The Maryland Court of Appeals found that § 2-504(3) of the Maryland DNA Collection Act is unconstitutional as applied to this case, where King's expectation of privacy outweighed the State's legitimate interest in using his DNA for identification purposes pertaining to his arrest, but found that § 2-504(3) was not facially unconstitutional under the Fourth Amendment because there are limited circumstances where DNA samples obtained without a warrant are necessary in order to identify an arrestee. King v. State, 425 Md. 550, 42 A.3d 549, *cert. granted*, 133 S. Ct. 594 (2012).

I. INTRODUCTION

Scientific advancements have made access to a person's genetic code a reality,[1] and consequently courts have struggled with articulating the right level of protection for the personal information contained within. In *King v. State*, the Maryland Court of Appeals considered the constitutionality of § 2-504(3) of the Maryland DNA Collection Act (the DNA Act),[2] which allowed an arrested person's DNA to be forcibly taken, archived, and compared with other DNA, all without a warrant.[3]

King, who was arrested on assault charges, had his DNA taken, matched with DNA from an unrelated open rape case, and was subsequently found guilty of that rape, in large part based on the DNA evidence.[4] King appealed, and the court of appeals reversed the lower court's decision, holding that King, as a mere arrestee, had a reasonable expectation of privacy against warrantless searches and that the State had no probable cause to warrant the DNA collection where there were other ways to identify King.[5]

II. HISTORICAL DEVELOPMENT

a. The Development of the Maryland DNA Collection Act

The Maryland legislature created the DNA Act in 1994, allowing for the collection of DNA from anyone convicted of a felony in Maryland.[6] In 2008, the DNA Act was amended to permit DNA collection without a warrant from anyone arrested and charged with a crime of violence, attempted crime of violence, burglary, or attempted burglary.[7] Furthermore, the amendment allowed for the expungement of the DNA record and destruction of the samples if the

arrestee was not convicted of the charges that triggered the DNA collection.[8]

b. Balancing Tests Used by the Supreme Court to Evaluate Fourth Amendment Challenges

The Supreme Court articulated a conjunctive "reasonableness test" in *Katz v. United States* to evaluate the constitutionality of a search or seizure requiring a person to have an actual expectation of privacy that is recognized as reasonable by society.[9] Furthermore, *United States v. Knights* implemented a "totality of the circumstances" approach that considered the balance between an intrusion on a person's privacy and the promotion of legitimate government interests in order to determine the reasonableness of a warrantless search.[10]

c. Other Jurisdictions Differ on an Arrestee's Expectation of Privacy and the Scope of the Government's Legitimate Interest

Since Maryland had yet to articulate a rule about DNA collection from arrestees, the *King* Court looked to other jurisdictions' application of the *Katz* and *Knights* balancing tests used to evaluate DNA collection from arrestees.[11] *Haskell v. Brown* stated that arrestees have a greater privacy interest than prisoners, but are still subject to a broad range of restrictions.[12] However, *United States v. Purdy* held that an arrestee's expectation of privacy outweighs the government's desire for a warrantless search,[13] and *Friedman v. Boucher* asserted that the Supreme Court has not permitted suspicionless searches of pre-trial detainees except for prison security reasons.[14] Furthermore, *In re Welfare of C.T.L.* held that the expungement provision suggested a greater expectation of privacy for all persons charged but not yet convicted.[15]

United States v. Mitchell held that there is a diminished expectation of privacy in an arrestee's identity relative to the government's ability to identify that person.[16] *Mitchell* stated that DNA was analogous to fingerprints where both were used solely for identification and the intrusion upon a person was minimal.[17] However, *United States v. Purdy* rejected the fingerprint/DNA analogy because unlike fingerprints, DNA is not exposed to the public and is able to reveal private medical facts.[18]

Haskell held that there are two components to an arrestee's identity: who that person is and what that person has done.[19] *People v. Buza* countered that the second component of an arrestee's identity is investigative in nature because it can take a month to process DNA and fingerprints are used alongside DNA to identify the arrestee.[20] *Mitchell* held that DNA collection is necessary because arrestees

could obscure their identity at booking,[21] yet *Buza* noted that an arrestee cannot wear gloves or a mask during booking.[22] Finally, the dissent in *Mitchell* stated that if the government interest were just identification there would be no need for the expungement provision.[23]

United States v. Pool suggested that a finding of probable cause for the initial criminal charge allowed the government to overcome the defendant's expectation of privacy in their identity.[24] However, *In re Welfare of C.T.L.* held that probable cause leading to a criminal charge differs from that necessary to effectuate a search where there must be a probability that evidence will be found in a certain location.[25]

d. Maryland Case Law has not Addressed the Constitutionality of Warrantless, Forcible DNA Collection from Arrestees

Maryland courts have not dealt with the issue of DNA being forcibly taken from an arrestee. In *State v. Raines*, the court of appeals upheld the constitutionality of the DNA Act prior to its 2008 amendment, where the State's interest in identifying convicted felons trumped a convict's diminished expectation of privacy in his identity due to his incarceration.[26] However, the court distinguished this finding from a search of "ordinary individuals" for the purpose of gathering evidence against them.[27] Furthermore, Judge Wilner's concurrence questioned the plurality's characterization of the DNA Act's purpose as identification and instead suggested it was investigative.[28]

In *Williamson v. State*, the court of appeals found a search reasonable where DNA was collected from an abandoned cup rather than forcibly taken,[29] and in *Raynor v. State* a search was found reasonable by the court of special appeals where DNA was shed onto a chair by the defendant and subsequently collected.[30] In both instances, the DNA was not forcibly taken, but rather was discarded by the arrestees, and both courts found that the DNA samples were collected for identification purposes only.[31]

III. INSTANT CASE

Alonzo King had his DNA taken after being arrested on assault charges, which was uploaded to the Maryland DNA database three months later.[32] A "hit" was received where King's DNA matched with DNA from an unsolved rape case from 2003.[33] King's indictment for rape relied solely on the DNA "hit" as probable cause.[34] At trial, King challenged the constitutionality of the DNA Act and filed a motion to suppress the DNA evidence he claimed was

seized illegally.[35] The motion was denied, King was convicted of the rape, and subsequently appealed.[36]

The Maryland Court of Appeals first addressed the constitutionality of the Act as-applied to King.[37] The court looked at the totality of the circumstances[38] and found that, unlike in *Raines*, King's expectation of privacy outweighed the State's interest in DNA collection because he was an arrestee instead of a convict.[39] The court stressed the presumption of innocence of arrestees and reasoned that the expungement provision in the DNA Act evidenced that a conviction was what altered an arrestee's privacy.[40]

The court rejected the analogy between fingerprints and DNA samples and held that, unlike fingerprints, DNA contains more than just identifying characteristics - it contains private genetic information as well.[41] Furthermore, the court determined that the DNA was not used to identify King because the State already had King's fingerprints and picture from a previous arrest.[42] Also, the "hit" took over three months to register, long after the State had determined King's identity.[43] Finally, the court rejected the probable cause "watershed event" concept and instead found that probable cause to arrest a person does not automatically create probable cause to collect DNA.[44] The court held that the DNA Act was unconstitutional as-applied to King and the initial DNA sample was illegally obtained.[45]

In order for the court to find the DNA Act facially unconstitutional, King had to "establish that no set of circumstances exist under which the Act would be valid."[46] The court found that the DNA Act was not facially unconstitutional because there were remote instances when routine identification of an arrestee would be extremely difficult and DNA could be utilized for identification purposes only.[47]

IV. ANALYSIS

a. Facial Constitutionality of the DNA Act

The *King* Court held that the DNA Act was not facially unconstitutional because there were rare instances when warrantless DNA collection could be necessary in order to ascertain an arrestee's identity.[48] This holding ignores the court's previous assertion that the expansive definition of identity advocated by many courts upholding warrantless DNA collection "stretches the bounds of reasonableness under a proper Fourth Amendment analysis."[49] Furthermore, the court fails to consider that if an arrestee's DNA is not already in the database, then there will be no DNA for comparison to identify the arrestee.[50] Finally, the court continues to allow warrantless DNA samples to be taken whenever ascertaining an arrestee's identity is

almost impossible, when in reality those circumstances could be enough satisfy probable cause that would justify a warrant for a DNA search.[51] The *King* Court admits having "some trepidation as to the facial constitutionality of the DNA Act" and could have better supported an arrestee's Fourth Amendment rights by finding the DNA Act facially unconstitutional.[52]

b. The Debate About the Privacy Interest of Arrestees

The *King* dissent takes issue with the majority's "overinflation" of King's privacy interest, instead arguing that an arrestee has a grossly diminished right to privacy from the moment of incarceration.[53] The majority concedes that an arrestee's privacy is somewhat diminished and that an arrestee is subject to searches which effectuate prison safety, yet the majority holds that an arrestee benefits from a presumption of innocence that gives them greater protection than convicted felons.[54] The majority differentiates defendant King from defendant Raines where Raines was a convicted felon and King a mere arrestee.[55] Furthermore, a foundation of our legal system is the idea that a defendant is innocent until proven guilty.[56]

The level of invasiveness of the buccal swab was a key issue that the majority and dissent viewed differently.[57] The dissent contended that the buccal swab was relatively noninvasive compared to other methods of extracting DNA and therefore was acceptable.[58] Yet there is a striking difference between a search being physically noninvasive and being substantively noninvasive. The dissent suggests that a wide variety of searches of an arrestee while in custody are much more invasive and still constitutional, including body cavity searches.[59] However, the dissent fails to account for the fact that the effects of body searches are brief, but DNA contains a "vast genetic treasure map" that remains retained by the State after the search, the results of which can expose an arrestee to future invasions of privacy.[60]

The dissent attempts to downplay the potential likelihood of the misuse or public disclosure of an arrestee's DNA sample by stating that § 2-512(c) of the DNA Act provides a penalty for willful disclosure of DNA information.[61] The majority responds to this assertion by noting Judge Wilner's concurrence in *Raines* that stated that there was no penalty for an accidental disclosure of a DNA sample, only for the willful disclosure of one.[62] While the dissent may be correct that the current law would act as a deterrent for willful disclosure of personal DNA information, the law alone will not be able to bring back DNA information that has been willfully or accidentally disclosed.

c. The Future Effects of this Ruling

As technology evolves and becomes more ingrained in society, courts will be faced with more questions about what procedures are effective versus invasive, and there will often be a fine line between the two. Judge Norris' dissent in *Mario W. v. Kaipio* warned of a "downward ratchet of privacy expectations" if warrantless searches were allowed to continue and stated that if left unchecked, the gains new technology bestows on law enforcement will only further encourage the erosion of Fourth Amendment rights.[63] The court in *People v. Buza* suggested that the answer to this slippery slope concern is active judicial scrutiny.[64] In contrast, Judge Barbera's dissent in *King* expressed that nothing written in the Constitution prohibited the government from utilizing new methods like DNA analysis to replace or supplement older methods like fingerprinting.[65] While this may be true, it is difficult for one method to replace another when the scope of one, and the potential issues that come along with it, vastly exceeds the other.[66]

V. CONCLUSION

In *King v. State*, the court considered the totality of the circumstances of the effect of warrantless DNA collection on an arrestee's privacy interest and found that the presumption of innocence of an arrestee prior to conviction trumped any State interest in DNA collection.[67] The *King* Court found that the wealth of private information contained within a person's DNA necessitated greater protection from warrantless searches and showed its willingness to protect this personal information, even at the expense of overturning a rape conviction.[68] New technologies may continue to develop and be judicially tested, but the basic protections afforded by the Fourth Amendment have so far withstood the test of time.

1. *See* Mary McCarthy, *Am I My Brother's Keeper?: Familial DNA Searches in the Twenty-First Century*, 86 NOTRE DAME L. REV. 381, 381 (2011). The discovery of DNA fingerprinting has given law enforcement the ability to identify genetic material and store that information in DNA databases that are used in criminal investigations and prosecutions.
2. *See* King v. State, 425 Md. 550, 555, 42 A.3d 549, 552 *cert. granted*, 133 S. Ct. 594 (2012).
3. MD. CODE ANN., PUB. SAFETY § 2-504(3) (LexisNexis 2008).
4. *King*, 425 Md. at 550, 42 A.3d at 552.
5. *Id*. at 556, 42 A.3d at 552–53.
6. MD. CODE ANN., PUB. SAFETY § 2-504 (LexisNexis 2003). The stated purposes of the Act were to allow law enforcement to analyze collected DNA samples that could assist in criminal investigations, identify missing persons and unidentified bodies, and

for research and administrative purposes. MD. CODE ANN., PUB. SAFETY § 2-505 (LexisNexis 2003).

7. MD. CODE ANN., PUB. SAFETY § 2-504(3) (LexisNexis 2008).
8. MD. CODE ANN., PUB. SAFETY § 2-511 (LexisNexis 2008).
9. Katz v. United States, 389 U.S. 347, 361 (1967)(Harlan, J., concurring).
10. United States v. Knights, 534 U.S. 112, 118-19 (2001)(finding that a condition of probation severely lessened a defendant's reasonable expectation of privacy).
11. *See* King v. State, 425 Md. 550, 575–93, 42 A.3d 549, 563–75 *cert. granted*, 133 S. Ct. 594 (2012).
12. Haskell v. Brown, 677 F.Supp.2d 1187, 1197 (N.D. Cal. 2009). Restrictions on arrestees can include pre-trial release conditions such as electronic monitoring and curfews. United States v. Pool, 621 F.3d 1213, 1217 (E.D. Cal. 2010).
13. United States v. Purdy, No. 8:05CR204, 2005 WL 3465721, at *3 (D. Neb. Dec. 19, 2005).
14. Friedman v. Boucher, 580 F.3d 847, 857 (9th Cir. 2009) (quoting Schmerber v. California, 384 U.S. 757, 769–70 (1966)).
15. *In re* Welfare of C.T.L., 722 N.W.2d 484, 486 (Minn.Ct.App. 2006) (explaining that the expungement provision allowed for the destruction of a defendant's DNA samples upon a finding of not guilty).
16. United States v. Mitchell, 652 F.3d 387, 411 (3rd Cir. 2011).
17. *Id.* at 412.
18. *Purdy*, No. 8:05CR204, 2005 WL 3465721, at *3.
19. Haskell v. Brown, 677 F.Supp.2d 1187, 1199 (N.D. Cal. 2009).
20. *People v. Buza*, 197 Cal.Rptr.3d 753, 773 (2011).
21. *Mitchell*, 652 F.3d at 414.
22. *Buza*, 197 Cal.Rptr.3d at 774.
23. *Mitchell*, 652 F.3d at 422 (Rendell, J., dissenting).
24. United States v. Pool, 621 F.3d 1213, 1219 (9th Cir. 2010) (holding that a finding of probable cause for the crime that gave rise to DNA collection was a "watershed event" which tipped the scales in favor of the government when applying the totality of the circumstances test).
25. *In re* Welfare of C.T.L., 722 N.W.2d 484, 490 (Minn.Ct.App. 2006)
26. State v. Raines, 383 Md. 1, 25, 857 A.2d 19, 33 (2004).
27. *Id.* at 25, 857 A.2d at 33.
28. *Id.* at 50, 857 A.2d at 49 (Wilner, J., concurring).
29. Williamson v. State, 413 Md. 521, 537, 993 A.2d 626, 635 (2010).
30. Raynor v. State 201 Md. App. 209, 222, 29 A.3d 617, 625 (2011).
31. *Williamson*, 413 Md. at 547, 993 A.2d at 641; *Raynor*, 201 Md. App. at 222, 29 A.3d at 625.
32. King v. State, 425 Md. 550, 557, 42 A.3d 549, 553 *cert. granted*, 133 S. Ct. 594 (2012).
33. *Id*. at 557, 42 A.3d at 553.
34. *Id.* at 558, 42 A.3d at 554. A search warrant was obtained after the initial "hit" and DNA was collected from King that again matched the open 2003 rape case which was used as evidence at trial. *Id.*
35. *Id*.
36. *Id.* at 559–61, 42 A.3d at 554–55.
37. *Id.* at 593, 42 A.3d at 575.

38. United States v. Knights, 534 U.S. 112, 118-19 (2001) (balancing the intrusion of a search upon a person's privacy against the promotion of legitimate government interests).
39. *King*, 425 Md. at 594–99, 42 A.3d at 576–78.
40. *Id*. at 597, 42 A.3d at 577.
41. *Id*. at 595–96, 42 A.3d at 576–77.
42. *Id*. at 599, 42 A.3d at 579.
43. *Id*. at 600, 42 A.3d at 579. Unlike the FBI fingerprint database, the DNA database contains no identifying information but rather matches newly added DNA against existing DNA samples. *Id*. at 599, 42 A.3d at 579.
44. *Id*. at 600, 42 A.3d at 579.
45. *Id*. at 602, 42 A.3d at 580.
46. Koshko v. Haining, 398 Md. 404, 426, 921 A.2d 171, 183 (2007).
47. *King*, 425 Md. at 601, 42 A.3d at 580.
48. *Id.* The majority was concerned that an arrestee could significantly alter their fingerprints or facial features which could necessitate DNA collection to identify the individual. *See id*.
49. *Id*. at 599, 42 A.3d at 578. The *Haskell* Court held that the identity of an arrestee had two components, including not only the name and birth date but also any criminal history, and that the government had a legitimate interest in both. *See* Haskell v. Brown, 677 F.Supp.2d 1187, 1199 (N.D. Cal. 2009).
50. Mario W. v. Kaipio, 265 P.3d 389, 408 (Ariz.Ct.App. 2011) (Norris, J., dissenting).
51. *King*, 425 Md. at 601, 42 A.3d at 580. In rare cases when an arrestee has obscured their identity by changing fingerprints or facial features, law enforcement officers could obtain a warrant from a neutral magistrate by demonstrating that there is a fair probability that a DNA search could produce the arrestee's real identity. *See In re* Welfare of C.T.L., 722 N.W.2d 484, 491 (Minn.Ct.App. 2006).
52. *King*, 425 Md. at 556, 42 A.3d at 553.
53. *King*, 425 Md. at 603, 42 A.3d at 581 (Barbera, J., dissenting). The dissent states that from the moment an arrestee is detained, that arrestee is subject to a full-body search, a warrantless strip-search, and is subject to observation, even while using the bathroom. *Id.* at 605–06, 42 A.3d at 583.
54. *Id*. at 597, 42 A.3d at 577 (majority opinion).
55. *Id*. at 596, 42 A.3d at 577.
56. *See id.* at 594, 42 A.3d at 576.
57. *Id.* at 606–08, 42 A.3d at 583–84 (Barbera, J., dissenting).
58. *Id.* 606–07, 42 A.3d at 583 (citing Schmerber v. California, 384 U.S. 757, 772 (1966)(holding that a warrantless drawing of blood from an arrestee did not violate the Fourth Amendment)).
59. *Id.* at 606, 42 A.3d at 583 ("The buccal swab technique has been described as 'perhaps the least intrusive of all seizures.'" (quoting Jules Epstein, *Genetic Surveillance – The Bogeyman Response to Familial DNA Investigations*, 2009 U. ILL. J.L. TECH & POL'Y 141, 152 (2009))).
60. *See King*, 425 Md. at 608, 42 A.3d at 584.
61. *See id.* The dissent states that the penalty of a fine or jail time alone for willful disclosure of a DNA sample will "foreclose, without exception, all avenues by which a genetic pirate can obtain and exploit" a DNA sample. *Id.*
62. *Id.* at 596, 42 A.3d at 577 (majority opinion) (citing State v. Raines, 383 Md. 1, 25, 857 A.2d 19, 33 (2004) (Wilner, J., concurring)). Furthermore, allowing the government access to a person's DNA but restricting its use is similar to giving the government access to a patient's private medical records but restricting the use of

those records to the small parts that would identify the patient. *See* United States v. Mitchell, 652 F.3d 387, 406 (3rd Cir. 2011) (Rendell, J., dissenting).

63. Mario W. v. Kaipio, 265 P.3d 389, 408 (Ariz.Ct.App. 2011) (Norris, J., dissenting).
64. People v. Buza, 197 Cal.Rptr.3d 753, 769 (2011)(holding that "the fact that fingerprinting is commonplace does not mean that DNA should take its place as a routine booking procedure without additional scrutiny"). *Id.*
65. *King*, 425 Md. at 612, 42 A.3d at 586. (Barbera, J., dissenting).
66. *See id*. at 602, 42 A.3d at 580 (majority opinion).
67. *Id*. at 555–56, 42 A.3d at 552–53.
68. *See supra* text accompanying notes 38, 61.