



2013

Recent Developments: Maryland v. King: The Use of a Buccal Swab to Obtain a Defendant's DNA Sample upon Arrest for a Serious Offense Is a Reasonable Search under the Fourth Amendment

Kristine L. Dietz

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/lf>



Part of the [Law Commons](#)

Recommended Citation

Dietz, Kristine L. (2013) "Recent Developments: Maryland v. King: The Use of a Buccal Swab to Obtain a Defendant's DNA Sample upon Arrest for a Serious Offense Is a Reasonable Search under the Fourth Amendment," *University of Baltimore Law Forum*: Vol. 44 : No. 1 , Article 10.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol44/iss1/10>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

RECENT DEVELOPMENT

MARYLAND v. KING: THE USE OF A BUCCAL SWAB TO OBTAIN A DEFENDANT'S DNA SAMPLE UPON ARREST FOR A SERIOUS OFFENSE IS A REASONABLE SEARCH UNDER THE FOURTH AMENDMENT.

By: Kristine L. Dietz

The Supreme Court of the United States held that the defendant's arrest and detainment for a serious criminal offense made the taking and analyzing of his DNA a legitimate booking procedure that was reasonable under the Fourth Amendment. *Maryland v. King*, 133 S. Ct. 1958 (2013). Further, the State's substantial interest in the identity of certain arrestees outweighed the negligible intrusion upon the arrestee's already diminished expectation of privacy. *Id.* at 1980.

On April 10, 2009, Alonzo King ("King") was arrested and charged in Wicomico County, Maryland with first and second-degree assault. Pursuant to the Maryland DNA Collection Act ("the Act"), King's DNA sample was taken as an administrative step incident to arrest, by applying a buccal swab to the inside of his cheeks. On August 4, 2009, King's DNA was matched to a sample taken from an unsolved, 2003 rape.

In the Circuit Court for Wicomico County, King unsuccessfully moved to suppress the DNA match arguing that Maryland's DNA Collection Act violated the Fourth Amendment. King was ultimately convicted for rape and sentenced to life in prison without the possibility of parole.

On its own initiative, the Court of Appeals of Maryland issued a writ of certiorari and struck down portions of the Act that compelled collection of DNA from arrestees charged with certain enumerated offenses. Accordingly, the state court held that the taking of King's DNA was an unreasonable search because King's expectation of privacy was greater than the State's interest in identifying him. The Supreme Court of the United States then granted certiorari to answer whether the Act was constitutional.

The Fourth Amendment protects against unreasonable searches and seizures. *King*, 133 S. Ct. at 1968. In the present case, the Court conceded that the use of a buccal swab inside a person's cheek in order to obtain DNA constituted a search. *Id.* at 1968-69. However, compared to the drawing of blood or the scraping of fingernails, the Court held that this search is a gentle process of negligible intrusion upon the arrestee. *Id.* at 1969 (citing *Schmerber v. California*, 384 U.S. 757, 770 (1966); *Cupp v. Murphy*, 412 U.S. 291, 295 (1973)). Nevertheless, the Court acknowledged that the decisive measure of the constitutionality of a governmental search is "reasonableness." *King*, 133 S. Ct. at 1969 (citing *Veronica School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995)). To determine "reasonableness", the Court weighed "the promotion of legitimate governmental interests" against "the degree to which the search intrudes upon an individual's privacy."

King, 133 S. Ct. at 1970 (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

The Court asserted that the legitimate government interest served by the Act is the need for police to safely and accurately process and identify people in custody. *King*, 133 S. Ct. at 1970. First, the Court held that the Act serves this interest by identifying perpetrators who might take steps to conceal their identity by carrying a false ID or changing their physical identity. *Id.* at 1971. Second, the Act minimizes risk for those officers in the booking facility, as DNA provides critical information to law enforcement, which aids in difficult decision-making. *Id.* at 1972. The DNA of an arrestee can help law enforcement officers understand the type of person they are detaining and make educated decisions on how to proceed with the arrestee. *Id.* However, the dissent notably points out that Maryland officials waited at least three days to process King's DNA sample; therefore, by the time the sample was processed, this information was no longer of assistance to those in the booking facility. *Id.* at 1983 (Scalia, J., dissenting).

Third, the Court found that the government has an interest in ensuring that defendants are available for trial. *King*, 133 S. Ct. at 1972-73. If an individual is arrested for one offense, but knows that he has yet to answer for a past crime, that person is more likely to flee. *Id.* at 1973. In the same vein, an arrestee's past conduct is an indicator of the danger he poses to the public. *Id.* Should a DNA sample produce evidence of past crimes, this information will inform the court on whether the arrestee should be released on bail. *Id.* Finally, DNA testing can serve the interests of justice by identifying an arrestee as the culprit of a crime while simultaneously freeing a person wrongfully incarcerated for the same offense. *Id.* at 1974.

Continuing its analysis, the Court emphasized the minimal intrusion involved in taking an arrestee's DNA. *King*, 133 S. Ct. at 1977-80. The Court stressed that the DNA material used to identify a person is "noncoding" as opposed to "coding." *King*, 133 S. Ct. at 1979. This means that the DNA taken from the arrestee does not reveal any genetic traits and does nothing beyond generating an identifying number against which other samples may be matched. *Id.*

The Court also explained that the physical intrusion upon the arrestee is quick and painless. *King*, 133 S. Ct. at 1968. The use of a buccal swab entails wiping a small cotton swab against the inside cheek and requires no surgical intrusion beneath the skin. *Id.* at 1968-69 (citing *Schmerber*, 384 U.S. at 770). The buccal swab poses no physical danger to the arrestee and does nothing to increase the indignity already associated with the administrative steps incident to arrest. *Id.* at 1979. Other administrative steps incident to arrest can require the arrestee to strip naked and therefore pose much greater indignation. *Id.* at 1978. In short, the Court reasoned that the minimal intrusion on the arrestee's privacy and body, coupled with an arrestee's already diminished expectation of privacy, provided for a legitimate "routine booking procedure" under the Fourth Amendment. *Id.* at 1978-79.

The Court also highlighted the statutory protections within the Act. *King*, 133 S. Ct. at 1967. In order for the Act to apply, the individual must be charged with a crime of violence, burglary, or an attempt thereof. *Id.* Once the DNA sample is taken from this individual, the sample may not be placed in the national database until the individual is arraigned. *Id.* Additionally, should a judicial officer determine there is no probable cause to detain the individual for the qualifying serious offense, the DNA sample must be immediately destroyed. *Id.* Similarly, the DNA sample must be destroyed if the charges against the individual do not result in a conviction. *Id.* The Act also includes specific language to protect against invasion of privacy, mandating that “a person may not willfully test a DNA sample for information that does not relate to the identification of individuals” *Id.* at 1979-80. Ultimately, the Court determined that these statutory safeguards appropriately limited the ways in which the DNA samples were used and stored. *Id.* at 1967.

Finally, the Court compared DNA compulsion, an administrative step incident to arrest, with fingerprinting, another longstanding booking procedure aimed at serving the State’s interest in identification. *King*, 133 S. Ct. at 1976. The Court asserted that any additional intrusion on privacy associated with DNA compulsion, when compared to fingerprinting, was insignificant. *Id.* Rather, the most significant difference between fingerprinting and DNA technology was that DNA is far more accurate. *Id.* The Court acknowledged that although fingerprinting was currently a much faster process, DNA technology would continue to improve in speed and effectiveness. *Id.* at 1976-77.

The dissent disagreed with the majority’s holding that DNA testing served the State’s interest in identification, and instead asserted that the State’s true interest was that of investigation. *King*, 133 S. Ct. at 1980 (Scalia, J., dissenting). Historically, “suspicionless searches” were only proper upon a justifying motive besides investigation of the crime. *Id.* After examining the realities of DNA testing and noting the lapse in time between the testing and the results, the dissent concluded it was “obvious that no such noninvestigative motivated” existed. *Id.* at 1980-86. Further, the dissent predicted that, although the majority limited its holding in *King* to serious offenses, the case could be later cited to extend the reach of DNA compulsion to all arrestees. *Id.* at 1989 (stating that “[i]f one believes that DNA will help ‘identify’ someone arrested for assault, he must believe that it will help ‘identify’ someone arrested for a traffic offense.”).

In *King*, the Supreme Court of the United States made a controversial decision that has the potential to increase prosecution of criminal defendants in “cold cases” throughout Maryland. However, it is critical to understand that this ruling applies only to crimes of violence, burglary, and attempts thereof. Maryland defense attorneys should therefore pay special attention to ensure that their client’s DNA sample is taken only when charged with a qualifying serious crime.