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FRIDAY

MONDAY

TODAY

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Majority fails to recognize intrusiveness of DNA collection

Erwin Chemerinsky is dean and distinguished professor of law, Raymond Pryke Professor of First Amendment Law, University of California, Irvine School of Law.



How long will it take for the Supreme Court's Fourth Amendment jurisprudence to move into the 21st century? Its recent decision in *Maryland v. King*, 2013 DJDAR 6991 (June 3, 2013), provides little reason for hope that it will be any time soon. In *Maryland v. King*, the court held, 5-4, that the government may take DNA

samples from those arrested for serious crimes to see if they are linked to crimes for which they are not suspects. This is a significant expansion of law enforcement to gather information about individuals for crimes where they are not a suspect and it fails to recognize the potential enormous loss of privacy from the government possessing a DNA database.

Alonzo Jay King, Jr. was arrested in Maryland for first and second degree assault. A sample of King's DNA was then taken by putting a cotton swab inside his cheek (a "buccal swab"). This was done pursuant to the Maryland DNA Collection Act, which requires the collection of DNA from those arrested for serious crimes. The DNA was not collected to link King to the assaults for which he was arrested; King was arrested for pointing a gun at some individuals, and there was no dispute as to his identity. DNA was not relevant to that prosecution. The DNA was collected entirely for the purpose of potentially linking King to other crimes.

King's DNA was then matched to a profile of forensic evidence from a sexual assault. Under Maryland law, the DNA match cannot be used as evidence at trial, but it does provide probable cause for arresting an individual for the other crime and for taking another DNA sample. Based on the DNA taken from him after his assault, King was charged with rape and ultimately convicted of that crime and sentenced to life in prison.

Federal law and the law in all 50 states provide that DNA will be collected from individuals convicted of felonies. The issue presented in *Maryland v. King* was whether DNA can be taken and analyzed from a person arrested for a crime, who has not yet been convicted, and for the sole purpose of investigating other crimes. The Maryland Court of Appeals found that this violated the Fourth Amendment and emphasized that the taking of DNA was a search done without any individualized suspicion. The court observed that "DNA samples contain a massive amount of deeply personal information." The court stressed the importance of the distinction between convicted individuals and those who only have been arrested.

***Maryland v. King* is troubling because it is about searching people to gather evidence for crimes where they are not suspects.**

Litigation

Former employee's suit over Madden video game turns on statute of limitations

Statements by Electronic Arts Inc. touting the 20th anniversary of its John Madden football video game tipped off a former employee that it was derived from a computer game he coded years earlier, the man's attorney said Monday.

U.S. Supreme Court

In noncustodial setting, right to silence isn't absolute

Individuals being questioned by police still have the right to remain silent following a U.S. Supreme Court decision Monday, but they'll have to speak up to invoke it.

Litigation

Bingham McCutchen helps Oracle win favorable outcome in copyright case

Oracle Corp. announced Monday that it has favorably concluded its unfair business and copyright infringement lawsuit against Georgia-based ServiceKey LLC in Oakland.

Law Practice

State Bar panel endorses licensing nonlawyers to perform limited legal work

A special State Bar panel formally endorsed the idea of licensing nonlawyers to perform some legal work for clients and recommended the bar's Board of Trustees move forward to develop a limited-license program.

Discipline

Disbarred OC lawyer sentenced to a year for embezzling \$150,000 from auto-accident clients

Tuan Thanh Tran, who was disbarred in November, pleaded guilty to stealing more than \$150,000 from settlements for auto-accident clients. He was sentenced to one year in jail.

Litigation

Judge awards firm \$1.2 million in fees in taxation case

Attorneys from Reed Smith LLP in Los Angeles obtained the award on behalf of Daniel V Inc., a Nevada-based real estate firm owned by a California resident.

Mergers & Acquisitions

Dealmakers

A roundup of recent mergers and acquisitions and

The Supreme Court reversed, with Justice Anthony Kennedy writing for the court, joined by Chief Justice John Roberts and Justices Clarence Thomas, Stephen Breyer and Samuel Alito. Justice Antonin Scalia wrote a powerful dissent joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan. Justice Kennedy's majority opinion stressed that reasonableness is the key to Fourth Amendment analysis, with the court needing to balance the law enforcement justification for taking DNA samples against the intrusion into privacy from the search. The court said that there were significant benefits to law enforcement in gathering DNA from those arrested, especially in terms of the ability to solve "cold" cases and unsolved crimes.

At the same time, the court said that the intrusion of privacy would be minimal. A swab inside a person's mouth was regarded as a minimal intrusion. The court accepted the government's argument that this was no more intrusive than taking a suspect's picture or fingerprints, things that are routinely done when people are arrested. He said that the testing focuses on part of the DNA which provides identification, but not personal information about individuals.

Some expressed surprise that Justice Breyer voted with the majority while Justice Scalia wrote the dissent. But this also occurred in a Fourth Amendment case earlier in the term. In *Florida v. Jardines*, 133 S.Ct. 1409 (2013), the court held, 5-4, that a police officer violated the Fourth Amendment by bringing a drug-sniffing dog on to the front porch of a home. Justice Scalia wrote the opinion, while Justice Breyer was in dissent. These cases reflect a more general theme in their jurisprudence: Justice Breyer is a pragmatist who favors balancing tests, including in Fourth Amendment cases. Justice Scalia, by contrast, prefers bright line rules: bringing a drug-sniffing dog on someone's property without consent is a trespass and that makes it a search; a person cannot be searched, such as by taking DNA, for crimes where a person is not a suspect.

Here, Justice Scalia's approach is much more persuasive than Justice Breyer's and the majority's in *Maryland v. King*. The problem with balancing is that it can leave little left of the Fourth Amendment. Of course, the police benefit by having DNA samples. Indeed, Justice Kennedy's opinion does not provide any basis for limiting the taking of DNA to those arrested for serious crimes; under his reasoning, police seemingly can take DNA from anyone arrested for any crime. And if the focus is on the benefit to law enforcement, why can't government take DNA from literally everyone? That would tremendously help law enforcement. Indeed, law enforcement would gain enormously if it could search anyone's person or property at any time.

The Fourth Amendment was meant to stop exactly that type of law enforcement action. A person can be searched only for offenses where there is probable cause. *Maryland v. King* is troubling because it is about searching people to gather evidence for crimes where they are not suspects. The court surely would not allow the police to automatically search the homes of those arrested. Why then allow their DNA to be taken and used against them?

The court's answer was that the taking of DNA is minimally intrusive; a cotton swab inside the cheek was seen as no different from taking fingerprints. But there is a great difference: A tremendous amount can be learned about an individual from his or her DNA and the amount that can be known is exponentially increasing. Fingerprints are taken to help identify the person; DNA is not used for that purpose because it takes too long to get the results from the tests. DNA is taken solely for the purpose of linking a person to a crime for which he or she is not a suspect.

The majority opinion in *Maryland v. King* was striking in its failure to recognize that taking DNA from a person is an especially intrusive search and that there is a potentially huge threat to privacy in the government having DNA data bases. Once more, the court left great doubts as to whether it is ready to move the Fourth Amendment into the 21st century.

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financing activity and the lawyers involved.

California Courts of Appeal Generic drugmaker can be sued for failing to update warning label, appellate court rules

A pharmaceutical company can be sued for failing to update a warning label on a generic drug to match the label on the corresponding brand-name drug, a state appellate court has ruled.

U.S. Supreme Court Majority fails to recognize intrusiveness of DNA collection

Maryland v. King is troubling because it is about searching people to gather evidence for crimes where they are not suspects. By **Erwin Chemerinsky**

Bankruptcy Bankruptcy court chastises Stockton's capital market creditors for their opposition to Chapter 9 relief

The capital market creditors asserted that, as a matter of state law, Stockton did not satisfy its good faith negotiation obligation during the AB 506 process. By **David Kupetz**

Litigation Parol evidence in a post-*Riverisland* world

In a case decided June 13, the 1st District Court of Appeal provided some guidance on how the appellate courts will treat the parol evidence rule in the post-*Riverisland* world. By **David Krause-Leemon**

Intellectual Property Take stock: Pre-1978 copyrighted works require thorough record keeping

Recently, the heir of rock-and-roll photographer James Marshall learned the importance of collecting and maintaining proper records of intellectual property rights. By **Nicholas Kanter**

Law Practice Guns on campus: navigating the legal maze

The debate over guns on school campuses has only intensified after last year's massacre at Sandy Hook Elementary School and the recent shootings at Santa Monica College. By **Daniel H. Handman**

Judicial Profile Andrew David Hurwitz

Circuit Judge 9th U.S. Circuit Court of Appeals (Phoenix)

Entertainment & Sports Electronic dance music opens new legal realm

The arena of legal representation of EDM artists is growing and still malleable. Artists and their