robberies)

Source: Governor's Office of Crime Control and Prevention

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