Majority fails to recognize intrusiveness of DNA collection

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 arrest, 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.
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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