No. _____

In The
Supreme Court of the United States

GLENN JOSEPH RAYNOR,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment is implicated when law enforcement surreptitiously analyzes a free citizen's involuntarily shed DNA profile.

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PETITION FOR A WRIT OF CERTIORARI

Glenn Joseph Raynor respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at *Raynor v. State*, 440 Md. 71, 99 A.3d 753 (2014), and is reproduced at App. 1-53. The Court of Appeals' denial of Petitioner's Motion for Reconsideration is reproduced at App. 88. Maryland's intermediate appellate court's opinion is reported at *Raynor v. State*, 201 Md. App. 209, 29 A.3d 617 (2011), and is reproduced at App. 54-82. The trial court's order denying Petitioner's Motion to Suppress DNA Evidence is unpublished and is reproduced at App. 83-87.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) (2012). The Court of Appeals of Maryland issued a decision in this case on August 27, 2014. On September 26, 2014, Petitioner filed a timely Motion for Reconsideration, which was denied on October 21, 2014.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On or about April 2, 2006, Ms. J. was raped in her home. She could not identify her assailant. Investigators collected DNA from her and from items at the crime scene. Over the next two years, the victim provided the police with names of about 20 people who she believed may have raped her. Each individual consented to DNA testing and was excluded as a source of the crime scene DNA.

Thereafter, the victim came to suspect that Petitioner was the rapist and she provided Petitioner's name to the police. Thereafter, upon request, Petitioner went to the police station, was escorted to an interview room, and was told to sit in a chair.

During the interview, the police asked Petitioner to provide a DNA sample for comparison to the crime scene DNA. Citing privacy concerns, Petitioner expressly refused to provide a DNA sample, and was permitted to leave the police station.

The police then swabbed the armrests of the chair in which Petitioner sat and submitted those swabs for DNA analysis, which revealed that Petitioner's DNA matched the crime scene DNA. The police then obtained a warrant to collect a DNA sample from Petitioner, which likewise matched the crime scene DNA. Petitioner was charged with first degree rape and related offenses.

Pre-trial motion to suppress

Before trial, Petitioner moved to suppress the DNA evidence and all derivative evidence, arguing that the collection and analysis of his DNA taken from the station-house chair violated the Fourth Amendment. That motion was denied.

During the suppression hearing, Petitioner testified that he declined to provide a DNA sample because he was concerned about his genetic privacy and he did not want his genetic material retained in a database. He said that, to protect his DNA, he did not leave any trash in the interview room, and he would have wiped down the chair had he known he left genetic material on it.

Trial

On June 12, 2009, Petitioner was found guilty of rape and related offenses and was sentenced on September 1, 2009 to 100 years incarceration.

Appellate proceedings

Petitioner took an appeal to the Court of Special Appeals of Maryland, which affirmed the suppression court. The Court of Appeals of Maryland thereafter granted Petitioner a writ of certiorari. Thereafter, the court stayed the appeal pending this Court's decision in *Maryland v. King*, 133 S. Ct. 1958 (2013).

After *King*, the Court of Appeals affirmed the suppression court in a 4 to 3 decision. The court held that "law enforcement's analysis of the 13 identifying loci within Petitioner's DNA left behind on the chair at the police station, in order to determine a match with the DNA the police collected from the scene of the rape, was not a search." App. 13-14.[1]

The majority recognized that this Court's opinion in *King* (1) did not address whether developing a DNA profile from a DNA sample, and comparing the profile to other profiles in a database, was a separate Fourth Amendment search, and (2) did not address

[1] Petitioner challenged the initial collection of his DNA in his briefs to the Court of Appeals and challenged the court's holding that counsel conceded this issue in his Motion for Reconsideration. App. 89-101.

whether a search could occur by analyzing and matching a DNA profile without physically intruding into a person's body. Thus, the majority stated that "the case at bar implicates those questions left unanswered in *King*." App. 13.

The court began its analysis by citing *United States v. Dionisio*, 410 U.S. 1, 17 (1973), and *United States v. Mara*, 410 U.S. 19, 21 (1973), for the proposition that "identifying physical characteristics are generally outside the protection of the Fourth Amendment." App. 17-18. The court assumed that society generally does not *knowingly* expose genetic material to the public, but deemed that fact irrelevant to whether Petitioner had a reasonable expectation of privacy against surreptitious analysis of his involuntarily shed DNA. App. 30-31.[2] The court concluded that Petitioner had no reasonable expectation of privacy against the DNA testing in this case because he "exposed to the public, albeit not to the naked eye, the identifying content of the genetic material he left on the chair." App. 30.

The majority stated that extracting Petitioner's DNA sample from involuntarily shed skin cells,

[2] The court did not address whether Petitioner abandoned an expectation of privacy in his DNA because the State did not argue abandonment. The State merely argued that Petitioner "never had a privacy interest [in his DNA] to abandon." App. 28. Abandonment should be deemed a forfeited argument. *See United States v. Jones*, 132 S. Ct. 945, 954 (2012) (declining to consider alternative argument that was not raised below).

developing a DNA profile of 13 purportedly "junk" loci, and comparing that profile with other profiles in a database, "[a]lthough highly useful for identification purposes, . . . 'does not show more far-reaching and complex characteristics like genetic traits.'" App. 19 (quoting *King*, 133 S. Ct. at 1967).

The majority deemed the "character of the information specifically sought" to be "paramount" in determining whether the Fourth Amendment applied. App. 18. Because Petitioner's purportedly "junk" loci were tested, the court confined its analysis to whether Petitioner had a reasonable expectation of privacy in the "identifying characteristics of his DNA." App. 29.

The majority (1) reasoned that *Dionisio*, 410 U.S. at 14-15, and *Cupp v. Murphy*, 412 U.S. 291, 295 (1973), implicitly held that the Fourth Amendment does not apply to fingerprints left behind by a suspect; and (2) held that DNA testing was tantamount to fingerprinting. App. 21. Relying on this Court's statement in *King*, the court stated that the only difference between DNA testing and fingerprinting was the "unparalleled accuracy DNA provides." App. 21 (quoting *King*, 133 S. Ct. at 1963-64).

The court distinguished *Skinner v. Railway Executives Labor Ass'n*, 489 U.S. 602 (1989), *Kyllo v. United States*, 533 U.S. 27 (2001), and the Fourth Circuit's recent holding that a free citizen retains a reasonable expectation of privacy in involuntarily shed DNA in *United States v. Davis*, 690 F.3d 226 (4th

Cir. 2012), *cert. denied*, 134 S. Ct. 52 (2013). The majority reasoned that testing Petitioner's DNA was less intrusive than testing urine samples for narcotics in *Skinner* because the testing in *Skinner* revealed "physiological data," while analyzing Petitioner's DNA profile did not. App. 24-25.

Disregarding *Davis*, the court stated:

> The *Davis* [c]ourt's conclusion that the DNA testing at issue in that case constituted a Fourth Amendment search rested on what may now be a faulty premise, given the discussion in *King* that DNA analysis limited to the 13 junk loci within a person's DNA discloses only such information as identifies with near certainty that person as unique.

App. 25.

The majority interpreted *Kyllo* as prohibiting the use of technology not in general public use to accomplish "any physical invasion of the structure of the home." App. 32 (quoting *Kyllo*, 533 U.S. at 37). The majority described the thermal imager in *Kyllo* as a substitute for a physical trespass into the home. App. 32. The court assumed that DNA testing was also not in general public use, but reasoned that collecting and analyzing Petitioner's DNA was not a substitute for a physical intrusion into his body, because "[t]he police did not seize genetic material from Petitioner, nor in any way search him for it, but

rather, collected it from an object on which the material had been left." App. 33.

The majority concluded:

> In the end, we hold that DNA testing of the 13 identifying junk loci within genetic material, not obtained by means of a physical intrusion into the person's body, is no more a search for purposes of the Fourth Amendment, than is the testing of fingerprints, or the observation of any other identifying feature revealed to the public – visage, apparent age, body type, skin color. That Petitioner's DNA could have disclosed more intimate information is of no moment in the present case because there is no allegation that the police tested his DNA sample for that purpose.

App. 33.

Three judges dissented, describing the majority opinion as "a significant extension of the State's right to invade private rights of individuals in their DNA beyond that authorized by the Supreme Court's decision in [*King*.]" App. 34 (Adkins, J., dissenting).

The dissenters pointed out that the buccal swab in *King* was described as a "routine booking procedure," and applied only to arrestees, who had a diminished expectation of privacy when compared with free citizens. App. 38. Accordingly, the dissent

stated that the State has a greater interest in identifying arrestees, and that interest does not apply to free citizens. App. 38.

Because in this case no statute limited the individuals to be tested or the amount of testing to be performed, the dissenters warned that the majority opinion could lead to arbitrary decisions about who to invite to the station-house for non-consensual DNA testing, and arbitrary decisions about what type of testing to perform. App. 41-42.

The dissenters described Petitioner's privacy interest in his DNA as "immensely personal and private." App. 43. This privacy interest deserved protection because (1) the police knew they were talking to Petitioner, and (2) Petitioner expressly refused to provide a sample. App. 43-44. The dissenters agreed with Petitioner that the surreptitious collection and analysis in this case intruded on the privacy expectation in his person in the same way that the thermal imaging in *Kyllo* intruded on the privacy expectation in the home. App. 44.

The dissenters relied on *Davis*, 690 F.3d at 231, 249-50, *Kyllo*, 533 U.S. at 27, *Katz v. United States*, 389 U.S. 347 (1967), and *Riley v. California*, 134 S. Ct. 2473 (2014), to support the conclusion that a search occurred in this case, even though the police did not physically intrude into Petitioner's body. App. 45-46. Similarly, the dissenters explained that *Kyllo*, 533 U.S. at 38, and *Skinner*, 489 U.S. at 617, undermined the majority's conclusion that no search

occurred because only 13-loci DNA profile was tested in this case, stressing that legitimate privacy expectations were invaded in both cases when a "mere potential for intrusion on information" existed. App. 49.

In concluding, the dissenters "propose[d] that we treat the zone of privacy not in terms of [Petitioner's] physical DNA in the form of saliva or sweat, but his expectation of privacy from exposure of the results of scientific tests performed on his DNA." App. 52.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This case is the next logical case in this Court's jurisprudence dealing with the intersection of emerging technology and the Fourth Amendment. This Court needs to decide whether analyzing and matching a free citizen's involuntarily shed DNA profile is a Fourth Amendment search. *Raynor* held that this process did not even implicate, let alone violate, the Fourth Amendment. This Court needs to review this decision.

Raynor's mechanical interpretation of the Fourth Amendment is fundamentally flawed. This case is not about a lack of bodily intrusion, lawful police possession of an item from which DNA can be obtained, the purportedly limited information contained in a DNA profile, or Petitioner's identity. Because cutting-edge technology gives law

enforcement the ability to perform the same DNA testing performed in *King* on virtually any object an individual contacts, this case is about ensuring that the Fourth Amendment continues to protect free citizens' basic assumptions about personal security in public places.

As the *Raynor* dissent observed:

> The Majority's approval of such police procedure means, in essence, that a person desiring to keep her DNA profile private, must conduct her public affairs in a hermetically-sealed hazmat suit. Moreover, the Majority opinion will likely have the consequence that many people will be reluctant to go to the police station to voluntarily provide information about crimes for fear that they, too, will be added to the CODIS database. . . . The Majority's holding means that a person can no longer vote, participate in a jury, or obtain a driver's license, without opening up his genetic material for state collection and codification. Unlike DNA left in the park or a restaurant, these are all instances where the person has identified himself to the government authority. All these are troubling consequences of the decision the [c]ourt makes today.

App. 51.

Petitioner respectfully requests that this Court issue a Writ of Certiorari for the following reasons:

1.

This Court should clarify the limits of *King*. This Court's statement that DNA analysis is tantamount to fingerprinting was grounded on the premises that (1) the individual being tested was an arrestee with a diminished expectation of privacy; and (2) the collection and analysis of DNA was a routine booking procedure. *King* involved neither a free citizen nor surreptitious analysis of involuntarily shed DNA. This Court needs to decide the Fourth Amendment status of free citizens' involuntarily shed DNA.

2.

Raynor conflicts with the fundamental premise in *Katz* that certain investigative methods, by their nature, intrude on basic assumptions about personal security. The *Raynor* majority relied on four fragmented rationales. Each rationale, by itself, conflicts with this Court's *Katz* jurisprudence. More fundamentally troubling, the majority went out of its way to avoid addressing the basic values embodied in *Katz* and its progeny. The majority's strained attempt to rely on isolated rationales that pre-date the DNA era represents a mechanical interpretation of the Fourth Amendment that, if upheld, will eviscerate the Fourth Amendment in the face of cutting-edge technology.

Raynor relied on the fact that the police lawfully possessed the chair from which Petitioner's DNA was collected, which is at odds with this Court's decision in *Riley*, which held that an arrestee retains an expectation of privacy in his or her cell phone after it is in the lawful possession of the police, incident to a lawful arrest. Even before *Riley*, the Fourth Circuit held, in *Davis*, that an ordinary citizen retains a reasonable expectation of privacy in involuntarily shed DNA left on clothing that the police lawfully collected from a hospital. *Raynor* conflicts with *Riley* and *Davis*.

Raynor equated a DNA profile with readily apparent characteristics such as a person's age or skin color, which conflicts with *Cupp*, and which is completely unrealistic given the amount of cutting-edge technology required to detect and use DNA for investigation.

Raynor relied on the lack of intrusion into Petitioner's body, which is at odds with *Kyllo* because the cutting-edge technology in this case is not in general public use, and DNA profiling accomplished the exact same thing, as to Petitioner, as thermal imaging accomplished, as to the Defendant's home, in *Kyllo*. The *Raynor* majority dismissed Petitioner's reliance on *Kyllo* because the police in this case detected genetic information that had escaped Petitioner's body. The majority completely ignored this Court's emphasis that the thermal imaging in *Kyllo* was a search because it revealed details of the home that were "otherwise [ ] imperceptib[le]," even

though the imager did not penetrate the walls of the home. 533 U.S. at 38 n.5. Petitioner's DNA profile is "a critical fact about [Petitioner] that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant." *United States v. Karo*, 468 U.S. 705, 715 (1984).

Raynor relied on the fact that the police tested only Petitioner's purportedly "junk" 13-loci DNA profile commonly used in forensic testing. This Court has consistently indicated that a search occurs when certain private matters *could* be obtained even though the police had not actually obtained them. This Court has held that chemical analysis of bodily fluids, taken with or without forcible compulsion, that could reveal "a host of private medical facts" and "physiological data," but which in fact detected only contraband, is a Fourth Amendment search. *Skinner*, 489 U.S. at 609-10, 616; *Ferguson v. City of Charleston*, 532 U.S. 67, 76 (2001).

In *Kyllo*, the police merely detected raw heat emanating from the outside of a home, yet implicated the Fourth Amendment because, in the home, all details are intimate details. This Court has also stressed the significant amount of information about a person that could be obtained from a smart phone, in *Riley*, 134 S. Ct. at 2491-93, and from tracking a vehicle's location, in *Jones*, 132 S. Ct. at 954-56 (Sotomayor, J., concurring); *id.* at 957-64 (Alito, J., concurring).

In this case, the police discovered far more than contraband by intruding into the nucleus of Petitioner's cells to analyze him at the sub-cellular level. The police intruded on a legitimate, private aspect of Petitioner's person.

Moreover, the line between which aspects of one's DNA are intimate and which are not is a line that courts are ill-equipped to decide on a case-by-case basis. To guide bench and bar, law enforcement, and free citizens, this Court, like in *Kyllo*, should draw a "firm, . . . bright" line around a free citizen's DNA. 533 U.S. at 40 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

Each of the *Raynor* majority's rationales, by itself, conflicts with this Court's *Katz* jurisprudence. Collectively, *Raynor* represents a mechanical interpretation of the Fourth Amendment designed to "reduce[ ] the Fourth Amendment to a form of words," *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920), by avoiding considering how technology infringes on society's sense of personal security in public places.

3.

The Fourth Amendment status of free citizens' DNA is an issue of national importance. Permitting the *Raynor* majority's decision to stand will fundamentally alter the relationship between free citizens and law enforcement.

I. This Court should clarify the Fourth Amendment status of DNA for free citizens. The *Raynor* majority's reliance on statements in *King* that a DNA profile is a fingerprint is misplaced because *King* involved neither a free citizen nor surreptitious analysis of involuntarily shed DNA.

In *King*, this Court determined that Maryland's DNA collection statute, which authorized collecting a DNA sample via buccal swab from an arrestee, did not violate the Fourth Amendment.

This Court's reasonableness analysis first pointed out that once the Defendant was arrested, there was little discretion for police to exercise because the Maryland statute prescribed the procedure for collection and prohibited misuse of the collected sample. 133 S. Ct. at 1970. In balancing the private and governmental interests at stake, *King* explained that the legitimate government interest served by the collection statute was the "need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody." *Id.*

This Court held that, in the context of arrest and processing, the Defendant's identity included his criminal history. *Id.* DNA provided "unparalleled accuracy." *Id.* at 1972. Accurately determining a detainee's prior criminal history assured availability of the Defendant at trial, helped judges determine future dangerousness in pretrial release

determinations, and protected the police, other inmates, and the public. *Id.*

In *King*, the Defendant's expectation of privacy was diminished due to his arrest for a serious offense because he should expect a "relatively extensive exploration" of his person and property when brought into the police station. *Id.* at 1978.

This Court distinguished a buccal swab of an arrestee, as part of the routine booking process, from "programmatic searches of . . . the public at large," for which a warrantless, suspicionless search required "some other purpose other than 'to detect evidence of ordinary criminal wrongdoing.'" *Id.* (quoting *Indianapolis v. Edmund*, 531 U.S. 32, 38 (2000)).

The Court also stated that (1) the Defendant's 13-loci forensic DNA profile was "not at present revealing information beyond identification," a point which the Court recognized was "in dispute;" (2) the police in fact only processed the Defendant's DNA sample to produce a unique identifying number; and (3) the statute provided for expungement upon acquittal and penalties for unauthorized use and testing. *Id.* at 1979-80. These facts relieved privacy concerns. *Id.*

The *Raynor* majority interpreted this Court's statement in *King*, that "[t]he only difference between DNA analysis and fingerprint databases is the unparalleled accuracy DNA provides," 133 S. Ct. at 1963-64, as equating DNA profiling with

fingerprinting for all Fourth Amendment purposes. App. 21.

The *Raynor* majority's reliance on *King* is misplaced because (1) the Defendant in *King*, an arrestee, had a diminished expectation of privacy; and (2) the DNA testing in *King* was analyzed as a routine booking procedure.

This Court's description of the reasons supporting the reasonableness of the search in *King* – accurate bail decisions, assuring the availability of the Defendant at trial, and officer and public safety – have no bearing in this case, in which the police "gather[ed] evidence against [Petitioner] in order to prosecute [him] for the very crimes that the search reveals." *State v. Raines*, 383 Md. 1, 25, 857 A.2d 19, 33 (2004).

Thus, this Court's context-based statement about the similarity of fingerprinting and DNA profiling cannot be supplanted wholesale in other contexts, especially when the *Raynor* court was asked to determine the Fourth Amendment status of a free citizens' DNA, a question that has not been addressed by this Court. The *Raynor* majority's reliance on *King* threatens to eviscerate the distinction between a routine booking procedure and a "programmatic search[ ] . . . of the public at large." *King*, 133 S. Ct. at 1978.

Similarly, Justice Scalia admonished the majority in *King* for eviscerating the line between booking

procedures and ordinary searches for evidence of a crime.

Justice Scalia criticized the majority's identity justification, reasoning that the structure and operation of the Maryland collection statute belied the notion that DNA was being collected from arrestees for mere identification. *Id.* at 1985-86. He reasoned that the State could not be seeking to identify the Defendant when it compared the Defendant's DNA with DNA from a crime scene because the DNA from a crime scene had obviously not been linked to any person. *Id.* at 1985.

Justice Scalia was adamant that there is a huge difference between fingerprinting and DNA profiling because the police used the results of each differently after arrest. *Id.* DNA was used solely to solve other crimes. *Id.* Fingerprints were used solely to identify the subject, and sometimes that process incidentally led to other crimes being solved. *Id.* Fingerprint analysis was returned in minutes, was accompanied by detailed identifying information, and could not readily be compared to "latent prints" from crime scenes. *Id.* Justice Scalia explained:

> Today, it can fairly be said that fingerprints really are used to identify people – so well, in fact, that there would be no need for the expense of a separate, wholly redundant DNA confirmation of the same information. What DNA adds – what makes it a valuable weapon

> in the law-enforcement arsenal – is the ability to solve unsolved crimes, by matching old crime-scene evidence against the profiles of people whose identities are already known. That is what was going on when King's DNA was taken, and we should not disguise the fact. Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches. The Fourth Amendment must prevail.

Id. at 1989.

Before any more courts read too much into *King* – as Maryland did – this Court needs to clarify the limits of *King*.

II. The *Raynor* majority's fragmented *Katz* analysis, if upheld, will permit technology to erase society's sense of personal security, forcing ordinary citizens to relinquish their expectation of privacy in their DNA when they enter a public place or identify themselves to the Government.

A. *Raynor* conflicts with the Fourth Circuit's holding in *Davis*, statements of the First, Second, and Third Circuits, and this Court's decision in *Riley*. Because cutting-edge technology encourages law enforcement to remotely and surreptitiously collect more and more information about ordinary citizens, law enforcement's lawful access to an item from which DNA can be obtained is irrelevant.

In *Davis*, four years before the Defendant was arrested, he was robbed and shot. 690 F.3d at 230. At the hospital, police collected his bloody clothes as evidence against the Defendant's assailant. *Id.* The Defendant's assailant was never prosecuted, but the police kept the Defendant's clothes. *Id.*

Four years later, when the Defendant became a murder suspect, the police developed a DNA profile, without a warrant, from the Defendant's bloody clothes in police storage and linked him to a murder. *Id.* at 231-32. The Defendant challenged the seizure of his clothing at the hospital and the subsequent DNA analysis. *Id.*

Davis held that the seizure of the bag that contained the Defendant's clothes in the hospital was valid under the plain view doctrine. *Id.* at 233-38. As a result, the Government argued that *United States v. Edwards*, 415 U.S. 800 (1974), categorically permitted police to conduct laboratory analysis on items in lawful police possession. *Id.* at 243. The Fourth Circuit disagreed. *Id.*

The Fourth Circuit stated that the analysis of physiological data collected from a free citizen implicates greater privacy concerns than the analysis of clothing collected from the arrestee in *Edwards*. *Id.* at 243-44 (citing *Skinner*, 489 U.S. at 616-17).

The Fourth Circuit held that the Defendant retained a reasonable expectation of privacy in his DNA because, when his DNA was collected, he was a free citizen. *Id.* The court stated:

> [Federal courts] uniformly recognize that persons who have not been arrested have a greater privacy interest in their DNA than would persons who have been arrested, such as the arrestee in *Edwards*.
>
> . . . [W]e do not accept even [a] small level of intrusion, [such as fingerprinting] for free persons without Fourth Amendment constraint.

Id. at 245 (alteration in original).

Davis concluded:

> [W]e are persuaded by the Supreme Court's analysis in *Skinner,* as applied in *Mitchell* and other cases in the context of DNA, that the extraction of DNA and the creation of a DNA profile result in a sufficiently separate invasion of privacy that such acts must be considered a separate search under the Fourth Amendment even when there is no issue concerning the collection of the DNA sample.

Id. at 246.

Davis demonstrates that, because DNA samples can be extracted from virtually any surface a person contacts, *see DNA Evidence: Basics of Identifying, Gathering and Transporting*, Nat'l Inst. of Justice (Aug. 9, 2012), http://nij.gov/topics/forensics/evidence/dna/basics/Pages/identifying-to-transporting.aspx, whether police have lawful access to, or lawful possession of, an item from which DNA can be analyzed is irrelevant.[3] For a free citizen, the reasoning in *Davis*

[3] Even before DNA technology gave police unfettered access to DNA samples in public places, "lawful possession" was not dispositive of Fourth Amendment applicability for a free citizen. *See Walter v. United States*, 447 U.S. 649, 651 (1980) (holding that packages containing illicit films, mailed via private carrier accidentally to a mistaken recipient, could not be searched by the FBI, even though the FBI lawfully obtained the films from the recipient, because the Defendant plainly "expected no one

(Continued on following page)

is most consistent with this Court's reasonable expectation of privacy jurisprudence because (1) the Fourth Circuit focused on whether the "type of analysis conducted" upset free citizens' privacy expectations; and (2) the Fourth Circuit recognized that, like in *Skinner*, *access* to physiological data was sufficient to implicate the Fourth Amendment. *Id.* at 244-46.

Davis is also consistent with this Court's 9-to-0 opinion in *Riley*, in which this Court stated that, even though the Defendant's expectation of privacy was "significantly diminished" upon arrest, the Defendant retained an expectation of privacy against a search of his lawfully collected cell phone because "[c]ell phones . . . place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in [a typical search incident to arrest.]" *Id.*

In contrast, the *Raynor* majority deemed the purportedly limited amount of information in Petitioner's 13-loci forensic DNA profile, and not law enforcement's access to the rest of Petitioner's DNA, to be "paramount" in determining Fourth Amendment applicability. App. 18. The majority suggested that

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except the intended recipient either to open the [twelve] packages or to project the films," *id.* at 658, and "an officer's authority to possess a package is distinct from his authority to examine its contents." *Id.* at 654.

Davis was no longer good law, "given the discussion in *King* that DNA analysis limited to the 13 junk loci within a person's DNA discloses only such information as identifies with near certainty that person as unique." App. 25. This Court should correct the *Raynor* majority's wholesale reliance on *King*, to disregard *Davis*, because the observation in *King* that DNA profiles consist of 13 purportedly "junk" loci (1) was already consistently assumed by federal and state courts when *Davis* was decided; (2) was nonetheless still "in dispute" when *King* was decided, 133 S. Ct. at 1979; and (3) may still constitute a Fourth Amendment search of a free citizen, even if it would be a reasonable search of an arrestee.

Raynor also conflicts with several U.S. Courts of Appeal that, in analyzing the Fourth Amendment reasonableness of DNA collection statutes, have stated that (1) the extraction of blood or saliva for DNA profiling is a search; and (2) analyzing a DNA profile and comparing the profile with other profiles in a database is a further, potentially more invasive, search. *United States v. Weikert*, 504 F.3d 1, 6, 12 (1st Cir. 2007); *United States v. Amerson*, 483 F.3d 73, 84-85 (2d Cir. 2007); *Nicholas v. Goord*, 430 F.3d 652, 670 (2d Cir. 2005); *United States v. Mitchell*, 652 F.3d 387, 406-07 (3d Cir. 2011) (en banc).

B. The *Raynor* majority's conclusion that a DNA profile obtained from involuntarily shed DNA is a "physical characteristic exposed to the public" belies ordinary citizens' common experience, which is the root of the *Katz* reasonable expectation of privacy analysis.

In *Katz*, this Court held that a free citizen had a reasonable expectation of privacy in the words that he spoke into a telephone in a public phone booth. The *Katz* Court emphasized that the Fourth Amendment protects people and not places. 389 U.S. at 351. This Court held that the Government "electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied . . . and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.* at 353.

Katz stated that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Id.* at 351. The *Raynor* majority correctly observed that, under *Katz* and its progeny, physical characteristics such as one's voice and handwriting do not implicate the Fourth Amendment. App. 17-18.

However, this Court has held that characteristics far more readily apparent than a DNA profile are protected by the Fourth Amendment. In *Cupp*, this Court held that searching fingernail scrapings "went beyond mere 'physical characteristics.'" 412 U.S. at

295. In *Cupp*, the police observed a dark spot on the Defendant's fingernails, which they believed to be blood from a murder. *Id.* at 292. The police asked for permission to take a fingernail sample. The Defendant refused consent. *Id.* This Court stated that subsequently forcibly obtaining a fingernail scraping was a "severe, though brief, intrusion upon cherished personal security that is subject to constitutional scrutiny." *Id.* at 295.

Petitioner's DNA was not at all visible, or usable, without cutting-edge technology that penetrates the nucleus of his cells to discover who he is at the sub-cellular level. Thus, the *Raynor* majority's decision threatens to dangerously expand the category of biological materials that are not protected by the Fourth Amendment under the unrealistic term "physical characteristic."

The *Raynor* majority dangerously oversimplified DNA analysis. The majority stated that Petitioner's DNA profile was a physical characteristic exposed to the public. App. 5-6. A DNA profile was the end product of the search. However, the police collected raw bodily fluid and residue from the station-house armchair. Notably:

> Physically, the surreptitious harvesting search is a search for an otherwise inaccessible item and one at the core of one's physical being. For STR testing, the forensic scientist must isolate the DNA molecules from other cellular

> materials, remove any possible inhibitors to the PCR process, and quantitate the DNA to make sure it is from a human subject. The analyst then amplifies the DNA so that enough exists for analysis and transforms the fluorescently labeled DNA into an image on an electropherogram. Only then can the analyst analyze the DNA in the original sample.

Albert E. Scherr, *Genetic Privacy & the Fourth Amendment: Unregulated Surreptitious DNA Harvesting*, 47 Ga. L. Rev. 445, 490 (2013).

The process described by Professor Scherr merely produces a usable DNA sample. Even more technology is required to isolate a DNA profile from a raw DNA sample.

The amount of technology – chemical and computerized manipulation, amplification, and isolation – needed to obtain a DNA profile from raw bodily residue demonstrates that DNA profiles are in no way exposed to the public in a way that eliminates a free citizen's reasonable expectation of privacy.

The *Raynor* majority ignored this process. Instead, the majority equated a DNA profile with one's "visage, apparent age, body type, [and] skin color." App. 33. The *Raynor* majority eliminated any distinction between readily apparent characteristics and characteristics hidden in one's cells that can only be accessed with cutting-edge technology.

C. The State does not need to invade Petitioner's body to implicate the Fourth Amendment. The *Raynor* majority ignored *Kyllo*'s reasoning.

In *Kyllo*, the question before this Court was "what limits are upon th[e] power of technology to shrink the realm of guaranteed privacy." 533 U.S. at 34. In *Kyllo*, officers sat in a vehicle across the street from the Defendant's home. *Id.* at 30. They used an imaging device to detect infrared radiation, which was otherwise invisible to the naked eye, to produce images depicting how much heat emanated from the home. *Id.* at 29.

This Court explained that the Defendant unquestionably had a reasonable expectation of privacy, "with roots deep in the common law," in the inside of his home. *Id.* Regarding thermal imaging, which was by no means "routine," *id.* at 39 n.6, this Court concluded:

> [O]btaining by sense enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," constitutes a search – at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government

> that existed when the Fourth Amendment was adopted.

Id. at 34 (citations omitted).

This Court stated that it was irrelevant that the heat emanating from the home could have been discovered through other means. *Id.* at 35 n.2. This Court recognized the need for a bright line specifying which "methods of surveillance" were constitutional, *id.* at 40, and held that the particular technology used violated the Fourth Amendment. *Id.* at 35.

It was also irrelevant that the imaging device detected heat emanating from the home's outside wall, and not from its internal surfaces. *Id.* at 35. The outside-versus-inside approach was a "mechanical interpretation" of the Fourth Amendment, which this Court rejected in *Katz*. *Id.* at 35-36. In *Kyllo*, this Court refused to leave the homeowner "at the mercy of advancing technology." *Id.* at 36.

The Defendant's reasonable expectation of privacy was violated because the character of the technology permitted the Government to see what it otherwise could not see in the Defendant's home. The degree to which the Government's technology intruded was irrelevant because the very nature of the investigative technique intruded upon the Defendant's reasonable expectation of privacy. *See id.* at 38 n.5 ("[T]he . . . focus not upon intimacy but upon otherwise-imperceptibility . . . is precisely the principle we vindicate today.").

The *Raynor* majority briefly and obtusely dismissed *Kyllo*. The majority stated that *Kyllo* prohibited only "in effect, a substitute for a physical trespass into the home." App. 32. Thus, the majority held that no Fourth Amendment search occurred in this case because DNA profiling technology was not used "as a substitute for a 'trespass' on or into Petitioner's body."[4]

Covertly collecting and analyzing involuntarily shed DNA is precisely a substitute for a physical trespass into Petitioner's body. Involuntarily shed DNA is a tangible part of Petitioner's person. It is estimated that a person sheds about 100 pounds of DNA-containing material in a lifetime and about 30,000 DNA-containing skin cells per hour. Sheldon Krimsky & Tania Simoncelli, *Genetic Justice: DNA Databanks, Criminal Investigations, and Civil Liberties* 117 (2011). The police observed Petitioner's genetic make-up at the sub-cellular level. When the Fourth Amendment was adopted, the police would have had to intrude into the body to discover anything about Petitioner's genetic or biological make-up. Even today, bodily intrusion is the method

[4] The majority assumed that covert DNA profiling was not in "general public use." App. 30-31. In *Florida v. Jardines*, 133 S. Ct. 1409, 1419, 1420 (2013) (Kagan, J., concurring), Justice Kagan stated that technology not in "general public use," under *Kyllo*, may be crude or sophisticated, and old or new. Thus, if a canine sniff dog would qualify as technology not in "general public use," *id.*, DNA profiling certainly qualifies as not in public use.

by which most DNA profiling occurs. The *Raynor* majority's interpretation of *Kyllo* should be reviewed because covert, involuntary DNA sampling accomplishes, as to the person, the exact same thing that thermal imaging accomplished, as to the home, in *Kyllo*.

D. The State does not need to analyze Petitioner's entire genome to implicate the Fourth Amendment. Petitioner's DNA is inherently private.

In *Skinner*, federal regulations required railroad employees who were involved in rail accidents to provide blood and urine samples to be "analyzed using 'state-of-the-art equipment and techniques' to detect and measure alcohol and drugs." 489 U.S. at 609-10. This Court held that, once a blood sample was collected, "[t]he ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests." *Id.* at 616 (citing *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987)). Additionally, this Court held that collecting and testing urine, which did not require physical intrusion into the body, was a search, because "chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic." *Id.* at 617.

In *Ferguson*, this Court held that non-consensual urinalysis tests for narcotics were "undisputably

searches," even when the Government lawfully obtained the urine to be tested without forcible compulsion. 532 U.S. at 76.

The *Raynor* majority's conclusion that the DNA profiling in this case was not as intrusive as the narcotics testing in *Skinner*, App. 24-25, is (1) incorrect, and (2) not the talisman of Fourth Amendment applicability. The collection and analysis in *Skinner* was much narrower than the collection, analysis, and comparison of Petitioner's DNA. In *Skinner*, the tests were designed to detect only illegal substances, in which this Court has otherwise held that the Defendant had no reasonable expectation of privacy. *See Illinois v. Caballes*, 543 U.S. 405, 410 (2005); *United States v. Jacobsen*, 466 U.S. 109, 123 (1984); *United States v. Place*, 462 U.S. 696, 707 (1983). DNA profiling reveals more than contraband. DNA reveals "lawful activity," *Caballes*, 543 U.S. at 410 (citing *Kyllo*, 533 U.S. at 38), in the context of a person's cellular make-up and cellular activity. *Accord* Presidential Comm'n for the Study of Bioethical Issues, *Privacy and Progress in Whole Genome Sequencing* 24 (2012), *available at* http://bioethics.gov/sites/default/files/PrivacyProgress508.pdf ("More than other medical information, such as X-rays, our genomes reveal something both objectively more comprehensive and subjectively . . . more fundamental about who we are, where we came from, and the health twists and turns that life might have in store for us.").

More fundamentally troubling is that the *Raynor* majority announced a Fourth Amendment framework for DNA in which the Fourth Amendment protects only against the most severe privacy intrusions into one's genetic privacy, a formulation that will "keep Defendants and Judges guessing for years to come." *Riley*, 134 S. Ct. at 2493.

In *Riley*, police were required to obtain a warrant before searching a cell phone that was validly collected incident to a lawful arrest because of the vast amount of information that was *potentially* available in the phone, not the amount of information that was actually discovered in that particular case. *Id.* at 2494.[5]

Riley swept aside the government's proposed rule that police officers be permitted to restrict their warrantless searches of cell phones to certain relevant areas "where an officer reasonably believes that information relevant to the crime, the arrestee's identity, or officer safety will be discovered." *Id.* at 2492. Instead, this Court stated: "Rather than requiring . . . 'case-by-case adjudication' . . . we ask instead whether application of the search incident to

[5] In *Riley*, the police found a picture, a video, and a call log that implicated the Defendants. These pieces of information were relatively benign in comparison to the massive amount of private information about one's associations, whereabouts, tastes, and even medical information accessible in a cell phone, on which this Court relied in categorically distinguishing cell phones.

arrest doctrine to this particular category of effects would 'untether the rule from the justifications underlying the [search incident to arrest] exception," *Id.* at 2485 (quoting *Arizona v. Gant*, 556 U.S. 332, 343 (2009)). This Court held that "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Id.* at 2488-89.

Additionally, this Court rejected the Government's argument that, at a minimum, call logs should be searchable. *Id.* at 2492. This Court held that call logs were protected because they revealed not only phone numbers, but "identifying information," *id.* at 2493, which conflicts with the *Raynor* majority's statement that, when DNA is used for "identification purposes only," no expectation of privacy is infringed. App. 29; *Cf. Texas v. Brown*, 443 U.S. 47, 52 (1979) (requiring police to have reasonable suspicion before they may require a free citizen to identity oneself).

This Court also applied the Fourth Amendment to law enforcement's *access* to information in *Jones*. This Court held that police placing a GPS device on a vehicle, when parked in public, and monitoring its movements for twenty-eight days without a warrant, violated the Fourth Amendment. 132 S. Ct. at 951. Even though Justice Scalia's opinion focused on the trespass on the Defendant's vehicle, a majority of concurring Justices agreed that, under *Katz*, the GPS monitoring invaded a reasonable expectation of privacy because of the tremendous amount of

information about an individual's whereabouts and associations that was capable of being collected. *Id*. at 954-56 (Sotomayor, J., concurring); *id.* at 957-64 (Alito, J., concurring).

This Court should grant certiorari in this case to clarify its reasonable expectation of privacy jurisprudence because cutting-edge technology will continue to allow law enforcement to investigate in ways that, while remote and not physically invasive, intrude on basic assumptions about personal security in public places.[6]

E. Collectively, *Raynor*'s fragmented, mechanical Fourth Amendment analysis threatens the vitality of the *Katz* reasonable expectation of privacy test.

The fundamental premise of *Katz* is that the Fourth Amendment protects people, not places, and that certain law enforcement techniques, by their nature, upset society's sense of personal security in a free society. The preceding analysis demonstrates that the *Raynor* majority mechanically relied on (1)

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[6] For example, the Fourth Circuit and the en banc Eleventh Circuit are considering whether retrieving historical cellular tower location data, which discloses the same information obtained in *Jones* without a physical trespass, is a search. *United States v. Graham*, No. 12-4659 (4th Cir.) (Oral argument heard, Dec. 11, 2014); *Davis v. United States*, 754 F.3d 1205 (11th Cir. 2014), *reh'g en banc granted, op. vac'd*, 573 Fed. Appx. 925 (mem.).

lawful police possession of the item from which DNA was obtained; (2) the notion of DNA as a "physical characteristic" merely because it has the potential to identify Petitioner; (3) the lack of bodily intrusion; and (4) the purportedly limited information contained in a 13-loci forensic DNA profile. However, the majority dismissed, with no explanation, Petitioner's argument that sanctioning DNA profiling of involuntarily shed DNA would deeply upset society's basic assumptions about personal security in public places.

The majority assumed that no ordinary citizen enters a public place reasonably believing that he or she has exhibited their genetic make-up to law enforcement. Nonetheless, the majority relied on *State v. Athan*, 160 Wash. 2d 354, 374, 158 P.3d 27, 37 (Wash. 2007) (en banc), in which the Supreme Court of Washington went so far as to proclaim that "the police may surreptitiously follow a suspect to collect DNA, fingerprints, footprints, or other possibly incriminating evidence, without violating that suspect's privacy." App. 29-30. The cutting-edge technology used in this case, which permitted police to collect raw bodily fluids, and subsequently scrutinize Petitioner's genetic make-up in a laboratory, promotes the type of constant following that clearly threatens one's personal security.

Furthermore, the *Raynor* majority unnecessarily separated the collection of Petitioner's bodily fluids from extracting a DNA sample, developing a DNA profile, and comparing that profile to other profiles.

In *Jones*, Justice Scalia described the futility of attempting to break police conduct into a series of small events when conducting a *Katz* analysis. 132 S. Ct. at 951. In *Jones*, Justice Alito's concurrence argued that, if analyzed separately, neither installing the GPS device, nor obtaining information about the Defendant's whereabouts after it was installed, would constitute a Fourth Amendment search. *Id.* at 958-59 (Alito, J., concurring). Justice Scalia responded: "[A] *Katz* invasion of privacy is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by . . . [an] invasion of privacy." *Id.* at 951 n.5. The *Raynor* majority missed this point when it segregated the collection and analysis into discrete acts.

III. The Fourth Amendment status of free citizens' DNA is an issue of national importance. Rejecting a reasonable expectation of privacy in free citizens' DNA will fundamentally alter the relationship between law enforcement and the general citizenry.

"A DNA sample contains the entire human genome, 'the total of all [a] person's genetic information.'" *People v. Buza*, 180 Cal. Rptr. 3d 753, 772, 231 Cal. App. 4th 1446, 1469 (Cal. Ct. App. 2014). DNA profiling is likely the most debated, the most newsworthy, and the most funded criminal investigation technique in history. Forensic DNA testing has been the subject of public opinion polling

about privacy. *See, e.g.*, Scherr, *supra*, at 513 (discussing a public opinion survey in which more than half of those polled distrusted law enforcement's use of their DNA). It may even be a tool in diplomacy. *See* Eriq Gardner, *Gene Swipe: Few DNA Labs Know Whether Chromosomes are Yours or if You Stole Them*, ABA Journal (Aug. 1, 2011, 8:40 AM), http://www.abajournal.com/magazine/article/gene_swipe_few_dna_labs_know_whether_chromosomes_are_yours_or_if_you_stole_/ (reporting that WikiLeaks disclosed that the U.S. State Department sought to surreptitiously collect DNA from world leaders).

"Indeed, there is at least a growing consensus, if not near unanimity, among bioethicists, medical professionals, and policy makers that an individual's DNA is a private matter." Krimsky & Simoncelli, *supra*, at 113. However, the *Raynor* majority's approval of law enforcement surreptitiously collecting involuntarily shed DNA profiles opens a "backdoor to population-wide data banking." Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 Nw. U. L. Rev. 857, 874 (2006).

In the near future, even before courts fully explore the privacy ramifications of current forensic DNA science, and even before lower courts decide the limits of *King*, forensic DNA science will expand in ways that exacerbate genetic privacy concerns. Professor Joh explained that expanding forensic DNA science is the norm, not the exception:

> If such projection sounds like an Orwellian fantasy, historical experience has proven how "function creep" has altered and expanded the uses of other identification practices. The Social Security number is the most prominent example of an identifier now used for purposes not originally intended. Although originally meant solely to track the contributions of working Americans in order to calculate retirement benefits, the Social Security number today is a de facto substitute for a national identity card. Even fingerprinting, the dominant method of criminal identification in the twentieth century, was originally intended as a system of recordkeeping for civil, not criminal, purposes.

Joh, *supra*, at 879. Thus, forensic DNA science creates the palpable risk that the Fourth Amendment can be "whittled away by sometimes imperceptible steps," *Osborn v. United States*, 385 U.S. 323, 343 (1966) (Douglas, J., dissenting), because "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure," *Boyd v. United States*, 116 U.S. 616, 635 (1886).

One growing concern is that DNA profiles of individuals like Petitioner, whose DNA analysis was not governed by a state or federal collection statute,

are uploaded to unregulated databases. Scherr, *supra*, at 473-74. The FBI's Combined DNA Index System (CODIS) software allows comparison of DNA profiles across multiple databases consisting of (1) known samples of convicted felons, probationers, parolees, and arrestees, and (2) unidentified samples collected from crime scenes, both of which are subject to statutory prohibitions on misuse and disclosure.

Involuntarily shed DNA that is surreptitiously collected from a known person is often maintained, at the local level only, in an unregulated suspect database. *Id.* Unregulated databases (1) are not governed by federal genetic privacy law because they do not qualify for inclusion in CODIS, and (2) are typically not governed by state genetic privacy laws. *Id.*; *State laws pertaining to surreptitious DNA testing*, Genetics & Public Policy Center, http://www.dnapolicy.org/resources/State_law_summaries_final_all_states.pdf. Petitioner's DNA was not subject to Maryland's statutory protections against misuse and disclosure. App. 41-42 (Adkins, J., dissenting); *accord Varriale v. State*, 218 Md. App. 47, 56-59, 96 A.3d 793, 798-800 (2014), *cert. granted*, Pet. Docket No. 426 (Md. Dec. 19, 2014) (holding that the protections in Maryland's DNA collection statute did not apply to DNA obtained from a free citizen). Thus, unregulated databases permit police to make arbitrary decisions about whose DNA to analyze, and about what type of testing to perform. *See* Stephen Mercer & Jessica Gabel, *Shadow Dwellers: The Underregulated World of State and Local DNA*

Databases, 69 N.Y.U. Ann. Surv. Am. L. 639 (forthcoming 2014). Not surprisingly, law enforcement, in the "competitive enterprise of ferreting out crime," *King*, 133 S. Ct. at 1970 (quoting *Terry v. Ohio*, 392 U.S. 1, 12 (1968)), has already attempted to bypass the statutory limitations that alleviated privacy concerns in *King*.

Another aspect of law enforcement's incremental intrusion on privacy is "familial searching." *See generally* Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291 (2010). Several states investigate whether an identified 13-loci forensic DNA profile partially matches an unidentified profile in the database. *See* Natalie Ram, *Fortuity and Forensic Familial Identification*, 63 Stan. L. Rev. 751 (2011). A partial match indicates that the source of the unknown DNA is likely a family member of the known profilee, although partial matches often occur between unrelated individuals. Thus, law enforcement is already expanding what can be discovered with Petitioner's purportedly "junk" loci. *See* Brief of Amici Curiae Electronic Privacy Information Center and Twenty-Six Technical Experts and Legal Scholars in Support of Respondent at 14-24, *Maryland v. King*, 133 S. Ct. 1958 (2013) (No. 12-207), 2013 WL 432945, at *14-24 (reviewing scholarly and medical literature discrediting the notion that a standard 13-loci forensic DNA profile is merely "junk" DNA).

Inevitably, expanding forensic DNA science means that:

> We may be heading toward a "genetic panopticon," [*King*, 133 S. Ct. at 1990 (Scalia, J., dissenting)], with all the innuendos of oppression that the term suggests, or we may be moving toward a society in which having a DNA profile will . . . become as common as having a [cell phone] number or email address: inconvenient sometimes, but tolerable because it is perceived as highly useful.

Elizabeth E. Joh, *Maryland v. King: Policing and Genetic Privacy*, 11 Ohio St. J. Crim. L. 281, 294 (2013).

CONCLUSION

Because (1) *King* does not apply to ordinary citizens, (2) the *Raynor* majority announced a mechanical, unworkable Fourth Amendment framework for DNA, and (3) technological limits are currently the only limits on expanding forensic DNA

science, Petitioner respectfully requests this Court to issue a Writ of Certiorari.

Respectfully submitted,

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Circuit Court for Harford County
Case No. 12-K-08-001527
Argued: April 8, 2014

IN THE COURT OF APPEALS
OF MARYLAND

No. 69

September Term, 2012

GLENN JOSEPH RAYNOR

v.

STATE OF MARYLAND

Barbera, C.J.,
Harrell
Battaglia
Greene
Adkins
McDonald
McAuliffe, John F. (Retired, Specially Assigned),

JJ.

Opinion by Barbera, C.J.
Harrell, Greene, and Adkins, J.J., dissent

Filed: August 27, 2014

This appeal has its genesis in the commission of a rape in 2006. More than two years later, the victim of the rape contacted the police and explained that she suspected that Petitioner, Glenn Joseph Raynor, had been the perpetrator. Shortly thereafter, Petitioner agreed to the request of the police to come to the police station for an interview. At some point during the interview, the police requested Petitioner's consent to the taking of a DNA sample for comparison to DNA evidence collected at the scene of the rape. He declined. Minutes after the interview concluded and Petitioner had departed the station, the police, who had noticed Petitioner rubbing his bare arms against the armrests of the chair in which he had been seated, took swabs of the armrests in an attempt to collect his DNA. The police submitted those swabs to the crime lab for DNA analysis, which revealed that the DNA extracted from the swabs matched DNA samples investigators had collected from the scene of the rape.

Further investigation ensued and, eventually, Petitioner was charged with first-degree rape and related offenses. He filed a pre-trial motion seeking suppression of the DNA evidence and all evidence derived therefrom, arguing that the warrantless collection and testing of cellular material that he shed during his interview at the police station violated his right under the Fourth Amendment to be free from unreasonable searches and seizures. The suppression court denied the motion, having concluded that Petitioner had no reasonable expectation of privacy in the

DNA evidence left on the chair. The Court of Special Appeals agreed with that ruling.

Petitioner no longer disputes, as he did before the suppression court, that the police lawfully obtained his DNA from the armrests of the chair in the station, and we assume, solely for purposes of our present analysis, that the police were not required to have a warrant or individualized suspicion of Petitioner's commission of the rape before collecting those DNA samples. Accordingly, the only legal question before us is whether analysis by the police of the 13 identifying "junk" loci contained within Petitioner's DNA was a search for purposes of the Fourth Amendment. For reasons we shall explain, we hold that the DNA testing at issue in the present case was not a search under the Fourth Amendment.

I.

The rape occurred in Bel Air, Harford County, Maryland during the early morning hours of April 2, 2006. The facts material to its commission and the police investigation that followed are undisputed. At approximately 5:00 a.m., the perpetrator broke into the home of the victim[1] through a patio door that led to the basement. Shortly thereafter, the perpetrator entered the victim's bedroom, raped her repeatedly, and fled the scene. The victim did not see

[1] We do not use the victim's name or initials in an effort to protect her privacy.

her attacker's face because, upon entering the bedroom, he pressed a pillow against her face and blindfolded her with his t-shirt. The victim noticed, however, that her attacker was Caucasian, had a medium build, and emanated a "metallic scent."

After the perpetrator fled, the victim ran to her neighbor's home, where she reported the rape to the police. Investigators responded to the victim's home and a crime scene technician processed it for evidence. The technician collected material possibly containing DNA, including blood from a pillow found in the victim's bedroom and the area near the door through which the perpetrator had entered. Meanwhile, a police officer accompanied the victim to the hospital where she underwent a rape examination, during which a nurse took vaginal and anal swabs.

The victim contacted the police on numerous occasions throughout the next two years to inform them about potential suspects. During that time, the police obtained consensual DNA samples from approximately 20 individuals with possible connections to the 2006 rape, including several of the victim's neighbors. None of those DNA samples matched the DNA collected from the victim's home on the day of the rape.

In July 2008, the victim contacted the lead investigator assigned to the case, Trooper First Class Dana Wenger, to report her suspicion that Petitioner was the rapist. The victim explained that she and Petitioner had gone to school together, he was the previous owner of the home in which the rape occurred,

and his body type matched that of the man who raped her. Approximately two weeks later, Trooper Wenger left a note at Petitioner's home asking him to contact her. A few days later, Petitioner called the trooper and agreed to come to the station later that day to answer questions related to the rape investigation.

Upon Petitioner's arrival at the station, Trooper Wenger escorted him to a vacant office and directed him to have a seat. Shortly thereafter, Sergeant James DeCourcey entered the room and a 30-minute interview ensued. The officers noted during the interview that Petitioner, who was wearing a short-sleeved shirt, repeatedly rubbed his bare arms against the armrests of his chair, and his body carried a metallic odor similar to the odor the victim had described smelling during the rape.

At some point during the interview, Trooper Wenger asked Petitioner for his consent to the taking of a DNA swab of his mouth. Petitioner responded that he would consent only if the police agreed to destroy the DNA sample after they concluded their investigation of the rape. When the police declined to give that assurance, Petitioner refused to provide a DNA sample, and the interview concluded.

Minutes after Trooper Wenger escorted Petitioner out of the station, Sergeant DeCourcey took swabs of the armrests of the chair in which Petitioner had sat during the interview, sealed those swabs in an envelope, and placed them in an evidence locker. Two days later, Trooper Wenger submitted the swabs to the

Maryland State Police Forensic Sciences Division laboratory for DNA analysis. The analysis revealed that the DNA extracted from the swabs of the armrests matched the DNA extracted from blood collected at the scene of the rape.

Trooper Wenger relied upon the results of the lab's DNA analysis, as well as other evidence the police had gathered during their investigation, in applying for and obtaining warrants to arrest Petitioner, collect an additional DNA sample, and search his home. After arresting Petitioner, the police transported him to the station, interviewed him, and, at some point, took a DNA sample via a buccal swab. That DNA sample, like the DNA samples collected from the chair in the police station, matched DNA collected from the victim's home on the day of the rape. A second DNA analysis of the buccal swab revealed a match to DNA extracted from the vaginal and anal swabs obtained during the victim's rape examination.

The State charged Petitioner with several counts of rape, assault, burglary, and related crimes. He was tried before a jury, which heard the results of the DNA analyses and other evidence linking him to the crimes. The jury found Petitioner guilty of two counts of rape and related crimes, for which the court sentenced him to a total of 100 years' imprisonment.

The Suppression Hearing

Petitioner filed a pre-trial motion to suppress the DNA evidence the police obtained from the chair in the police station, and the fruits derived therefrom.[2] He argued that the police violated his right under the Fourth Amendment to be free from unreasonable searches and seizures, by seizing his genetic material[3] from the armrests of the chair and then searching that material for the 13 loci on the DNA strand that allowed the police to connect him to the rape. He claimed in the alternative that, even if the police officer's obtaining his genetic material by swabbing the chair was not an unlawful seizure for purposes of the Fourth Amendment, the police nonetheless conducted a separate search that violated the Fourth Amendment when they performed a DNA analysis of the material.[4]

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[2] Petitioner asserted that the warrants to arrest him, collect an additional DNA sample, and search his home were predicated upon the DNA evidence obtained from the armrests of the chair in the police station. He thus sought suppression of any statements he made to police after his arrest, the DNA sample police took after his arrest, and any evidence recovered from his home pursuant to the search warrant.

[3] Petitioner uses this phrase to describe the perspiration and/or skin cells he shed onto the armrests of the chair during his interview in the police station. For the purposes of our discussion, we shall adopt, in certain places, the term "genetic material."

[4] In support of that argument, Petitioner relied upon the so-called "container cases." *E.g., United States v. Chadwick,* 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). He reasoned that

(Continued on following page)

The suppression court denied the motion, reasoning in pertinent part:

> [D]oes [the] Fourth Amendment apply at all in this case? . . . This is a very simple matter as I see it. Does he have a reasonable expectation of privacy that society is prepared to recognize of what's left [on] a chair when he gets up and leaves? The answer to that as far as I am concerned is no, he has no such expectation of privacy. He is in a public building. . . . Yes, he refused [to submit voluntarily a DNA sample], there is no doubt about that. He refused to give consent. So when he refuses to give consent, does that mean that if the police can get [a DNA sample] some other way, they can't use it? Of course not.
>
> * * *
>
> So I think that the seizure of the sample did not violate the Fourth Amendment at all because I don't think the Fourth Amendment applies in this situation because I don't think he had any reasonable expectation of privacy with regard to the [genetic material] he left on the chair.
>
> * * *

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the genetic material he deposited on the chair was a closed "container" with no independent value to the police and that, to "open" the container to reveal its contents, namely Petitioner's DNA, the police were required to obtain a warrant. The suppression court rejected that theory and, as we shall see, Petitioner does not rely upon that argument on appeal.

> I don't think DNA is any different in terms of leaving it anywhere than a fingerprint [or] than if he walks out of the [police station] and somebody takes his photograph. He is sitting in there and [the police] ask can we take a picture of you . . . to have other people look at it. He says no. . . . So [he] walks outside the [station], is standing on the sidewalk, and they take his picture. He is in a public place. When he goes in there, does he have any expectation that anything he leaves that he is going to continue to have a privacy right in it? I don't think so. And because I don't think so, because I don't think the Fourth Amendment applies at all, because I don't think he had any reasonable expectation [of privacy] . . . that society is prepared to recognize as reasonable, then the same logic applies because the use of [the DNA evidence] to obtain the search warrants also is perfectly legitimate.
>
> * * *
>
> So the Motion to Suppress is going to be denied. . . .

The Appeal

On appeal to the Court of Special Appeals, Petitioner contended that, in the absence of a proper warrant, the police were prohibited from "analyzing the swab they took from the chair, developing a DNA profile, and comparing it to the DNA recovered from the crime scene." *Raynor v. State,* 201 Md. App. 209,

217 (2011). The Court of Special Appeals held that the Fourth Amendment did not apply to the testing of the genetic material Petitioner left on the chair, reasoning that Petitioner's DNA profile was used for identification purposes only and he had "no objectively reasonable expectation of privacy in the identifying characteristics that could be gleaned from the normal biological residue he left behind." *Id.* at 225. The court relied upon certain similarities between DNA evidence and fingerprints: "[L]ike the analysis of a latent fingerprint, which involves no physical intrusion into the body and is used for identification purposes only, the analysis in the instant case of DNA evidence . . . was not a constitutionally protected search." *Id.* at 222.

We granted Petitioner's petition for a writ of certiorari to consider the following questions posed by Petitioner:[5]

> 1. Whether, under the Fourth Amendment . . . ,[6] a free citizen maintains an objectively reasonable

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[5] In November 2012, after having granted certiorari, we stayed the present appeal pending resolution by the Supreme Court of the United States of *Maryland v. King,* 133 S. Ct. 1958 (2013). We lifted the stay in August 2013, shortly after the Supreme Court issued its opinion in *King*.

[6] Petitioner argued in his petition for writ of certiorari that Article 26 of the Maryland Declaration of Rights provides an independent basis for reversal of the judgment of the Court of Special Appeals. Yet, in his briefs to this Court, Petitioner explains that he does "not endeavor[ ] to address Article 26 as an independent basis for reversal."

> expectation of privacy in the DNA found in genetic material involuntarily and unknowingly deposited through ordinary biological processes?
>
> 2. Whether, under the Fourth Amendment . . . , the determination of an individual's expectation of privacy requires consideration of the privacy interest in the information obtained, and not just the privacy interest in the place in which it was found?

We also granted the State's conditional cross-petition, which asks, assuming the Fourth Amendment applies, whether the testing of Petitioner's genetic material constituted a limited intrusion justified by reasonable suspicion that he had committed the rape and, if not, whether the police conduct in this case compels application of the Fourth Amendment exclusionary rule. Given our disposition of the case on the basis of the threshold questions presented by Petitioner, we need not, and therefore do not, reach the questions the State presents in its conditional cross-petition.

II.

In reviewing the denial of a motion to suppress evidence, as we do here, "we must rely solely upon the record developed at the suppression hearing." *See Briscoe v. State,* 422 Md. 384, 396 (2011). "We view the evidence and inferences that may be drawn therefrom in the light most favorable to the party who prevails on the motion," *id.,* here, the State. We accept

the suppression court's factual findings unless they are shown to be clearly erroneous. *Id.* We, however, make our own independent constitutional appraisal of the suppression court's ruling, by applying the law to the facts found by that court. *Id.*

None of the evidence pertinent to the legal issue raised in the present appeal is disputed and the suppression court's ruling reflects its having credited the testimony of Trooper Wenger and Sergeant DeCourcey. We therefore accept the officers' testimony related to the collection and testing of Petitioner's genetic material as we analyze the parties' legal arguments.

III.

We begin our discussion by clarifying what legal issue is *not* before us. In his briefs to this Court, Petitioner argues, as he did before the suppression court, that the Fourth Amendment required the police to obtain warrants authorizing both the collection of the genetic material from the armrests of the chair and the DNA testing of that material. During oral argument before us, however, Petitioner, through counsel, stated "for the sake of this discussion, we would concede that, fine, . . . it was okay for [the police] to take the stuff off of their chair." Counsel further conceded that "it really does not matter that much whether it gets analyzed as a one-step process or a two-step process" because "[t]he obvious real issue in this case is the content of what [the police] got

when they used their technology to analyze [Petitioner's DNA]." Given Petitioner's concession that the police lawfully obtained his genetic material from the armrests of the chair, the precise question for decision is whether law enforcement's testing of the identifying loci within that DNA material for the purpose of determining whether those loci match that of DNA left at a crime scene constitutes a search under the Fourth Amendment.

The Fourth Amendment to the Constitution of the United States provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." Recently, in *Maryland v. King,* 133 S. Ct. 1958 (2013), the Supreme Court held "that using a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search" for purposes of the Fourth Amendment, reasoning that "[v]irtually any intrusio[n] into the human body . . . will work an invasion of cherished personal security that is subject to constitutional scrutiny." *Id.* at 1968-69 (quotations and citations omitted). The Court did not decide explicitly whether the testing of the 13 identifying loci the police later extracted from King's DNA sample required a separate Fourth Amendment analysis, and how, if at all, the analysis would have differed had the police obtained King's DNA absent a physical intrusion into his body.

The case at bar implicates those questions left unanswered in *King.* For reasons we shall explain, we

hold that law enforcement's analysis of the 13 identifying loci within Petitioner's DNA left behind on the chair at the police station, in order to determine a match with the DNA the police collected from the scene of the rape, was not a search, as that term is employed in Fourth Amendment parlance.

IV.

It is bedrock constitutional law "that the rights accorded by the Fourth Amendment 'are implicated only if the conduct of the [government] officials at issue . . . infringed an expectation of privacy that society is prepared to consider reasonable.'" *Walker v. State,* 432 Md. 587, 605 (2013) (quoting *O'Connor v. Ortega,* 480 U.S. 709, 715 (1987) (plurality opinion)). The test for ascertaining whether a particular form of conduct is a search for purposes of the Fourth Amendment is often referred to as the *Katz* test, so named for *Katz v. United States,* 389 U.S. 347 (1967), the case in which Justice Harlan's much-quoted concurrence described the test. *See id.* at 361 (Harlan, J., concurring). Justice Harlan's formulation remains the lodestar for determining whether police conduct is a search for purposes of the Fourth Amendment. *See, e.g., Kyllo v. United States,* 533 U.S. 27, 33 (2001) ("[A] Fourth Amendment search occurs when the

government violates a subjective expectation of privacy that society recognizes as reasonable.").[7]

The *Katz* test consists of two parts, "each of which must be satisfied in order for the Fourth Amendment to apply: (1) a defendant must 'demonstrate an actual, subjective expectation of privacy in the item or place searched' and (2) 'prove that the expectation is one that society is prepared to recognize as reasonable.'" *Walker,* 432 Md. at 605 (quoting *Corbin v. State,* 428 Md. 488, 499 (2012)); *see also Williamson v. State,* 413 Md. 521, 534 (2010). "A person demonstrates a subjective expectation of privacy by showing that he or she sought 'to preserve something as private.'" *Williamson,* 413 Md. at 535 (quoting *McFarlin v. State,* 409 Md. 391, 404 (2009)). An objectively reasonable expectation of privacy, by contrast, has "'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by

[7] We do not overlook *United States v. Jones,* 132 S. Ct. 945 (2012), in which the Supreme Court resorted to a property-based approach to determine whether a Fourth Amendment search had occurred. The Court's reliance upon principles of trespass law in *Jones* has not displaced the "reasonable expectation of privacy" test set forth in *Katz.* Indeed, the *Jones* Court made clear that "we do not make trespass the exclusive test" and "where a classic trespassory search is not involved . . . resort must be had to *Katz* analysis." 132 S. Ct. at 953-54; *see also Florida v. Jardines,* 133 S. Ct. 1409, 1417 (2013) (stating that "[t]he *Katz* reasonable-expectations test 'has been *added to* . . . ' the traditional property-based understanding of the Fourth Amendment") (quoting *Jones,* 132 S. Ct. at 952).

society,' and constitutes 'more than a subjective expectation of not being discovered.' " *Id.* (quoting *Rakas v. Illinois,* 439 U.S. 128, 143-44 n.12 (1978)). "We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable." *Ortega,* 480 U.S. at 715. Nonetheless, common experience and social norms bear upon our assessment of whether one has an objectively reasonable expectation of privacy in a particular item or place. *See California v. Greenwood,* 486 U.S. 35, 51 n.3 (1988) ("Expectations of privacy are established by general social norms.") (citation omitted); 1 Wayne R. LaFave, Search and Seizure § 2.1(d), at 587 (5th ed. 2012) ("[I]t is necessary to look to the customs and values of the past and present. . . . [,] the structure of society, the patterns of interaction, [and] the web of norms and values.") (quotations and citations omitted).

Petitioner relies upon the *Katz* test to argue that the analysis of the identifying loci within his DNA implicated the protections of the Fourth Amendment. He first claims that he demonstrated a subjective expectation of privacy in his DNA when, during the course of his interview with Trooper Wenger and Sergeant DeCourcey, he declined to consent to the taking of a DNA sample, thereby asserting a belief that "his genetic markers would not be inspected." The State accepts as much, and so do we.

Petitioner further claims, as he must for his argument to prevail, that his expectation of privacy in his DNA, under these circumstances, was objectively

reasonable. In making that argument, he urges us to "focus . . . squarely on the 'treasure map' . . . of information capable of being culled from" one's DNA. He claims that, contrary to the conclusion of the Court of Special Appeals, individuals have a "much greater" expectation of privacy in their DNA than their fingerprints because DNA contains "a massive amount of deeply personal information," including "medical history, family history, disorders, behavioral characteristics, and . . . propensity to . . . commit certain behaviors in the future."

The State counters that Petitioner did not possess an objectively reasonable expectation of privacy in the information the police analyzed because they tested only 13 junk loci, which, unlike other regions of the DNA strand, do not disclose the intimate genetic information about which Petitioner expresses concern. Instead, those loci reveal only information related to a person's identity. In this regard, the State argues, law enforcement's testing of the DNA evidence in this case is indistinguishable from its testing of fingerprints left unknowingly upon surfaces in public places, which does not implicate the protections of the Fourth Amendment.

We agree with the State. The Supreme Court has made clear that one's identifying physical characteristics are generally outside the protection of the Fourth Amendment. *See United States v. Dionisio,* 410 U.S. 1, 14 (1973); *see also State v. Athan,* 158 P.3d 27, 37 (Wash. 2007) (en banc) ("Physical characteristics [that] are exposed to the public are not subject to

Fourth Amendment protection.") (citing *United States v. Mara,* 410 U.S. 19, 21 (1973)). The analysis of such physical characteristics by law enforcement "involves none of the probing into an individual's private life and thoughts that marks" a Fourth Amendment search. *See Dionisio,* 410 U.S. at 15 (citation omitted). Consequently, the character of the information specifically sought and obtained from the DNA testing of Petitioner's genetic material – whether it revealed only identifying physical characteristics – is paramount in assessing the objective reasonableness of his asserted privacy interest.

With the advent of DNA testing technology, law enforcement has a highly effective means of identifying an individual as "unique" in the general population and thereby identifying, or excluding, a criminal suspect as the actor in the commission of a crime. *King,* 133 S. Ct. at 1966 (noting the view among "law enforcement, the defense bar, and the courts" of "DNA testing's 'unparalleled ability both to exonerate the wrongly convicted and to identify the guilty' ") (quoting *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne,* 557 U.S. 52, 55 (2009)). As described in *King,* "[t]he current standard for forensic DNA testing relies on an analysis of the chromosomes located within the nucleus of all human cells. The DNA material in chromosomes is composed of 'coding' and 'non-coding' regions." *Id.* at 1966-67 (quotations and citation omitted). Coding regions – otherwise known as genes – "contain the information necessary for a cell to make proteins." *Id.* at 1967 (citation omitted).

Non-coding regions, which do not relate directly to the production of proteins, are generally referred to as junk DNA; it is these regions of junk DNA that are "used with near certainty to identify a person." *Id.* Although highly useful for identification purposes, junk DNA "does not show more far-reaching and complex characteristics like genetic traits." *Id.*; *accord Williamson,* 413 Md. at 543 (noting that the 13 junk loci consist of stretches of DNA that "do not presently recognize traits" and "are not associated with any known physical or medical characteristics") (citation omitted); *State v. Belt,* 179 P.3d 443, 448 (Kan. 2008) ("In essence, the loci are merely addresses. . . .").[8]

Moreover, as noted by the Supreme Court in *King,* there exists no incentive for the police to unveil more intimate information contained in a suspect's

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[8] The *King* Court explained the procedure for conducting forensic DNA analysis: "Many of the patterns found in DNA are shared among all people, so forensic analysis focuses on repeated DNA sequences scattered throughout the human genome, known as 'short tandem repeats' (STRs)." 133 S. Ct. at 1967 (quotations and citation omitted). The analysis involves the examination of "alleles." *See id.* (explaining that "[t]he alternative possibilities for the size and frequency of these STRs at any given point along a strand of DNA are known as 'alleles' . . . and multiple alleles are analyzed in order to ensure that a DNA profile matches only one individual") (citation omitted). The *King* Court observed that "[f]uture refinements may improve present technology, but even now STR analysis makes it 'possible to determine whether a biological tissue matches a suspect with near certainty.'" *Id.* (quoting *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne,* 557 U.S. 52, 62 (2009)).

DNA, even if the police had access to the technology to do so:

> [E]ven if non-coding alleles could provide some [private medical] information, they are not in fact tested for that end. It is undisputed that law enforcement officers analyze DNA for the sole purpose of generating a unique identifying number against which [other] samples may be matched. This parallels a similar safeguard based on actual practice in the school drug-testing context, where the Court deemed it significant that the tests at issue [in those cases] look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic. If in the future police analyze [DNA] samples to determine, for instance, an arrestee's predisposition for a particular disease or other hereditary factors not relevant to identity, *that case would present additional privacy concerns not present here.*

133 S. Ct. at 1979 (quotations and citation omitted) (emphasis added); *see also* Albert E. Scherr, *Genetic Privacy & The Fourth Amendment: Unregulated Surreptitious DNA Harvesting,* 47 Ga. L. Rev. 445, 474 (2013) (acknowledging that "no evidence currently exists" indicating that police analyze DNA samples "for information . . . beyond that provided by the more standard 13-loci . . . testing").

Petitioner does not cite, nor has our research revealed, a case holding that law enforcement's analysis of fingerprints left behind by a potential suspect

implicates the protections of the Fourth Amendment. In fact, the Supreme Court has given, albeit impliedly, the constitutional "go ahead" for such police practices. *See Dionisio,* 410 U.S. at 14-15; *see also Doe v. Poritz,* 662 A.2d 367, 407 (N.J. 1995) (citing *Cupp v. Murphy,* 412 U.S. 291, 295 (1973), and *Dionisio,* 410 U.S. at 14, for the proposition that "no person can have a reasonable expectation of privacy in her fingerprints."). Petitioner, evidently recognizing the Supreme Court's tacit approval of fingerprint testing, argues not that the police in the present case would have been prohibited from analyzing fingerprints he left behind at the station, but rather, that the DNA evidence in the present case is "physically and functionally different than fingerprints," and therefore subject to different treatment under the Fourth Amendment.

We disagree with Petitioner that targeted analysis of the identifying loci within genetic material differs in any meaningful way from analysis of a fingerprint. Indeed, it is generally accepted that analysis of a person's DNA, solely for purposes of identification, reveals no more information about that person than does analysis of his or her latent fingerprints. *King,* 133 S. Ct. at 1963-64 ("The only difference between DNA analysis and fingerprint databases is the unparalleled accuracy DNA provides."); *accord Williamson,* 413 Md. at 542 (noting that DNA tested for identification purposes is "akin to . . . a fingerprint") (citation omitted). In her concurring opinion in *State v. Raines,* 383 Md. 1 (2004), Judge Raker explained

the functional similarities between DNA used for identification purposes and fingerprints:

> DNA type need be no more informative than an ordinary fingerprint. For example, the [13 junk] loci . . . are noncoding, nonregulatory loci that are not linked to any genes in a way that would permit one to discern any socially stigmatizing conditions. The "profile" of an individual's DNA molecule . . . is a series of numbers. The numbers have no meaning except as a representation of molecular sequences at DNA loci that are not indicative of an individual's personal traits or propensities. In this sense, the [13 loci are] very much like a social security number – though it is longer and is assigned by chance, not by the federal government. In itself, the series of numbers can tell nothing about a person. But because the sequence of numbers is so likely to be unique . . . , it can be linked to identifiers such as name, date of birth, or social security number, and used to determine the source of DNA found in the course of criminal investigations. . . .

383 Md. at 45 (Raker, J., concurring) (quoting D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage,* 2003 Wis. L. Rev. 413, 431-32 (2003)).

A number of federal courts and the courts of some of our sister states also recognize the functional similarities between the non-coding regions of DNA and

fingerprint evidence. *E.g., Haskell v. Harris,* 669 F.3d 1049, 1063 (9th Cir. 2012) (stating that "[t]he collection and use of DNA for identification purposes is substantially identical to a law enforcement officer obtaining an arrestee's fingerprints to determine whether he is implicated in another crime"), *aff'd en banc,* 745 F.3d 1269 (9th Cir. 2014); *United States v. Mitchell,* 652 F.3d 387, 412 (3d Cir. 2011) (concluding that "DNA profiles . . . function as 'genetic fingerprints' used only for identification purposes"); *State v. Surge,* 156 P.3d 208, 212 (Wash. 2007) (en banc) (observing that the collection of DNA evidence in that case was "limited to the same purposes as fingerprints, photos, or other identifying information"); *see also* Edward J. Imwinkelried & D.H. Kaye, *DNA Typing: Emerging or Neglected Issues,* 76 Wash. L. Rev. 413, 440 (2001) ("[F]or the present the better course is to treat human cells left in public places like fingerprints in deciding what expectation of privacy is reasonable.").

Petitioner contends that DNA differs from fingerprints because it has the potential to provide more information about a person. Petitioner relies, in part, upon *Skinner v. Railway Labor Executives' Association,* 489 U.S. 602 (1989), and *United States v. Davis,* 690 F.3d 226 (4th Cir. 2012). The Supreme Court held in *Skinner* that the toxicological testing of railroad employees' blood and urine, in order to detect the presence of alcohol or drugs, "intrude[d] upon expectations of privacy that society has long recognized as reasonable" and thus constituted a Fourth

Amendment search. 489 U.S. at 609-10 (noting that the "chemical analysis of the sample to obtain physiological data is a[n] . . . invasion of the tested employee's privacy interests"). In *Davis,* the United States Court of Appeals for the Fourth Circuit, relying upon *Skinner,* held "that the extraction of Davis' DNA sample from his [lawfully seized] clothing and the creation of his dna profile constituted a search for Fourth Amendment purposes." 690 F.3d at 246. The *Davis* Court cited *Skinner* for the following:

> [B]ecause the analysis of biological samples, such as those derived from blood, urine, or other bodily fluids, can reveal "physiological data" and a "host of private medical facts," such analyses may "intrude[ ] upon expectations of privacy that society has long recognized as reasonable." . . . Therefore, such analyses often qualify as a search under the Fourth Amendment. . . . Similarly, an analysis required to obtain a DNA profile, like the chemical analysis of blood and urine at issue in *Skinner,* generally qualifies as a search, because an individual retains a legitimate expectation of privacy in the information obtained from the testing.

Id. at 243-44 (citations omitted). The *Davis* Court added that, at the time police lawfully came into possession of Davis's clothing, he was not under arrest, but rather, a "free person" among the public at large, who enjoys "a greater privacy interest in [his or her] DNA than would persons who have been arrested." *Id.* at 244-45.

Skinner is of little assistance to Petitioner because here, unlike in *Skinner,* the targeted analysis of the 13 identifying loci did not reveal "physiological data" about Petitioner, but rather, revealed only identifying information. For much the same reason, *Davis* offers Petitioner little succor. The *Davis* Court's conclusion that the DNA testing at issue in that case constituted a Fourth Amendment search rested on what may now be a faulty premise, given the discussion in *King* that DNA analysis limited to the 13 junk loci within a person's DNA discloses only such information as identifies with near certainty that person as unique.[9]

Petitioner does not allege that the police in the present case tested any portion of his DNA other than the 13 junk loci, nor does he claim that law enforcement, at present, has the technological capabilities to do so. In short, Petitioner attempts to "evoke images of an oppressive 'Big Brother' cataloguing our most intimate traits," but the reality here is "far less troubling." *Harris,* 669 F.3d at 1059; *accord Williamson,* 413 Md. at 543 (finding that Williamson's argument regarding potential misuse of DNA beyond

[9] For the reasons we have discussed so far, the analysis of the junk loci contained within the DNA collected from the chair is not a Fourth Amendment search because no individual has a reasonable expectation of privacy in his or her identifying physical characteristics. It therefore matters not that, at the time of the analysis, Petitioner was, in the words of *Davis,* a "free person." *United States v. Davis,* 690 F.3d 226, 245 (4th Cir. 2012).

the testing of the 13 junk loci, which was not alleged in the case, did not have "feet").

Petitioner further claims that DNA is distinguishable from fingerprint evidence because it is not visible to the unaided eye, whereas fingerprints left on a surface are more readily apparent. Even so, the fact remains that a fingerprint, like the genetic material swabbed here, has no independent value to the police until it is tested and compared to other, previously collected fingerprints.

Petitioner finally contends that DNA evidence is used for different purposes than are fingerprints, after it is collected. We disagree. It cannot be doubted that "both DNA and fingerprints can be used to link suspects to crime scenes." *Garcia-Torres v. State,* 949 N.E.2d 1229, 1235 (Ind. 2011); *accord Harris,* 669 F.3d at 1063 ("The . . . use of DNA for identification purposes is substantially identical to a law enforcement officer obtaining an arrestee's fingerprints to determine whether he is implicated in another crime."). In the present case, had the police dusted the chair in the police station for Petitioner's fingerprints, that evidence would have been used for the same purpose as his DNA: the police would have analyzed the fingerprints to reveal their identifying characteristics and compared them to any fingerprint evidence collected at the victim's home.[10] The only

[10] During oral argument, Petitioner argued that the police used his DNA for "traditional crime detection" rather than "just

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distinction that reasonably can be drawn is that the DNA test results in the present case directly linked Petitioner not merely to the crime scene but also directly and with certainty to the rape of the victim.

In determining that Petitioner does not possess a reasonable expectation of privacy in the identifying characteristics of his DNA, we continue down a path set forth by this Court in *Williamson v. State, supra.* In that case, Williamson, who was in police custody awaiting booking, discarded on the floor of his jail cell an empty cup out of which he had drunk. 413 Md. at 528. After Williamson was removed from the cell, the police retrieved the discarded cup, submitted it to the crime lab for DNA analysis, and eventually discovered that DNA extracted from the cup matched DNA collected at the scene of a crime committed approximately four years earlier. *Id.* We addressed several theories advanced by Williamson in connection with the officers' collection of the discarded cup and the DNA testing of the genetic material that Williamson had left on it. We concluded, first, that he had abandoned any expectation of privacy in the cup itself, *id.* at 536-38, and, ultimately, that the police did not violate the Fourth Amendment by testing the lawfully

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identification." Other courts have observed, and we agree, that "'[i]dentification' encompasses not merely a person's name, but also other crimes to which the individual is linked." *Haskell v. Harris,* 669 F.3d 1049, 1062 (9th Cir. 2012).

acquired DNA that Williamson had deposited on the discarded cup, *id.* at 547.[11]

We addressed Williamson's contention that he enjoyed a "heightened privacy interest in avoiding DNA testing, because of the amount of information that *could* be revealed." *Id.* at 541 (emphasis added). We rejected the contention, noting that "Williamson's DNA was tested for identification only" and concluding that the DNA-related information disclosed by examination of only the 13 junk loci was akin to the identifying information contained within fingerprints. *See id.* at 542-43.

Petitioner, in arguing that he possessed a reasonable expectation of privacy in his DNA, like Williamson, relies upon the amount of sensitive information police could have unveiled if they misused his DNA for purposes other than identification. *Id.* at 542-43. We acknowledged in *Williamson* that "there may be debate regarding privacy concerns should technological advances permit testing of DNA to glean more information from acquired DNA than mere identification." *Id.* at 543. Those concerns have not been raised in this case. The present case, like *Williamson,* generates

[11] The State does not argue in the present case that Petitioner abandoned any expectation of privacy he might otherwise have in the DNA contained in the material left on the chair, but rather, that Petitioner "never had a privacy interest [in his DNA] to abandon." We therefore do not consider whether Petitioner abandoned an expectation of privacy in the DNA that was tested.

only the question of whether Petitioner had an objectively reasonable privacy interest in the *identifying* characteristics of his DNA.

Some courts in our sister states have taken a similar tack, holding that "the use of DNA for identification purposes only does not infringe on a privacy interest in one's genetic identity because the DNA is not being used to reveal personal information." *See Piro v. State,* 190 P.3d 905, 911 (Idaho Ct. App. 2008) (collecting cases). Closest to the present case is an en banc decision of the Supreme Court of Washington, *State v. Athan, supra.*

In *Athan,* the police, who were investigating an unsolved murder, mailed to a suspect, Athan, a fictitious letter, purporting to be from a law firm, asking if he wanted to join a class action lawsuit. 158 P.3d at 31. When the police received Athan's response, they extracted his DNA from the saliva he had used to close the return envelope, analyzed that DNA, and discovered that it matched a DNA sample recovered from the victim in the unsolved case. *Id.* at 32. The *Athan* Court held that the "analysis of DNA obtained without forcible compulsion and analyzed by the government for comparison to evidence found at a crime scene is not a search under the Fourth Amendment." *Id.* at 37. The court reasoned that "[p]hysical characteristics which are exposed to the public," such as those contained within one's DNA, "are not subject to Fourth Amendment protection" because the "[e]xamination of such physical characteristics involves none of the probing into an individual's private life and

thoughts that marks a[ ] . . . search." *Id.* (quotations and citations omitted). The court further observed that the "[p]olice may surreptitiously follow a suspect to collect DNA, fingerprints, footprints, or other possibly incriminating evidence, without violating that suspect's" rights under the Fourth Amendment. *Id.*

We find persuasive the reasoning in *Athan.* Like Athan, Petitioner exposed to the public, albeit not to the naked eye, the identifying content of the genetic material he left on the armrests of the chair. Moreover, like Athan, Petitioner was not subjected to the forcible collection of his genetic material, or any other bodily intrusion. *See id.*

Petitioner argues that, even if the police analyzed only the identifying characteristics of his DNA, he had an objectively reasonable expectation of privacy in that evidence because, unlike fingerprints, blood, or saliva, society is generally unaware that individuals shed uncontrollably genetic material whenever they venture into public. Even assuming that Petitioner is correct in his premise,[12] the fact that one has

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[12] At least one commentator has suggested that society is generally aware of the nature of DNA evidence:

> Society knows about DNA and its capabilities through television and other media. Furthermore, the use of DNA analysis is one click away on the Internet. People can perform DNA tests from their homes, and third parties can obtain the DNA of other individuals without restraint.
>
> * * *

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not knowingly exposed to the public certain evidence does not, by itself, demonstrate a reasonable expectation of privacy in that evidence. "[W]hile *Katz* says it is no search to discover what one 'knowingly exposes,' it does not declare the exact reverse of this proposition. That is, the [Supreme] Court did not say that discovery of what was not knowingly exposed is inevitably a search." 1 LaFave, *supra,* § 2.2(d), at 649.

Petitioner finds support for his argument in the Supreme Court's decision in *Kyllo v. United States, supra.* There, the police suspected that an individual was growing marijuana within his home. 533 U.S. at 29. As part of their investigation, the police, who remained in their vehicle across the street from the suspect's home, used a thermal imager to scan the home. *Id.* at 29-308. The scan revealed that the roof over the garage and a side wall were hot compared to the rest of the home, and substantially warmer than neighboring homes. *Id.* at 30. Based upon this information, the police believed that the suspect was growing marijuana using halide lights. *Id.* Relying in part upon the results of the thermal imager scan, the police

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> DNA evidence is no stranger to pop culture. Anyone who watches television is likely aware that DNA can be left at the scene of a crime. Popular networks broadcast shows such as CSI, Law and Order, and Forensic Files, all of which feature DNA evidence in the laboratory and courtroom on a regular basis, have a combined audience of over fifty-million viewers.

Laura A. Matejik, *DNA Sampling: Privacy and Police Investigation in a Suspect Society,* 61 Ark. L. Rev. 53, 78-80 (2008).

applied for and obtained a search warrant for the suspect's home, which, indeed, contained an indoor marijuana growing operation. *Id.* The *Kyllo* Court held that, "[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id.* at 40.

Petitioner contends that, like the use of thermal imager scanners on homes, the use of biotechnology by police to create DNA profiles reveals characteristics of the person that are not otherwise visible to the naked eye. *Kyllo,* however, does not stand for the broad proposition that "using 'sense-enhancing technology' to acquire information about an individual is, *ipso facto,* a search." *See* D.H. Kaye, *Who Needs Special Needs? On the Constitutionality of Collecting DNA and Other Biometric Data from Arrestees,* 34:2 J.L. Med. & Ethics 188, 190 (2006). Rather, the central teaching of *Kyllo* is that "any physical invasion of the structure of the home, by even a fraction of an inch, [is] too much," because "*all* details [in the home] are intimate details." 533 U.S. at 37 (quotations and citation omitted). The *Kyllo* Court determined that the thermal imager was, in effect, a substitute for a physical trespass into the home, and thus constituted a search for purposes of the Fourth Amendment. *See id.* at 34.

Not so, here. Even if we were to accept that the DNA profiling technology used in the present case is

not "in general public use,"[13] it remains that the police did not use that technology as a substitute for a "trespass" on or into Petitioner's body. *See id.* The police did not seize genetic material from Petitioner, nor in any way search him for it, but rather, collected it from an object on which the material had been left.

In the end, we hold that DNA testing of the 13 identifying junk loci within genetic material, not obtained by means of a physical intrusion into the person's body, is no more a search for purposes of the Fourth Amendment, than is the testing of fingerprints, or the observation of any other identifying feature revealed to the public – visage, apparent age, body type, skin color. That Petitioner's DNA could have disclosed more intimate information is of no moment in the present case because there is no allegation that the police tested his DNA sample for that purpose. Because the testing of Petitioner's DNA did not constitute a search for the purposes of the Fourth Amendment, he was not entitled to suppression of the DNA evidence or any fruits derived therefrom. The Court of Special Appeals came to the

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[13] At least one commentator has noted that "the claim that DNA profiling is not in public use is, at worst, false, or at best, in need of refinement or development." D.H. Kaye, *Who Needs Special Needs? On the Constitutionality of Collecting DNA and Other Biometric Data from Arrestees,* 34:2 J.L. Med. & Ethics 188, 191 (2006).

same conclusion. We therefore affirm the judgment of that Court.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED; COSTS TO BE PAID BY PETITIONER.

Dissenting Opinion by Adkins, J.,
which Harrell and Greene, JJ., join.

Most respectfully, I dissent. The Majority holding represents a significant extension of the State's right to invade private rights of individuals in their DNA beyond that authorized by the Supreme Court's decision in *Maryland v. King,* 569 U.S. ___, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013). The result of the Majority opinion is that, short of searching a person via touch or entering her home, the State may collect any person's DNA, create a genetic profile, and add it to the CODIS database,[1] all without implicating, let alone respecting, any constitutional protection. The

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[1] According to Md. Code (2003, 2011 Repl. Vol., 2013 Supp.), § 2-501(c) of the Public Safety Article ("PS"):

> (1) "CODIS" means the Federal Bureau of Investigation's "Combined DNA Index System" that allows the storage and exchange of DNA records submitted by federal, state, and local forensic DNA laboratories.
>
> (2) "CODIS" includes the national DNA index administered and operated by the Federal Bureau of Investigation.

State may do this regardless of the legal status of the person. In my view, this holding is unfounded, and a warrantless search of a free citizen's[2] DNA against his will should be considered unreasonable and a violation of the Fourth Amendment.

The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV. An unbiased magistrate may grant a warrant to search and seize based upon probable cause. *See id.* If there were probable cause for Raynor's arrest, the police could have obtained Raynor's DNA by following normal booking procedures.[3] The State could also have obtained his DNA if he were already a parolee, a probationer, or incarcerated.[4]

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[2] By "free citizen" I mean a person who has not been arrested or detained on the basis of probable cause or reasonable suspicion. I include in this category persons who are not United States citizens, but who reside here legally.

[3] The victim had identified for the police anyone with whom she had contact who might be a suspect. Approximately 23 persons consented to having their DNA swabbed, but Raynor did not. As the Majority did not rest its opinion on the existence of probable cause for Raynor's arrest, and the State concedes Raynor was not under arrest, I do not address the question of probable cause.

[4] *See Samson v. California,* 547 U.S. 843, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006) (parolee); *Corbin v. State,* 428 Md. 488, 52 A.3d 946 (2012) (probationer); *State v. Raines,* 383 Md. 1, 857 A.2d 19 (2004) (incarcerated person).

A warrantless search, however, must be submitted to the test of reasonableness by balancing legitimate government interests with a person's privacy expectation. "The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *United States v. Knights,* 534 U.S. 112, 118-19, 122 S. Ct. 587, 591, 151 L. Ed. 2d 497, 505 (2001) (quoting *Wyoming v. Houghton,* 526 U.S. 295, 300, 119 S. Ct. 1297, 1300, 143 L. Ed. 2d 408, 414 (1999)). The controlling modern test to establish whether a person has a privacy interest entitled to protection under the Fourth Amendment was penned by Justice Harlan in his concurrence in *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring). Justice Harlan set forth a two-part test: (1) that the person exhibits an actual, subjective expectation of privacy; and (2) that society is prepared to recognize the privacy interest as "reasonable." *Id.* at 361, 88 S. Ct. at 516, 19 L. Ed. 2d at 587-88.

As I see it, two distinct events happened in this case that raise Fourth Amendment concerns. The first is the State's collection of Raynor's DNA from the police station chair after inviting him to the station for questioning, at which time he refused to submit to DNA testing. The second is the analysis and submission to the CODIS database of the DNA. Here, the

Majority neatly disregards the first step, relying on counsel's words at oral argument as a deemed "concession" from Raynor that the police acquired his DNA legally. In doing so, the Majority lifts these events from their real-life context, and places them in a more palatable milieu – comparing them to fingerprints the police happen to find in some public place. This short-cut by the Majority avoids addressing the crucial issue of whether police can legally "invite" free citizens into the station for questioning, with the intended purpose of surreptitiously collecting their DNA for analysis and submission to CODIS, and effectuate that collection against their express refusal.

King And The DNA Collection Act

As *Knights* instructs us, we must weigh the government's interest against that of the individual. To support its claim to a strong governmental interest in Raynor's DNA, the State proffers a body of case law, and state interests identified therein, which applies **only in the context of an arrest**. Most, if not all, of these cases were decided under the DNA Collection Act. Md. Code (2003, 2011 Repl. Vol., 2013 Supp.), § 2-501 *et seq*. of the Public Safety Article ("PS").[5] This Act, which the police relied upon in *King,* mandates collection of DNA from all persons arrested for certain crimes and contains clear restrictions on use of that DNA. PS §§ 2-504(a)(3); 2-505(b)(2). Not only does it

[5] Discussed *infra*.

restrict such collection to those arrested, but it also requires that the DNA be removed from the database if the person is not convicted.[6] The Act also restricts use of the DNA strictly to "records that directly relate to the identification of individuals[.]" PS § 2-505(b)(1). Significantly, there is no statute authorizing such police action against persons who are not under arrest.

Unlike Mr. King, undisputedly, Raynor was not arrested and therefore was not subject to the DNA Collection Act. Thus, in examining Raynor's rights, we deal with a different paradigm, involving rules markedly distinct from those applicable in *Maryland v. King, Williamson v. State,* 413 Md. 521, 993 A.2d 626 (2010), and similar cases. As explained below, arrestees are a class of persons with a diminished expectation of privacy. The DNA Collection Act depends on this diminished expectation of privacy in mandating collection of an arrestee's DNA.

Unlike its lesser interest in free citizens, who possess the full panoply of constitutional rights, the State has considerably weighty interests in learning the true identity of an arrestee. The *King* Court enumerated five state interests advanced by the DNA Collection Act: first, the need to identify "who is being tried"; second, the need to ensure the detainee does not create "inordinate 'risks for facility staff'"; third, the need to ensure persons are available for trial;

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[6] *See* PS § 2-511 (requiring removal of a person's DNA profile if she is not convicted).

fourth, the need to determine the threat posed to society (by finding if the arrestee committed other crimes); and fifth, the possibility of freeing an innocent man wrongfully imprisoned in his stead. *King,* 569 U.S. at ___, 133 S. Ct. at 1971-74, 186 L. Ed. 2d at 22-24 (citations omitted). Not one of those interests applies to Raynor.

By endorsing the police action in this case against a free citizen, the Majority opinion considerably extends the *King* holding beyond the boundary of what should be considered constitutional.[7] The

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[7] As Justice Scalia declared, "[s]olving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches. The Fourth Amendment must prevail." *Maryland v. King,* 569 U.S. ___, 133 S. Ct. at 1958, 1989, 186 L. Ed. 2d 1, 41 (2013) (Scalia, J., dissenting); *see also Skinner v. Ry. Labor Execs. Ass'n,* 489 U.S. 602, 619, 109 S. Ct. 1402, 1414, 103 L. Ed. 2d 639, 672 (1989) (Marshall, J., dissenting) (reasoning that searches as part of the "normal need for law enforcement" are not included in the narrow category of warrantless searches). In *Raines* we upheld as legitimate a buccal swab of an inmate under the DNA Collection Act, and expressly distinguished two cases that failed the reasonableness test on grounds that the only government interest was general evidence-gathering:

> Additionally, both [*City of Indianapolis v.*] *Edmond*[, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000)] and *Ferguson* [*v. City of Charleston,* 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001)] are distinguishable on their facts from the DNA collection context for two reasons. First, the *Edmond* and *Ferguson* cases involved searches of ordinary citizens without individualized suspicion, not incarcerated criminals. Second,

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limited scope of the Supreme Court's holding in *King* is revealed in the High Court's concluding paragraph:

> In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

569 U.S. at ___, 133 S. Ct. at 1980, 186 L. Ed. 2d at 32. The High Court expressed no intent to authorize police, in their unfettered discretion, to invite free

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> the primary purpose of the government actions in those cases was not to identify individuals, but to gather evidence of crimes, thus acting like a general warrant.

383 Md. at 21-22, 857 A.2d. at 31.

citizens to police stations, collect their DNA when they leave, test the DNA to create a profile, and submit the visitor's profile to the CODIS Database, all against the free citizen's wishes.

As I see it, here, the police conducted one search by collecting Raynor's DNA from the chair, and a second search when they tested it to create a profile. *See, e.g., United States v. Amerson,* 483 F.3d 73, 85 (2d Cir. 2007) ("There is, however, a second and potentially much more serious invasion of privacy occasioned by the DNA Act. As we recognized in *Nicholas,* the 'analysis and maintenance of [offenders'] information' in CODIS, the federal database is, in itself, a significant intrusion. We are mindful of the vast amount of sensitive information that can be mined from a person's DNA and the very strong privacy interests that all individuals have in this information." (quoting *Nicholas v. Goord,* 430 F.3d 652, 670 (2d Cir. 2005))); *see also Mario W. v. Kaipio,* 230 Ariz. 122, 128, 281 P.3d 476, 482 (Ariz. 2012) ("This second search presents a greater privacy concern than the buccal swab because it involves the extraction (and subsequent publication to law enforcement nationwide) of thirteen genetic markers from the arrestee's DNA sample that create a DNA profile effectively unique to that individual."). Alternatively, these two searches may be seen as two parts of a single search.

Without an authorizing statute with defined limitations on use of the DNA, under the Majority opinion, the police have unfettered choice as to who to bring into the station for non-permissive DNA collection

and testing, thus allowing for arbitrary decisions. Without the restrictions of the DNA Collection Act, the State also has the ability to retain a private citizen's DNA, to be mined in future years, for whatever purposes it desires. *See Amerson,* 483 F.3d at 85; *United States v. Kincade,* 379 F.3d 813, 843 (9th Cir. 2004) (Reinhardt, J., dissenting) ("[A]ll Americans will be at risk, sooner rather than later, of having our DNA samples permanently placed on file in federal cyberspace, and perhaps even worse, of being subjected to various other governmental programs providing for suspicionless searches conducted for law enforcement purposes.").

The Supreme Court in *King* emphasized that the DNA Collection Act mandated that DNA be collected from all persons arrested for certain crimes, and the Court considered it material that the officers had no discretion to decide whose DNA would be taken. *See King,* 569 U.S. at ___, 133 S. Ct. at 1969-70, 186 L. Ed. 2d at 20-21. In all of the DNA collection cases discussed by the parties, the government's right to collect the DNA hinged on the individual being part of a diminished status group, such as an arrestee. *See, e.g., King,* 569 U.S. ___, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (arrestee); *United States v. Mitchell,* 652 F.3d 387 (3d Cir. 2011) (arrestee); *Williamson,* 413 Md. 521, 993 A.2d 626 (2010) (arrestee); *State v. Raines,* 383 Md. 1, 857 A.2d 19 (2004) (incarcerated person). As I indicated, in each of these cases, the primary government interest was only established once the person

became a detainee or arrestee. Here, that critical linchpin is glaringly absent.

Nature Of Privacy Interest In DNA And Supreme Court Protection Of Privacy

The privacy interest Raynor sought to protect, his DNA, is immensely personal and private, and deserves the staunchest protection under the Fourth Amendment. DNA has the potential to reveal enormous amounts of private information about a person. With today's technology, scientists have the power to discern genetic traits, behavioral tendencies, propensity to suffer disease or defects, other private medical information, and possibly more. *Williamson,* 413 Md. at 564, 993 A.2d at 652.[8] *Cf. Skinner v. Ry. Labor Execs. Ass'n,* 489 U.S. 602, 617, 109 S. Ct. 1402, 1413, 103 L. Ed. 2d 639, 659 (1989) ("It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic."). Raynor explicitly refused police acquisition of his DNA, and such assertion of his privacy right deserved protection. His presence at the station and his objection also distinguish the police

[8] DNA contains "an individual's entire genome, [and thus,] tissue samples retained by the government threaten privacy interests the most, yet they receive less attention than the computer profiles contained within DNA databases." Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy,* 100 Nw. U. L. Rev. 857, 871 (2006).

action here from police finding DNA of some unidentified person, which has some connection to a crime being investigated. The Majority, though, in refusing to treat the collection of Raynor's DNA from the chair as a search for Fourth Amendment purposes based on counsel's "concession," turns a blind eye to this important consideration.

The Supreme Court has repeatedly recognized the existence of privacy protection outside of the Fourth Amendment context, particularly bodily privacy and the right of a person to control information about himself and intimate aspects of life. *See Lawrence v. Texas,* 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (striking down law against sodomy between consenting adults on privacy grounds); *Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (constitutional right of privacy encompasses decision involving termination of pregnancy); *Griswold v. Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (constitutional right of privacy in use of contraceptives). If a warrant is required for the police to see the personal intimate details kept secured in one's home,[9] then logically a warrant is required to seize the same private information locked inside of an individual. *See* Stephanie B. Noronha, Comment, *Maryland v. King: Sacrificing the Fourth Amendment to Build Up the DNA Database,* 73 Md.

[9] *See Kyllo v. United States,* 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) (using thermal imaging device to gather information about heat in home's interior constitutes search).

L. Rev. 667, 685 (2014) (arguing that the reasoning in *King* "begs the question: why is it that the Court finds privacy, secrecy, and autonomy within the four walls of the home paramount, but does not hold intrusion into the human body to as high of a standard?" (Footnote omitted)).

Recent Federal Cases On Privacy Rights Even Without Physical Invasion

The ongoing debate regarding cloud technology and collecting intangible data depicts the tremendous intrusions that can occur without a physical invasion. In its decision in *United States v. Davis,* 690 F.3d 226, 231 (4th Cir. 2012), the Fourth Circuit warned of police trampling on an individual's Fourth Amendment rights when the police collected a DNA sample from the defendant's pants and created a profile without probable cause, resulting in an unreasonable search. The court reasoned that the absence of a judicial officer to approve or deny the use of an individual's DNA accords police an unchecked power that can be exercised arbitrarily. *See id.* at 249-50.

Less than three months ago, in a case involving a different Mr. Davis, the Eleventh Circuit held that the government's collection of electronic location information from the defendant's cell phone service provider, without probable cause, resulted in a violation of the defendant's Fourth Amendment protections. *See United States v. Davis,* 754 F.3d 1205, 1216-17 (11th Cir. 2014). The Eleventh Circuit rejected the

government's abandonment and lack of physical intrusiveness justifications, agreeing with the proposition that when a cell phone user receives a call, he does not voluntarily expose anything, even though the location of his cell phone is automatically traced. *Id.* at 1217. The dual *Davis* cases support the notion that an individual's informational privacy should be protected by the Fourth Amendment, even without physical intrusion.

More importantly, the Supreme Court, on June 25, 2014, issued its unanimous decision in *Riley v. California,* holding that, even after a lawful arrest, the police could not seize data from a cell phone in the arrestee's possession without a warrant because of the wealth of personal and private information stored there, including calls made and received. ___ U.S. ___, 134 S. Ct. 2473, ___ L. Ed. 2d ___ (2014). As Chief Justice Roberts wrote for the Court: "[a]n Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns – perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD." ___ U.S. at ___, 134 S. Ct. at 2490, ___ L. Ed. 2d at ___. Thus, the Supreme Court has taken another important step in recognition of privacy in personal information *not* tied to a physical intrusion.

Flaws In Majority's Reasoning

The Majority opinion discounts the large amounts of highly personal details that DNA reveals on grounds that here, the State only used the DNA profile for identification. As I indicated earlier, the Majority also sidesteps Raynor's claim for protection of his privacy interests by seizing upon a "concession" that defense counsel made during oral argument. The Majority's logic goes like this: (i) defense counsel at oral argument said it was "okay" for police to take the DNA off the chair in the police station, objecting only to the scientific testing; (ii) the police therefore legitimately took possession of the DNA without a search; and (iii) the only testing the police performed was of the junk DNA for purposes of identification. Maj. Slip Op. at 9-10, 13-14.

This reasoning is flawed in several respects. First, we should not decide important constitutional issues based on a statement made by counsel at oral argument. Unlike matters of fact, we are not bound by counsels' stipulations regarding legal principles. As the Kentucky Supreme Court said, "[s]tipulations of the parties will not be allowed to determine the decision of the court on matters involving constitutional or statutory construction or other matters of public interest." *Com. ex rel. Breckinridge v. Nunn,* 452 S.W.2d 381, 382 (Ky. 1970). Second, the police did not test Raynor's DNA for identification because they already knew full well who he was. And, because they were not arresting Raynor, none of the State's interests in safety and other concerns attendant to the

identity of incarcerated persons arose. Third, DNA collection and testing is still in its infancy stage, and technology is constantly improving. Thus, it is not unreasonable to believe that the government's capacity for obtaining useful information from "junk" DNA will expand significantly, and will involve the discovery of enlarged personal details in the future.[10] As there is no statute placing limits on either the length of time

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[10] Federal courts have recognized potential misuse as foreseeable long before Justice Scalia's warning in *Maryland v. King* last year:

> Although the DNA collection as currently implemented involves only junk DNA that is not associated with any known physical or mental characteristics, "new discoveries are being made by the day that challenge the core assumption underlying junk DNA's name – regions of DNA previously thought to be 'junk DNA' may be genic after all." [*United States v.*] *Kincade,* 379 F.3d [813,] 850 [(9th Cir. 2004)] (Reinhardt, J., dissenting). Therefore, we agree that, "[s]hould the uses to which 'junk DNA' can be put be shown in the future to be significantly greater than the record before us today suggests, a reconsideration of the reasonableness balance struck would be necessary." [*United States v.*] *Amerson,* 483 F.3d [73,] 85 n.13 [(2d Cir. 2007)].

United States v. Weikert, 504 F.3d 1, 13 (1st Cir. 2007); *see also United States v. Davis,* 657 F. Supp. 2d 630, 662 (D. Md. 2009) ("[T]here are significant privacy interests implicated by the maintenance of one's DNA profile in a government database, above and beyond those implicated by the testing and comparison of one's DNA profile to evidence from a single, specific crime. Were law enforcement permitted to include individuals' DNA profiles in searchable databases under these circumstances, it would open 'a backdoor to population-wide data banking.' " (citation omitted)).

the DNA may be retained or the uses to which it may be put, the State is free to test the DNA using scientific techniques we can only imagine today.

The Majority's limited-use-of-information rationale is also inconsistent with the Supreme Court's rulings in *Kyllo v. United States*[11] and *Skinner v. Railway Labor Executives' Association.*[12] In those cases, the mere *potential* for intrusion on information created an expectation of privacy. *Kyllo v. United States,* 533 U.S. 27, 38, 121 S. Ct. 2038, 2045, 150 L. Ed. 2d 94, 104 (2001) ("Limiting the prohibition of thermal imaging to 'intimate details' would not only be wrong in principle; it would be impractical in application, failing to provide 'a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment[.]'" (citation omitted)); *Skinner,* 489 U.S. at 617, 109 S. Ct. at 1413, 103 L. Ed. 2d. at 659 ("It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic."). *See also* Albert E. Scherr, *Genetic Privacy & the Fourth Amendment: Unregulated Surreptitious DNA Harvesting,* 47 Ga. L. Rev. 445, 471 (2013).

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[11] *Kyllo v. United States,* 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001).

[12] *Skinner v. Ry. Labor Execs. Ass'n,* 489 U.S. 602, 617, 109 S. Ct. 1402, 1413, 103 L. Ed. 2d 639, 660 (1989) (finding it "clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable").

The lack of physical intrusion should not resolve the question of whether there was a search. The Supreme Court has repeatedly held that an intrusion and a violation of the Fourth Amendment can occur without crossing physical boundaries. *See Kyllo,* 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (thermal imaging); *Katz,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (wiretap). Justice Harlan's test moves away from strict property-rights interests, and *Katz* rejected the need for trespass, holding that a Fourth Amendment violation can occur by violating a person's privacy without physical intrusion. *See Katz,* 389 U.S. at 353, 88 S. Ct. at 512, 19 L. Ed. 2d at 583. In light of today's cutting-edge technology, under the circumstances here, gathering Raynor's DNA, testing to create a profile, and submitting it to the CODIS database should not be considered as any less intrusive a search and seizure than that which results from a cheek swab. The practical result is the same and it should be seen for what it is: a significant search into the body and permanent seizure of a person's private information.[13]

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[13] *See Skinner,* 489 U.S. at 650, 109 S. Ct. at 1431, 103 L. Ed. 2d at 681 (Marshall, J., dissenting) ("Only by erroneously deriding as 'minimal' the privacy and dignity interests at stake, and by uncritically inflating the likely efficacy of the FRA's testing program, does the majority strike a different balance."); *Davis v. Mississippi,* 394 U.S. 721, 728, 89 S. Ct. 1394, 1398, 22 L. Ed. 2d 676, 681 (1969) (noting that fingerprinting 24 youth[s] and releasing them without charge as a tool to find a rapist was minimally intrusive, but violated their Fourth Amendment protections because it was "not authorized by a judicial officer").

The Majority's approval of such police procedure means, in essence, that a person desiring to keep her DNA profile private, must conduct her public affairs in a hermetically-sealed hazmat suit.[14] Moreover, the Majority opinion will likely have the consequence that many people will be reluctant to go to the police station to voluntarily provide information about crimes for fear that they, too, will be added to the CODIS database.

The State argues that any DNA shed in any public area is unprotected, an averment that goes too far. The Fourth Amendment protects what a person "seeks to preserve as private, even in an area accessible to the public." *Katz,* 389 U.S. at 351, 88 S. Ct. at 511, 19 L. Ed. 2d at 582. In *United States v. Davis,* the Eleventh Circuit declared that the defendant had "not voluntarily disclosed his cell site location information to the provider in such a fashion as to lose his reasonable expectation of privacy." 754 F.3d at 1217. I strongly submit that a person's DNA deserves at least as much protection as one's whereabouts based on cell phone data. The State concedes that Raynor did not volitionally leave his DNA on the arms of the chair in the police station. Therefore, he still retains an

[14] The Majority's holding means that a person can no longer vote, participate in a jury, or obtain a driver's license, without opening up his genetic material for state collection and codification. Unlike DNA left in the park or a restaurant, these are all instances where the person has identified himself to the government authority. All these are troubling consequences of the decision the Court makes today.

expectation of privacy in his intimate and personal genetic make-up.[15]

A New Approach For DNA

Raynor's counsel argues that the Fourth Amendment requires a new approach that takes into account the advanced technology that allows collection and harvesting without invasion, and recent knowledge that we shed DNA everywhere we go throughout each day. I agree and propose that we treat the zone of privacy **not** in terms of Raynor's physical DNA in the form of saliva or sweat, but his expectation of privacy from exposure of the results of scientific tests performed on his DNA.

Conclusion

The State concedes that Raynor was not an actual suspect at the time his DNA was taken and tested, because the one piece of information that caused police to ask him to come to the station was the rape victim's claim, two years after the crime, that she had a hunch he may have been involved.

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[15] Of course the individual's privacy rights in his DNA must yield to the State's interests in that the State may investigate and collect and analyze DNA found at or near the scene of a crime, or on or near a weapon, or other means used to commit a crime. This does not mean, however, that outside that context, the police may gather new DNA from free citizens in an attempt to find a DNA match.

This occurred after she had previously identified 22 other persons, whom the police interviewed as "persons of interest." Moreover, Raynor refused to give a DNA sample, and specifically said that he did not wish to be in the CODIS database. Under these circumstances, the balance of the *Katz* reasonableness test shifts dramatically. Here, the State lacks the weighty government interests that were present in *King* and earlier cases. Such interests arise when the police possess probable cause to make an arrest and take a person into custody, thus diminishing the person's expectation of privacy.

On the other hand, Raynor's expectation of privacy in his DNA deserves the utmost protection because he was a free citizen at the time of police questioning. The defining traits of DNA illustrate dignitary, informational, and personal characteristics that the Supreme Court has come to protect in other contexts, even without physical intrusion. There *was* a search here, and it was an unreasonable one that violated Raynor's Fourth Amendment Constitutional rights. I would reverse the judgment of the Court of Special Appeals, and remand the case to that court with direction to reverse the judgment of the Circuit Court of Harford County and direct the court to grant Raynor's motion to suppress.

Judges Harrell and Greene authorize me to state that they join the views expressed in this dissent.

REPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1629

September Term, 2009

GLENN JOSEPH RAYNOR

v.

STATE OF MARYLAND

Krauser, C.J.,
Matricciani,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Krauser, C.J.
Concurring Opinion by Matricciani, J.

Filed: September 29, 2011

Convicted by a jury in the Circuit Court for Harford County of multiple degrees of rape, assault, burglary, and sexual offense, as well as malicious destruction of property,[1] appellant, Glenn Joseph

[1] Appellant was convicted of first- and second-degree rape; second-degree assault; first-, third-, and fourth-degree burglary;
(Continued on following page)

Raynor, contends, first, that the circuit court erred in denying his motion to suppress DNA evidence recovered, without his knowledge and without a warrant, from a chair he sat on at the police station and, second, that the court abused its discretion in denying his request for a mistrial because the State had failed to timely disclose certain emails between the victim and the police prior to trial and further neglected to provide other emails either before or after trial. Finding no merit to either contention, we affirm.

Background

The record, when reviewed in a light most favorable to the State, as the prevailing party, shows that, early on the morning of April 2, 2006, after cutting

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malicious destruction of property; two counts of first- and second-degree sexual offense; and one count of third-degree sexual offense. For sentencing purposes, the convictions for third- and fourth-degree burglary and malicious destruction of property were merged into the conviction for first-degree burglary, which was merged, along with the convictions for second-degree rape and second-degree assault, into the conviction for first-degree rape, and the convictions for second- and third-degree sexual offense were merged into the conviction for first-degree sexual offense.

Appellant was sentenced to a term of eighty years for the first-degree rape conviction and two terms of ten years, for each of the first-degree sexual offense convictions, to be served consecutively to each other and the eighty-year sentence, for a total term of one hundred years' imprisonment with credit for the ninety-three days he had already served.

the victim's telephone line, appellant gained entry to the victim's home by chiseling open the basement door. After entering her bedroom, he pressed a pillow against her face and threatened to kill her if she moved. Then, tying a shirt over the victim's face as a blindfold, he raped her and fled. During the attack, the victim noticed that her attacker had a wedding band on his hand and had a "metallicky odor."

After appellant left her house, the victim ran to her neighbors' house and, from there, called the police. When the police arrived, they took swabs of blood stains that were found on a pillow case on the victim's bed and on the floor of the back patio of the victim's home, underneath a broken window. Later that day, swabs were taken of the victim's vagina and anus.

Appellant did not become a suspect in the investigation of the rape until, more than two years later, the victim sent an email to the lead investigator in the case, Trooper First Class Dana Wenger of the Maryland State Police, stating that she believed that appellant was the man who had raped her. At trial, the victim described the process by which she had come to that conclusion. She explained that, two years after the attack, she had called Bruce Arthur, her former next-door neighbor, for help with a tree on her property. Mr. Arthur owned a tree-trimming business.

Arthur's failure to return her call prompted the victim to reflect as follows:

> So, July 15 [2008] . . . I am driving home once again going over in my head as I did every day thinking okay, Bruce didn't call me back, why didn't he call me back. And then I am thinking okay, Bruce is partners with [appellant]. And . . . my mind starts going. . . . [Appellant] used to live in [the house in which the attack took place]. [Appellant] has a body type that closely fits the body type of [the attacker]. Then it's oh, [appellant] is married [and] has children, I went to school with [appellant], he lived in that house. He is partners with Bruce. . . .

When she considered the possibility that appellant was her attacker, "it all fit," exclaimed the victim. Pursuing this lead, Trooper Wenger left a note at appellant's home asking him to call her. On July 28, 2008, appellant telephoned Trooper Wenger and agreed to go to the police barracks that afternoon. When he arrived, he was taken to a spare office. During the interview that ensued, Trooper Wenger and Sergeant James Decourcey asked appellant for a DNA sample to compare with the DNA recovered from the pillow case, the broken window, and the victim's body. Appellant agreed to provide a sample on the condition that it would be destroyed after the investigation was concluded. When the officers declined to give such an assurance, appellant refused to provide a DNA sample.

At that time, appellant was wearing a short-sleeved shirt and, according to Trooper Wenger, "kept rubbing his arms up and down the armrests of the

chair." The trooper also noticed a "metallic" odor emanating from appellant and observed that he appeared "nervous" and provided "peculiar" answers during the interview. After appellant left the police barracks, Sergeant Decourcey swabbed the armrests of the chair on which appellant had been sitting. The swabs were submitted to the Maryland State Police Forensic Lab, where the forensic sciences supervisor, Bruce Heidebrecht, extracted DNA from the swabs and developed a DNA profile for comparison purposes. That DNA profile was found to match the DNA profile developed from the evidence taken from the pillow case and the patio at the scene of the crime.

On the strength of the DNA comparison and circumstantial evidence developed by Trooper Wenger – specifically the victim's identification, appellant's familiarity with the victim and her home, Trooper Wenger's detection of a "metallic" odor emanating from appellant's person, and appellant's nervousness and "peculiar" conduct during his interview with the police – Trooper Wenger obtained warrants to arrest appellant, search his home, and collect an additional DNA sample. The DNA from the additional sample, gathered by swabbing appellant's cheek, also matched the DNA on the pillow case and the patio. An independent lab compared the DNA obtained from appellant's cheek with DNA from swabs of the victim's anus and vagina, taken during the forensic examination the day of the rape, and concluded that neither appellant nor any of his male paternal relatives could be excluded as a potential contributor to that DNA

sample, but that 99.57% of the male population in a country the size of the United States could be.

Discussion

I.

Appellant contends that the circuit court erred in failing to suppress the DNA sample gathered from the chair that he sat on at the police barracks.[2] The suppression court denied appellant's motion, concluding that, because appellant did not have "any reasonable expectation of privacy with regard to the sweat he left on the chair," the police were lawfully in possession of his DNA.

There is no dispute that the officers had the right to swab their own chair without a warrant. It was the property of the police and not of appellant, and thus he had no reasonable expectation of privacy in the

[2] Appellant, we note, insists that the characterization of the biological matter from which the DNA was extracted is of central importance. Although appellant previously referred to the seizure of his "bodily fluids" and of his "sweat," he now asserts that his DNA was extracted from his skin cells and that characterizing the DNA as being taken from his perspiration is "inaccurate and misleading" because the act of shedding skin cells is less familiar than the act of perspiring and leaves no visible residue. As a result, appellant argues that he could not have been aware that he had shed skin cells onto the chair in the police barracks. As we shall explain, appellant lacked an objectively reasonable expectation of privacy in his DNA profile as used for identification purposes, and we therefore do not concern ourselves with what he knew about the shedding of skin cells.

chair itself. *See Gamble v. State,* 78 Md. App. 112, 116 (1989) ("The police needed no warrant to search [an officer's] cruiser since it was police property, and no warrant is required to search one's own property.").

But appellant contends that he had a reasonable expectation of privacy in the DNA contained in his skin cells, even if the police lawfully acquired the skin cells by swabbing their own chair. In the absence of a warrant, the police were prohibited by the Fourth Amendment, maintains appellant, from analyzing the swab they took from the chair, developing a DNA profile, and comparing it to the DNA recovered from the crime scene.

In reviewing a trial court's denial of a motion to suppress evidence alleged to have been seized in contravention of the Fourth Amendment, we view the evidence adduced at the suppression hearing and the inferences fairly drawn therefrom in the light most favorable to the prevailing party. *Williamson v. State,* 413 Md. 521, 532 (2010) (citations omitted). We defer, moreover, to the fact-findings of the suppression court, unless those findings were clearly erroneous. *Id.* But, with respect to the ultimate question of constitutionality, we "make our own independent constitutional appraisal by reviewing the law and applying it to the facts." *Id.* (quoting *Bailey v. State,* 412 Md. 349, 362 (2010)).

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated." U.S. Const. amend. IV; *McFarlin v. State,* 409 Md. 391, 403 (2009). "The person invoking Fourth Amendment protections bears the burden of demonstrating his or her legitimate expectation of privacy in the place searched or items seized." *Williamson,* 413 Md. at 534 (citing *Smith v. Maryland,* 442 U.S. 735, 740 (1979)).

The burden of demonstrating a "legitimate" or "reasonable"[3] expectation of privacy includes both a subjective and an objective component. *Id.* First, the individual invoking Fourth Amendment protection must "demonstrate an actual (subjective) expectation of privacy in the item or place searched." *Id.* (citing *Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *Venner v. State,* 279 Md. 47, 51-52 (1977)). A subjective expectation of privacy is demonstrated by a showing that the person "sought 'to preserve something as private.'" *Id.* at 535 (quoting *McFarlin,* 409 Md. at 404). Second, the expectation must be "objectively reasonable under the circumstances." *Id.* at 534 (citing *Laney v. State,* 379 Md. 522, 545 (2004)). That is, "[a]n expectation of privacy does not give rise to Fourth Amendment protection . . . unless society is prepared to accept that expectation as objectively reasonable." *Id.* at 535 (quoting *California v. Greenwood,* 486 U.S. 35, 39-40 (1988)).

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[3] The terms "legitimate expectation of privacy" and "reasonable expectation of privacy" are used interchangeably. *Wallace v. State,* 373 Md. 69, 80 n.8 (2003).

The Court of Appeals, in *Williamson v. State,* 413 Md. 521 (2010), recently addressed the issue of a suspect's reasonable expectation of privacy in DNA evidence recovered from an object in the possession of the police. The DNA sample at issue was obtained, as here, by police without the suspect's knowledge.

The events leading up to the taking of this sample began in 1994. In that year, Kelroy Williamson entered an *Alford*[4] plea to a charge of battery stemming from a rape investigation. *Id.* at 526. Although swabs were collected from the victim in the investigation of that rape, they were not tested at that time for the presence of DNA. *Id.* In 2006, to obtain a DNA sample from Williamson, whom police suspected was involved in a rape committed in 2002, investigators arrested him on charges unrelated to the rape, took him to the police station, and provided him with a meal. *Id.* at 528. When Williamson, in a holding cell, left the cup from that meal on the cell floor, the cup was tested for DNA. *Id.* The resultant DNA profile matched the profile of the rapist in the 2002 rape, and Williamson was eventually convicted of that crime. *Id.*

Appealing that conviction, Williamson challenged, among other things, the warrantless seizure of the cup and the analysis of the DNA removed from it. The Court of Appeals, first, declared that the Fourth Amendment did not apply to the seizure of the

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[4] *North Carolina v. Alford,* 400 U.S. 25 (1970).

cup because Williamson had abandoned it when, after drinking from it, he tossed it to the floor and that he, therefore, retained no reasonable expectation of privacy in it. *Id.* at 536-37.

It next rejected Williamson's claim that, even if the cup had been lawfully seized, he retained a reasonable expectation of privacy in his DNA and that the police were therefore prohibited from analyzing the DNA without a warrant. *Id.* at 547. In so ruling, the *Williamson* Court considered the nature of what had been collected and how it had been used, emphasizing that its collection and use had been in conformity with the strictures of the Maryland DNA Collection Act, which "limits the depth of DNA testing and the storage of the results to that data that is directly related to the identification of an individual." *Id.* at 542 (citing Md. Code (2003), § 2-505(b) of the Public Safety Article).[5] It further pointed out that DNA profiles used in the database "consist of analyses of

[5] The Maryland DNA Collection Act provides for the collection of DNA samples from individuals who are either charged with or convicted of certain crimes. Md. Code (2003, 2010 Supp.), § 2-504 of the Public Safety Article. The DNA records developed from such samples are maintained in a statewide DNA database, but "[o]nly DNA records that directly relate to the identification of individuals" may be collected and stored. *Id.* at §§ 2-502, 2-505(b), 2-506(a). In the instant case, appellant's DNA sample was collected prior to the filing of charges against appellant, and, therefore, the DNA Collection Act was not at issue. We note, however, that there is no contention that appellant's DNA was analyzed in a way that would provide more information than is authorized by the Act.

13 'junk' loci consisting of stretches of DNA, which do not presently recognize traits and were purposely selected because they are not associated with any known physical or medical characteristics." *Id.* (citing *United States v. Davis,* 657 F. Supp. 2d 630, 656 n.6 (D. Md. 2009)). Thus, "the only information collected from testing and storage of DNA profiles," stressed the Court, was "the identity of the person whose DNA [was] being tested." *Id.* at 543. Hence, the purpose of uploading DNA profiles to a DNA database was "akin to that of a fingerprint." *Id.* (quoting *State v. Raines,* 383 Md. 1, 25 (2004)). The Court of Appeals further observed that Williamson's arguments "regarding his expectation of privacy in his DNA d[id] not relate to the 13 'junk' loci used for identification, but on the potential misuse of DNA," which was not an issue in the case because Williamson's DNA was tested for identification only. *Id.*

The *Williamson* Court also cited with approval the concurring opinion of the Honorable Irma S. Raker in *State v. Raines,* specifically its discussion regarding the nature of DNA identification evidence. *See Williamson,* 413 Md. at 544. In *Raines,* the State collected a DNA sample from an inmate pursuant to the Maryland DNA Collection Act. 383 Md. at 5-6. Because the seizure of the DNA in that case was compulsory and involved the physical intrusion of a swabbing of the inmate's cheek, the State conceded that the act constituted a search but asserted that it was both reasonable and constitutional. *Id.* at 14. The *Raines* Court held that both the warrantless search

and the statute that authorized it were constitutional, noting the diminished expectation of privacy of incarcerated individuals, the minimal intrusiveness of the search, and the limited nature of the information actually collected from the DNA sample. *Id.* at 15, 17-18, 25.

In her concurring opinion in *Raines,* Judge Raker stressed that the statute was constitutional because the DNA was used for identification purposes only, explaining that, although a DNA sample *could* provide more personal information than a fingerprint, it need not necessarily do so:

> "DNA type need be no more informative than an ordinary fingerprint. . . . The numbers [constituting the DNA profile] have no meaning except as a representation of molecular sequences at DNA loci that are not indicative of an individual's personal traits or propensities. In this sense, the . . . 'profile' is very much like a social security number. . . . In itself, the series of numbers can tell nothing about a person. But because the sequence of numbers is so likely to be unique (with the exception of identical twins), it can be linked to identifiers such as name, date of birth, or social security number, and used to determine the source of DNA found in the course of criminal investigations. . . ."

Id. at 45 (Raker, J., concurring) (quoting D. Kaye & M. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage,* 2003 Wis. L. Rev. 413, 431-32 (2003)).

Although *Williamson* involved DNA taken from abandoned property and *Raines* involved DNA removed from the cheek of an incarcerated individual, the lesson as to the nature of lawfully collected DNA evidence is the same. That is, DNA evidence, when used for identification purposes only, is akin to fingerprint evidence. And, although fingerprint evidence is suppressible if it is obtained in the course of an unlawful detention, *see Hayes v. Florida,* 470 U.S. 811, 816 (1985); *Davis v. Mississippi,* 394 U.S. 721, 727 (1969), the fingerprinting process itself "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." *See United States v. Dionisio,* 410 U.S. 1, 15 (1973) (quoting *Davis,* 394 U.S. at 727).

Thus, even if appellant could demonstrate a *subjective* expectation of privacy in his DNA profile, he nonetheless had no *objectively reasonable* expectation of privacy in it because it was used for identification purposes only. As in *Williamson,* the police were in lawful possession of the item from which the DNA was collected. In *Williamson,* the cup from which the DNA was collected came into police possession when the suspect discarded it in the holding cell; here, the chair in the police barracks was, from the outset, in the possession of the police. Thus, like the analysis of a latent fingerprint, which involves no physical intrusion into the body and is used for identification purposes only, the analysis in the instant case of DNA evidence, which was in the lawful possession of the police, was not a constitutionally protected search.

And, as in *Williamson,* there is no suggestion here that the police used the swab for anything other than analyzing the 13 "junk" loci for identification purposes. Hence, potential privacy concerns, "should technological advances permit testing of DNA to glean more information from acquired DNA than mere identification," have no "feet" here. *See Williamson,* 413 Md. at 544.

We note, however, that at least one federal district court has made a distinction between fingerprint and DNA evidence, stating that the latter involved a "greater privacy concern" because of the "potential for the disclosure of a vast amount of intensely personal information." *See United States v. Davis,* 657 F. Supp. 2d 630, 663 n.9 (D. Md. 2009).

And it appears that there is growing debate among commentators as to the extent of the information that can be gleaned from the "junk" loci that are analyzed in criminal investigations. In *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy,* Professor Elizabeth E. Joh argues that "[t]he defense that current DNA sampling techniques target only 'junk' DNA, and thus cannot reveal medical information, should not assuage privacy concerns . . . as some markers now thought to be meaningless may be (and have been) found to contain predictive medical information as the science progresses." 100 Nw. U.L. Rev. 857, 870 (2006) (footnote omitted). Professor Joh suggests that the comparison between fingerprints and DNA is inapt because, "unlike DNA, fingerprints have a limited

identification value" and "cannot reveal any more information about the person from whom they have been collected." *Id.* Likewise, Professor Simon A. Cole cautions that "calling forensic STRs[6] 'junk,' 'not socially or medically significant,' or 'as meaningless as fingerprints' does not inform clearly or completely." *See* Simon A. Cole, *Is the "Junk" DNA Designation Bunk?,* 102 Nw. U.L. Rev. Colloquy 54, 63 (2007) (footnotes omitted). "If some forensic STRs are correlated with genes that cause physical traits, though they do not cause the physical traits themselves," Professor Cole suggests, "the public can be informed of that fact." *Id.*

Professor D.H. Kaye, on the other hand, writes that "[j]ust as the argument that nonfunctional DNA cannot be a threat to privacy is superficial, it would be incomplete and misleading simply to inform the public that an STR profile contains information that is correlated to physical traits such as disease and possibly behavioral predispositions and hence could be used to predict whether an individual will develop a disease." *See* D.H. Kaye, *Please, Let's Bury the Junk: The Codis Loci and the Revelation of Private Information,* 102 Nw. U.L.Rev. Colloquy 70, 71 (2007). "No one can say for certain what the future of genetics holds," says Professor Kaye, "but based on current

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[6] In his article, Professor Cole explains that "[t]hirteen *loci* (locations on the human genome) known as [short] tandem repeats, or 'STRs,' are examined to produce the DNA profiles that are standard for databases in the United States."

knowledge and practice, the information coded in the databases is and will remain, with . . . limited exceptions . . . useful only for identification." *Id.* (footnote omitted).

We also point out that there are safeguards in the Maryland code that protect against the misuse of DNA records in the statewide database. In fact, subsections 2-512(c) and (e) of the Public Safety Article provide criminal penalties for, among other things, the testing of DNA samples for information unrelated to identification. But those protections, of course, are little comfort to those who do not believe that the State should have such information at its disposal in the first place.

Still, as we have seen, the Court of Appeals declined to draw a distinction between DNA and fingerprint evidence in *Williamson,* and we, of course, shall follow suit.

In an attempt to distinguish fingerprint evidence from DNA evidence and thereby avoid *Williamson*'s holding that DNA evidence that is used for identification purposes is "akin to that of a fingerprint," appellant asserts that leaving a fingerprint requires the "volitional act of placing a hand on the surface," while "it requires no effort or volitional act to shed DNA." But neither does it require an effort or a volitional act to leave a fingerprint on an object while touching that object or to deposit saliva and skin cells on a cup while taking a sip from it. Rather, just like the individual who places his hand on an object, intentionally

or otherwise, and, in so doing, inadvertently deposits identifying information on the object, appellant walked into the police barracks, sat down on a chair, and rubbed his bare arms on the armrests of the chair, while sitting there. In so doing, he deposited identifying information on the chair.

Further undercutting appellant's proposed distinction is the fact that, as early as 1997, researchers had reported the ability to extract DNA from fingerprints themselves. *See* Roland A.H. van Oorschot & Maxwell K. Jones, *DNA fingerprints from fingerprints,* 387 Nature 767 (1997); Richard Saltus, *DNA in Fingerprints Used as Identifier,* Boston Globe, June 19, 1997, at A5. In the instant case, it appears that the same process, which makes use of "touch DNA," was employed to gather appellant's DNA from the chair in the police barracks. "Touch DNA" is described by the independent lab that processed appellant's sample as "the DNA that is left behind from skin cells when a person touches or comes into contact with an item." *See* Touch DNA Evidence – Overview, Bode Technology, http://www.bodetech.com/technologies/touch-dna/touch-dna-overview (last visited May 20, 2011).

We conclude that appellant had no objectively reasonable expectation of privacy in the chair in the police barracks and that he retained no objectively reasonable expectation of privacy in the identifying characteristics that could be gleaned from the normal biological residue he left behind. Consequently, the suppression court did not err in denying appellant's motion to suppress the DNA evidence.

II.

Appellant contends that the circuit court abused its discretion in not granting a mistrial, first, because the State failed to disclose before trial eighty-nine[7] emails between the victim and the police and, second, because the State failed to provide, either before or after trial, additional emails, the existence of which the State denies.

At trial, the victim testified that, after her rape, she "was in contact with [Trooper] Wenger and other troopers daily" and that she gave Trooper Wenger "multiple leads" in the investigation:

> I mean [Trooper Wenger] was asking me questions about what I did and who I knew and I was thinking of every possible person who it could possibly be. . . . I sent her multiple emails, dozens. No, hundreds of emails I sent.

Although appellant's trial counsel eventually informed the circuit court that he had not received the emails the victim had referred to in her direct testimony, he did not do so until after conducting cross-examination of the victim. In response, the circuit court ordered the State to determine whether

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[7] Although the exact number of emails is difficult to determine (in part because some of the emails include fragments of other emails), appellant asserts, and the State does not deny, that eighty-nine emails were exchanged between the victim and the police during the period from July 15, 2008, to May 22, 2009.

any undisclosed emails existed and, if so, to turn them over to appellant. By the next trial date, which was four days later, the State had provided appellant with copies of previously undisclosed emails between the victim and Trooper Wenger. None pre-dated the victim's email to Trooper Wenger on July 15, 2008, in which she described how she had come to believe that appellant was her attacker.

At trial, appellant claimed that he was entitled to a mistrial because the emails "should have been disclosed" before trial and could have been used as impeachment evidence during his cross-examination of the victim, specifically citing an email from the victim to Trooper Wenger on July 16, 2008, in which the victim said of appellant, "I KNOW his name was brought up, but I don't know why I didn't think for you to swab him." Appellant asserted that this email's reference to an earlier conversation between the victim and Trooper Wenger contradicted the victim's testimony that appellant's name first came to her attention right before she sent the email of July 15, 2008, in which she named appellant as her assailant.

Appellant's trial counsel accused the State of deliberately withholding the emails, alleging that he had made an oral request for emails before trial and that the State did not respond to that request even though the assistant state's attorney knew about the emails because she had been included in some of the correspondence.

In response, the assistant state's attorney denied having received an oral request from appellant for emails and asserted that she had not willfully violated the discovery rules. She further stated that she had simply forgotten about any emails she had sent or received, and the circuit court found this representation to be credible.

While agreeing with appellant that the emails should have been provided before trial, the circuit court denied his motion for a mistrial, finding no deliberate discovery violation by the State. In any event, appellant would have the opportunity, the court pointed out, to question the victim as to when appellant's name first came up. Notwithstanding that judicial invitation, appellant chose not to conduct any further cross-examination of the victim.

Appellant nonetheless reiterated his complaints at a hearing on his motion for a new trial, claiming that he had suffered "significant[ ] prejudice[ ]" from the State's failure to disclose "information regarding the circumstances under which [appellant's] name came up earlier." The circuit court denied appellant's motion, stating: "Clearly the emails aren't material to the guilt or innocence of the defendant. Nor are they exculpatory. Nor do they reflect on anything that would mitigate punishment."

Appellant now claims that the circuit court abused its discretion in denying his request for a mistrial, a request which was based on the State's failure to disclose the victim's emails before she

testified. Assuming, without deciding, that the State violated Maryland Rule 4-263(d)(3), which provides that the state's attorney shall, without request, provide to the defense, "all written statements of [a state's witness] that relate to the offense charged," we hold that the circuit court did not abuse its discretion in denying appellant's motion for a mistrial or in choosing, instead, a less severe remedy for the State's discovery violation.

The remedy for a violation of the discovery rules "is, in the first instance, within the sound discretion of the trial judge." *Williams v. State,* 364 Md. 160, 178 (2001) (citing *Evans v. State,* 304 Md. 487, 500 (1985)). Rule 4-263(n) provides a list of potential sanctions, including: ordering discovery of the undisclosed matter, granting a continuance, excluding evidence as to the undisclosed matter, granting a mistrial, or entering any other appropriate order. The rule "does not require the court to take any action; it merely authorizes the court to act." *Thomas v. State,* 397 Md. 557, 570 (2007). Thus, the circuit court "has the discretion to select an appropriate sanction, but also has the discretion to decide whether any sanction is at all necessary." *Id.* (citing *Evans,* 304 Md. at 500).

But, in exercising its discretion regarding sanctions for discovery violations, "a trial court should consider: (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Id.* at 570-71 (citations and

footnotes omitted). Although "the prosecutor's intent alone does not determine the appropriate sanction, bad faith on the part of the State can justify exclusion of evidence or serve as a factor in granting a harsher sanction." *Id.* at 571 n.8. And, if the discovery violation irreparably prejudices the defendant, a mistrial may be required even for an unintentional violation. *Id.* (citing *Evans,* 304 Md. at 501).

The declaration of a mistrial, however, "is an extraordinary act which should only be granted if necessary to serve the ends of justice." *Barrios v. State,* 118 Md. App. 384, 396-97 (1997) (quoting *Hunt v. State,* 321 Md. 387, 422 (1990)). "The most accepted view of discovery sanctions is that in fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Thomas,* 397 Md. at 571 (citations omitted). We have said that the purpose of the discovery rules "is to give a defendant the necessary time to prepare a full and adequate defense." *Ross v. State,* 78 Md. App. 275, 286 (1989). And the Court of Appeals has warned that, if a defendant declines a limited remedy that would serve the purpose of the discovery rules and instead seeks the greater windfall of an excessive sanction, "the 'double or nothing' gamble almost always yields 'nothing.'" *Thomas,* 397 Md. at 575 (quoting *Jones v. State,* 132 Md. App. 657, 678 (2000)).

Here, in accordance with *Thomas,* the circuit court considered the reason for the State's failure to disclose, the evidence as to the State's intent, and the

prejudice to appellant, that is, the use to which the emails could have been put. *See Thomas,* 397 Md. at 571. As for the cause of the violation, the circuit court found that the assistant state's attorney simply forgot about the emails she had sent and received, and we have no reason to conclude that that finding was clearly erroneous. As for the prejudice to appellant, the circuit court, before fashioning a remedy, heard argument from appellant's counsel as to the extent to which the emails were actually inconsistent with the victim's trial testimony and how they could be used for impeachment purposes. Appellant's arguments were, and remain, unconvincing.

Although appellant may have been surprised by the victim's reference to her emails during her direct testimony, the delayed disclosure did not deny him the necessary time to prepare a full and adequate defense. *See Ross,* 78 Md. App. at 286. Appellant learned of the emails during the victim's direct examination but did not inform the circuit court that he did not have copies until after he had completed his cross-examination. Thus, appellant's decision to delay informing the circuit court of the issue was what ensured that his cross-examination of the victim would be conducted without the evidence he later characterized as "crucial exculpatory information."

Moreover, with the exception of one State's witness who briefly described the victim's physical examination, the proceedings were halted after appellant learned of the emails and remained so until the State provided them. When the trial resumed,

four days later, appellant neither asked for a continuance nor took advantage of the circuit court's offer to allow limited additional cross-examination of the victim about the content of the emails.

Thus, appellant's argument that the only available course of action was to call the victim once again and, in so doing, "go[ ] back to the victim and go[ ] into everything" is undermined by the record. Appellant could have halted the proceedings and obtained the emails before he cross-examined the victim, or he could have recross-examined the victim in a limited manner, without permitting her to repeat her account of the rape. Appellant took advantage of neither remedial option and, in much the same manner as the defendants in *Thomas* and *Jones,* sought the greater windfall of a mistrial, *see Thomas,* 397 Md. at 575; *Jones,* 132 Md. App. at 678, which the circuit court understandably declined to grant.

Appellant further claims that "[t]here is simply no question that . . . a multitude of other emails exist that were never disclosed to the defense," citing the amount of email traffic between July 15, 2008, and May 22, 2009; the victim's statement that she sent "hundreds" of emails to Trooper Wenger; and Trooper Wenger's reference, on cross-examination, to "a lot of emails back in 06."

After appellant asserted that there were additional emails that the State had failed to disclose, the circuit court denied appellant's motion for a mistrial, finding that there was no "deliberate discovery

violation . . . by the State." The context of the discussion in the circuit court sheds light on the nature of the court's ruling.

As noted, after appellant brought the State's failure to disclose the emails to the court's attention, the court instructed the assistant state's attorney that she had a duty to inquire as to the existence of the emails: "So now what you're going to have to do . . . is get together with Trooper Wenger and find out where these emails are." Four days later, after having disclosed eighty-nine emails, the State represented to the circuit court that its prior failure "wasn't a willful violation." Finding that representation credible and, consequently, that there had been no deliberate discovery violation, the circuit court denied appellant's motion for a mistrial.

In that context, the court's express finding that the State had violated the discovery rules but that its violation was not deliberate included implied findings, first, that the State had rectified the discovery violation by providing, during trial, the emails that existed between the victim and the police and, second, that any prejudice suffered by appellant would be cured by the opportunity for limited recross-examination of the victim on the issues raised by the emails. We are not convinced that the victim's reference to sending "multiple . . . , dozens . . . [n]o, hundreds" of emails to Trooper Wenger necessarily meant that the final number mentioned, i.e., "hundreds," was an exact figure. Thus, it was not clearly erroneous for the circuit court to find that the eighty-nine emails

that were disclosed constituted the entire set. And, of course, the fact that the victim and Trooper Wenger communicated by email between July 15, 2008, and May 22, 2009, does not necessarily mean that they did so during the preceding thirty-seven months.

We also note that the circuit court's factual findings were made before Trooper Wenger testified, and therefore, in making its findings, the circuit court could not have considered the portion of her testimony, to which appellant now points, in which she referred to "a lot of emails back in '06." When reviewing whether the circuit court's factual findings were clearly erroneous, we think it proper to assess the record as it existed at the time of the circuit court's ruling. *Cf. Duncan v. State,* 64 Md. App. 45, 52 (1985) ("When we determine whether the trial judge committed an error in admitting or rejecting evidence or in striking out or refusing to strike out evidence previously admitted, we do so on the basis of the record as of the time the ruling was made, not on the basis of facts later developed."). If, as appellant claims, Trooper Wenger's subsequent testimony confirmed the existence of additional emails, appellant should have reasserted his objection and asked the circuit court to reconsider its finding in light of the new testimony.

Moreover, as noted, at trial, appellant did not request a continuance or any remedy other than a mistrial. He did not, for example, seek to subpoena the custodian of the police department's electronic records to determine whether old emails that might

have once existed had been destroyed. Indeed, he did not even seek to determine whether the police department had a policy on maintaining emails. Rather, appellant simply asserted that the "evidence suggest[ed]" that there were additional undisclosed emails. The circuit court's finding to the contrary was not clearly erroneous, and the court did not abuse its discretion in declining, on the record before it, to take the "extraordinary act" of declaring a mistrial.

But, under the circumstances of the instant case, even if there were additional undisclosed emails, the failure, by the State, to disclose those emails did not, contrary to appellant's assertion, violate *Brady v. Maryland,* 373 U.S. 83 (1963). In *Brady,* the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. A *Brady* violation occurs when the State withholds or suppresses evidence that is (1) favorable to the defense (because it was either exculpatory or impeaching) and (2) material to the guilt or punishment of the defendant. *Wilson v. State,* 363 Md. 333, 346 (2001). If the alleged *Brady* violation pertains to the failure to disclose favorable evidence, the evidence is "material" if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 347 (citations omitted). The Court of Appeals has interpreted the "reasonable probability" standard to mean

a "substantial possibility that . . . the result of [the] trial would have been any different." *Id.* at 347 n.3 (alterations in original) (citations omitted).

Accepting appellant's proffer that the undisclosed emails would have been favorable to the defense because they would have shown that the victim and the police had previously considered and rejected appellant as a suspect, we conclude that there is no substantial possibility that, had the evidence been disclosed, the result of the trial would have been different. The evidence adduced at trial established that appellant's DNA matched the DNA found on the back patio of the victim's home, on a pillow case on her bed, and, with somewhat less statistical certainty, on swabs of her vagina and anus. Moreover, the impeachment value of any undisclosed emails would have been slight. Even without the emails, the jury heard the victim's testimony that she provided Trooper Wenger with "multiple leads" and discussed with Trooper Wenger "every possible person who it could possibly be." And, although the victim testified that she believed appellant was her attacker, she also testified that the rapist tied a shirt over her face, preventing her from seeing his face. Thus, even if the undisclosed evidence was favorable to the defense because it demonstrated that appellant, whose DNA matched that of the rapist, had been briefly considered as a suspect by the victim at an earlier point in the investigation, it was not material to his guilt because there is no "substantial possibility that . . . the result of [the] trial would have been any different"

had the evidence been disclosed. *See Wilson,* 363 Md. at 347 n.3 (alterations in original) (citations omitted).

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY APPELLANT.[8]

[8] Our resolution of this appeal renders moot the State's motion to strike portions of appellant's appendix. *Cf. Eiland v. State,* 92 Md. App. 56, 102-03 (1992) (noting that a motion to strike a portion of a party's appendix was "to some extent mooted by the assessment of all costs against [that party]" but finding "the problem of the swollen appendix . . . sufficiently epidemic to warrant official comment"), *rev'd on other grounds sub nom., Tyler v. State,* 330 Md. 261 (1993).

IN THE CIRCUIT COURT FOR HARFORD COUNTY

STATE OF MARYLAND, Plaintiff vs. GLENN J. RAYNOR, Defendant	:	CRIMINAL CASE 12-K-08-1527

OFFICIAL TRANSCRIPT OF PROCEEDINGS

March 24, 2009

Bel Air, Maryland

BEFORE:

THE HONORABLE EMORY A. PLITT, JR., JUDGE

* * *

[132] THE COURT: Okay. Now, Maryland's dean of Fourth Amendment analysis, Judge Moylan, has for years suggested a form of analysis on all Fourth Amendment cases. That form of analysis goes like this. First of all, you determine standing. If there is no standing, end of story. Second, you decide whether or not the Fourth Amendment applies at all. If the Fourth Amendment does not apply at all, end of story. You do not get to part three of the analysis unless parts one and two are first satisfied.

Now, in this case, he clearly has standing. There is no issue with regard to that. Also with regard to that I want to make sure that one other thing is clear.

He was clearly not in custody as that term means under [133] the Fourth Amendment when he was at the barrack being interviewed. Nobody has advanced that argument. He went there voluntarily so he wasn't in custody. That's not an issue either.

Third thing, does Fourth Amendment apply at all in this case? I've read your memos before I came on the bench. These are all recently reported Opinions of both the Fourth Circuit and our Court of Appeals search and seizure cases.

This is a very simple matter as I see it. Does he have a reasonable expectation of privacy that society is prepared to recognize of what's left in a chair when he gets up and leaves? The answer to that as far as I am concerned is no, he has no such expectation of privacy. He is in a public building. He is there on his own.

Now, I know it sounds kind of snippish to say this, but if he was so concerned about it, he should have worn a long sleeve shirt. That's the analysis that fits, even though it sounds kind of snippish. Yes, he refused, there is no doubt about that. He refused to give consent. So when he refuses to give [134] consent, does that mean that if the police can get it some other way that they can't use it? Of course not. Courts have said even if it was a nefarious plot by Sergeant Decourcey and Trooper Wenger to go about getting it this way, so what?

The Supreme Court, you all will recall the Christian burial speech as it sometimes is called. Trickery,

subterfuge can be used because the Fourth Amendment, it is an analysis, it is an objective analysis, not subjective.

So here we have him sitting in a chair and he is sitting in a chair admittedly in a State Police barrack. I tend to agree with Mr. Allen to some extent that people aren't usually going in and out of there like they are at a county office building. Nevertheless, he is there, he is there on his own, he sits down in a chair. The question is does he have a reasonable expectation, his refusal to consent aside, that sweat from his arms on the chair that he leaves enjoys Fourth Amendment protection? Not in my opinion.

So I think that the seizure of the sample [135] did not violate the Fourth Amendment at all because I don't think the Fourth Amendment applies in this situation because which I don't think he had any reasonable expectation of privacy with regard to the sweat he left on the chair. This is not the kind of case like the railway case and some of the others. They are a little different. They involved a different kind of interaction. That's why I asked the question that I did of both of you about various permeatations of this and what you thought about it.

I don't think DNA is any different in terms of leaving it anywhere than a fingerprint than if he walks out of the barrack and somebody takes his photograph. He is sitting in there and ask can we take a picture of you and they tell him we want to take a picture of you to have other people look at it.

He says no, you're going to take a picture. So walks outside the barrack, is standing on the sidewalk and they take his picture. He is in a public place. When he goes in there, does he have any expectation that anything he leaves that he is going to continue to have a privacy [136] right in it? I don't think so. And because I don't think so, because I don't think the Fourth Amendment applies at all, because I don't think he had any reasonable expectation, as the courts say, that society is prepared to recognize as reasonable, then the same logic applies because the use of that to obtain the search warrants also is perfectly legitimate.

There is one other issue, too, about this container business. This is not a typical container case. Typical container cases involve a search of a car where a bag is found and a container is in it or a briefcase, as Mr. Allen points out, where a container is in it. Container search has been the subject of much litigation in the Supreme Court, who has standing, do you need a search warrant, if it's the automobile exception, do you need a search warrant for purposes of looking in containers that are in the trunk. This isn't a container case. The minute the swab was taken from the chair the seizure was over. End of story. The processing of that sample after that is a routine matter because if the State Police lawfully had that sample in their possession, [137] they did not need a search warrant to send it to the lab to have it analyzed because, as they say, it was already in custodia legas.

So the Motion to Suppress is going to be denied as to all of that. I will issue an order to that effect.

* * *

GLENN JOSEPH RAYNOR	*	In the
v.	*	Court of Appeals
STATE OF MARYLAND	*	of Maryland
	*	No. 69
	*	September Term, 2012

ORDER

The Court having considered the motion for reconsideration filed in the above-captioned case, it is this twenty-first day of October, 2014,

ORDERED, by the Court of Appeals of Maryland, that the above motion be, and it is hereby, DENIED.

/s/ Mary Ellen Barbera
Chief Judge

GLENN RAYNOR,	*	**IN THE**
Petitioner/	*	**COURT OF APPEALS**
Cross-Respondent,	*	**OF MARYLAND**
v.	*	**Docket No.: 69**
STATE OF MARYLAND,	*	**September Term,**
Respondent/	*	**2012**
Cross-Petitioner	*	

* * * * * * * * * * * * * * * * *

MOTION FOR RECONSIDERATION

Petitioner, Mr. Glenn J. Raynor, pursuant to Md. Rule 8-605, respectfully requests that this Court reconsider its decision in *Raynor v. State*, No. 69, Sept. Term, 2012 (Md. Aug. 27, 2014). This Court erroneously concluded that the seizure and analysis of Mr. Raynor's genetic material was not a search. Mr. Raynor respectfully requests that this Court reverse its position on three critical aspects of Mr. Raynor's case and reverse its judgment.

1. First, the majority dramatically misconstrued two of counsel's statements during oral argument and then relied on that misconstruction in not addressing one of Mr. Raynor's contentions. Mr. Raynor, through undersigned counsel, never conceded that the police lawfully seized his genetic material from the armchair in which he sat in the police station.

Mr. Raynor challenged both the seizure and the analysis of his genetic material (1) in his Motion to

Suppress in the trial court, *Raynor*, slip op. at 5, 9; (2) in his Brief and Motion for Reconsideration in the Court of Special Appeals, Pet'r's Reply Br. 7; Appellant's Br. 2; (3) in his Petition for a Writ of Certiorari, Brief, and Reply Brief in this Court, *Raynor*, slip op. at 9; Pet'r's Reply Br. 6; and, as explained herein, (4) at oral argument.

The majority relied on two of counsel's statements to hold that counsel conceded the validity of the seizure of Mr. Raynor's genetic material. First, the majority quoted counsel as stating: "'[I]t really does not matter whether it gets analyzed as a one-step process or a two-step process' because '[t]he obvious real issue in this case is the content of what [the police] got when they used their technology to analyze [Mr. Raynor's DNA].'" *Raynor*, slip op. at 9. The majority incorrectly combines, as one, two of counsel's responses to two different questions.

Judge Battaglia's Question and Counsel's Response.

Judge Battaglia asked counsel: "So they could seize what was on the chair?" I mean, they could take that up? Like a finger . . . [inaudible] . . . they could do it like a fingerprint, ok?" Oral argument, No. 69, Sept. Term, 2013, at 05:00-05:10 (Apr. 8, 2014), *available at* http://www.mdcourts.gov/coappeals/imedia/2013/coa20140408caseno69.wmv. Counsel's full response was:

> Your Honor, it gets to be, I won't say form over substance, but it really does not matter that much whether it gets analyzed as a one step process or a two step process. There is no question the reason the police were doing what they could do, by their own admission, so that they could get it tested.

Id. at 05:11-05:27. Counsel did not respond to Judge Battaglia's question by stating: "[T]he obvious real issue in this case is the content of what [the police] got when they used their technology to analyze [Mr. Raynor's DNA]," *Raynor*, slip op. at 9. As explained below, counsel made that statement later in response to a different question from Chief Judge Barbera. Thus, the majority misquoted counsel.

Moreover, the point of counsel's response to Judge Battaglia was to *strengthen*, not *concede*, the argument that the police were prohibited from collecting Mr. Raynor's genetic material without a warrant. Counsel emphasized that the police always intended to test Mr. Raynor's genetic material. It was not as if the police acquired Mr. Raynor's genetic material for one purpose, and then, because they coincidentally had it in their possession, tested it later while investigating this case. Because the police always intended to test Mr. Raynor's genetic material, counsel emphasized that the seizure and the analysis of Mr. Raynor's genetic material were one in the same, which cannot be interpreted as conceding that the seizure was valid. Counsel did not concede anything in his response to Judge Battaglia's question.

Judge Barbera's Question and Counsel's Response.

Second, the majority quoted counsel as stating: "[F]or the sake of this discussion, we would concede that, fine, . . . it was okay for [the police] to take the stuff off of their chair." *Raynor*, slip op. at 9. The majority misquoted counsel again by omitting a part of counsel's statement. Chief Judge Barbera asked counsel:

> Well, what about the upcoming cases, on searches of cell phones that had been seized? The seizure, right or wrong, I don't think that the initial seizures are at issue before the Supreme Court, but the second evaluation of the contents of the cell phone is before the Court.

Oral Argument, at 05:28-05:47. Counsel's full response was:

> That has, that has certain similarity Your Honor, because, *although we don't think anything should have been done*, for the sake of this discussion, we would concede that fine, *let's suppose* that it was ok for them to take the stuff off of their chair, the obvious real issue in this case is the content of what they got when they used their technology to analyze it.

Id. at 05:47-6:07. Counsel unequivocally stated that Mr. Raynor's position was that nothing should have been done with his genetic material. Moreover, counsel did not state, as the majority quotes him, "for the

sake of this discussion, we would concede that, fine, . . . it was ok for them to take the stuff." *Raynor*, slip op. at 9. Counsel stated "*let's suppose* that it was ok for them to take the stuff." Oral argument, at 05:56-06:00.

Chief Judge Barbera was not asking counsel about whether the police could lawfully seize Mr. Raynor's DNA. The essence of Chief Judge Barbera's question, and counsel's statement, was merely that this case was similar to *Riley v. California*, 134 S. Ct. 2473 (2014), which was pending in the Supreme Court at the time of oral argument.

Mr. Raynor's case is a case of first impression and is a case that will fundamentally impact the relationship between law enforcement and free citizens. The majority incorrectly held that Mr. Raynor's counsel conceded that the seizure of Mr. Raynor's genetic material was lawful. The majority (1) materially altered counsel's statements at oral argument; (2) erroneously found a concession in a response to Judge Battaglia's question that emphasized that the seizure and the analysis of Mr. Raynor's genetic material were essentially one in the same; (3) erroneously found a concession in a response to Chief Judge Barbera's question that merely confirmed her suggestion that this case was similar to *Riley*, and (4) erroneously found a concession in counsel's willingness to assume the validity of the initial seizure "for the sake of [the] discussion," while steadfastly maintaining that Mr. Raynor's position was that "nothing should have been done" with his genetic material.

The majority relies on the fact that Mr. Raynor, through counsel, conceded an important part of his argument. Because the majority misinterpreted two of counsel's statements, and then relied on its misinterpretations in its holding against Mr. Raynor, the majority should reverse its holding. Mr. Raynor has a reasonable expectation of privacy and made no concession to the contrary.

2. Second, the majority ignored *Riley v. California*, 134 S. Ct. 2473 (2014), which recognized, as Mr. Raynor asserted, that technology has so expanded the information that can be obtained by a search of the Fourth Amendment search that traditional Fourth Amendment jurisprudence is inadequate to protect people.

The majority completely ignored what may be the most significant case – the 9-to-0 Supreme Court decision, in favor of the Defendant, in *Riley v. California*, 134 S. Ct. 2473 (2014), which was decided on June 25, 2014 (78 days after oral argument in this case, and 63 days before the Court's opinion in this case). The analysis in *Riley* should control Mr. Raynor's case, yet the majority inexplicably acted as if *Riley* had never been decided.

In this case, Mr. Raynor argued that, as a free citizen (not convicted, not arrested, not on probation, and not on parole), he had the highest expectation of privacy in his genetic material, which prevented the police from extracting, analyzing, and comparing his

genetic material without a warrant. Mr. Raynor stressed that technological advances had outgrown current Fourth Amendment jurisprudence.

Because the Fourth Amendment "protects people, not places," *Katz v. United States*, 389 U.S. 347, 351 (1967), he argued that he retained a reasonable expectation of privacy in the contents of his genetic material – an inherent part of his person – regardless of the place from which it was obtained. He stressed that focusing merely on the place searched – in this case an armchair – meant that a free citizen would lose his or her expectation of privacy in their genetic material any time they entered a public place. Ironically, if the majority's analysis in *Raynor* is not reversed, then, in light of *Riley*, an arrestee has a greater expectation of privacy in the contents of his cell phone than a free citizen has in the contents of his or her DNA.

In *Riley*, the police, with probable cause, arrested the Defendant. Since 1969, under the search incident to a lawful arrest analysis, if police validly arrest the Defendant, police are permitted to search everything within the Defendant's lunge, reach, and grasp. In *Riley*, there was a cell phone within the Defendant's lunge, reach, and grasp, which the police seized. Subsequent to obtaining the cell phone, the police searched its contents.

In *Riley*, the Supreme Court held, 9-to-0, that even though the police validly obtained the cell phone, the police could not search the inside of the

cell phone without a warrant, because people have their entire lives in their cell phones. 134 S. Ct. at 2484-85. *Riley* changed everything. For 45 years, as long as the police obtained the cell phone within the Defendant's lunge, reach, and grasp, then, under the traditional view of the search incident to a lawful arrest exception, police could seize and search it without a warrant.

However, the Supreme Court held that the traditional concept of the Defendant's lunge, reach, and grasp did not adequately protect the Defendant's expectation of privacy, when considering the diverse and immense amount of information that technology placed in the Defendant's cell phone. Moreover, it did not matter what the police actually took from inside the cell phone. Once the police went into the cell phone, they could not take anything. The Court held that even though the cell phone was validly seized, police could not go into the phone without a warrant.

The same is true in Mr. Raynor's case. Mr. Raynor, like all of us, has his most intimate personal details contained within his genetic material. The Fourth Amendment "person" was traditionally protected against physical intrusion into the body. Science and technology has eviscerated the traditional notion that the Fourth Amendment "person" extends only to an individual's physical body. In *Riley*, due to technological advances, the police would have access to an individual's entire life by searching the area within his or her lunge, reach, and grasp.

Similarly, in this case, science and technology permit police to invade the very make-up of a person without physically intruding beneath the skin. In this case, the traditional notion of the Fourth Amendment "person" can no longer protect people, like the traditional concept of an individual's "lunge, reach, and grasp" in *Riley*. To protect people, the majority must recognize that a search of the person may occur even without physical intrusion into the body.

In *Riley*, the Court stated that "modern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy . . . [P]hones are based on technology inconceivable just a few decades ago. . . ." *Id*. at 2484. By analogy, genetic testing did not exist when the Supreme Court decided *United States v. Dionisio*, 410 U.S. 1 (1973), which the majority interpreted as an "implicit . . . constitutional 'go ahead'" for fingerprinting. *Raynor*, slip op. at 16. If the Court holds that Mr. Raynor had no reasonable expectation of privacy, the Fourth Amendment, as understood by the Framers, is dead. There is no privacy. If the police have probable cause, let them present it to a neutral and detached magistrate. Otherwise, the police must stay out of the intimacies of Mr. Raynor's person.

The State's argument, and the majority's conclusion, that police only obtained 13 junk loci for purposes of identification is a "red herring." First, the fact that police could have taken more, but did not, is legally insignificant to the question of whether a

search occurred. If police illegally break into a home, it is the same Fourth Amendment intrusion if the police take many things, take a few things, or take nothing.

The applicability of the Fourth Amendment is not governed by the self-restraint, or lack of self-restraint, of the police. In *Riley*, the Defendant's reasonable expectation of privacy was invaded because the police *could* sort through a vast amount of information, even though the police merely viewed several pictures. 134 S. Ct. at 2488-89. Similarly, in this case, regardless of what the police actually took, they had access to everything.

The Fourth Amendment required the police to obtain a warrant before testing Mr. Raynor's genetic material. Studies show that an expectation of privacy in one's genetic make-up is an expectation of privacy that society is prepared to recognize as reasonable. *See* Pet'r's Br. 37-38. Thus, shy of an exception to the warrant requirement, none of which is inapplicable here, the police were required to obtain a warrant. It is impossible to reconcile *Riley* and the majority's decision in this case. The net effect is that, under the Fourth Amendment, an arrestee has a larger expectation of privacy in the contents of his or her cell phone than a free citizen has in the contents of his or her genetic material.

3. Third, the majority incorrectly adopted an unworkable, case-by-case approach for determining the applicability of the Fourth Amendment to genetic testing.

In *Riley*, the Supreme Court recognized that the Fourth Amendment is implicated when the police have *access* to private information that is typically inaccessible, but which technology places at their fingertips. The Supreme Court did not linger on the amount of information that the police actually took, which, in *Riley*, was only a few pictures and a record of a phone call.

In this case, the majority ignored the Supreme Court's clear indication that the Fourth Amendment is implicated when technology gives the police the power to *potentially* invade private information. The majority's analysis turned on "the character of the information specifically sought and obtained from the DNA testing of Petitioner's genetic material – whether it revealed only identifying physical characteristics . . . " *Raynor*, slip op. at 14. The Court relied most on the fact that the police purportedly tested "non-coding regions" of Mr. Raynor's genetic material. *Id*. at 15.

Under the majority's analysis, there is an invisible line along the genetic code that marks the boundary between a search and a non-search. If the State sought to analyze Mr. Raynor's entire genetic code, then the State would take the exact same steps that it took in this case. First, it would extract genetic material. Second, it would develop a genetic profile by

chemically altering and amplifying the cells for analysis. Regardless of the extent of testing, those actions invade Mr. Raynor's person. That is all that is required for a search to occur.

Genetic science evolves rapidly. The assumption that police cannot search Mr. Raynor's entire genetic profile from the strands of his genetic material that were tested in this case is not static. Amicus for Mr. Raynor pointed out that, as science evolves, police will be able to learn more information from the same strands of genetic material that were tested in this case. Amicus Br. 19-22.

Moreover, it is impossible to determine the line along the genetic code that divides searches from non-searches. The majority should not rely on an arbitrary distinction to determine the relationship between law enforcement and free citizens. The Supreme Court has consistently insisted on broad rules of application to guide law enforcement and the general public. *See Riley*, 134 S. Ct. at 2491-92 ("[T]he United States and California offer various fallback options for permitting warrantless cell phone searches under certain circumstances. Each of the proposals is flawed and contravenes our general preference to provide clear guidance to law enforcement through categorical rules, [I]f police are to have workable rules, the balancing of the competing interests . . . must in large part be done on a categorical basis – not in an ad hoc, case-by-case fashion by individual police officers."); *Kyllo v. United States*, 533 U.S. 27, 39-40 (2001) ("The dissent offers no practical guidance for

the application of [its] standard, and for reasons already discussed, we believe there can be none. The people in their houses, as well as the police, deserve more precision. . . . [The Fourth Amendment] requires clear specification of those methods of surveillance that require a warrant.").

Conclusion

Mr. Raynor respectfully urges that the majority's decision is flawed. This Court should (1) order re-briefing, (2) order re-argument, (3) vacate its erroneous decision, and/or (4) vacate Mr. Raynor's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 20th day of September, 2014, two copies of this Motion for Reconsideration in the above-captioned case were mailed first class, postage pre-paid, to:

Criminal Appeals Division
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202

/s/ Byron Warnken
Byron L. Warnken