IN THE SUPREME COURT OF THE UNITED STATES

Maryland, Applicant v. Alonzo Jay King, Jr.	No.: 12A48

MEMORANDUM IN OPPOSITION TO APPLICATION FOR STAY OF THE JUDGMENT AND MANDATE PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

Alonzo Jay King, Jr., through counsel, files this memorandum in opposition to Maryland's Application for Stay of Judgment and Mandate Pending the Filing and Disposition of a Petition for a Writ of Certiorari, filed on July 13, 2012, with the Honorable John G. Roberts, Jr., Chief Justice of the United States, Circuit Justice of the Fourth Circuit. In support of this memorandum in opposition, Mr. King states:

INTRODUCTION

In the decision below, the Maryland Court of Appeals held that the warrantless, suspicionless search of DNA from Mr. King—an arrestee presumed to be innocent—for the immediate and primary purpose of investigating him for evidence of crimes violates the Fourth Amendment. *Alonzo Jay King, Jr. v. State of Maryland*, 42 A.3d 549, 556 (Md. 2012). On May 18, 2012, the Maryland Court of Appeals properly rejected the State's request—repeated here nearly eight weeks later—to grant the extraordinary relief of a stay of the mandate and enforcement of that judgment. The State of Maryland's substantial delay in seeking a stay belies its claim that the decision below deprives it of a

"valuable crime-fighting tool" and has "interfered" with the efforts of other states to use DNA evidence to prosecute crimes within their own borders. (State's Application, p. 2). Moreover, the State overstates the data submitted in its application in its attempt to show irreparable harm, and is otherwise lacking in specifics to support its claims. Further, the Court is unlikely to grant certiorari because of the shallowness of the State's claimed conflict or its mischaracterization of the decision below, and particularly because the Maryland statute expires on December 31, 2013. The balance of these factors decisively points to the correctness of the lower court's decision to deny the stay. The State's application for stay should accordingly be denied.

A. The State's Delay In Filing Its Application Belies Its Claim Of Irreparable Harm And Confirms The Maryland Court Of Appeals' Denial Of The State's Request For A Stay

The State's delay in filing its application for a stay directly undercuts the legitimacy of its claim of irreparable harm that is essential to sustain the extraordinary relief of a stay, and "tend[s] to blunt [its] claim of urgency and counsel[s] against the grant of a stay." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1318 (1983) (Blackmun, J., in chambers); *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers) (taking undue time to apply for a stay held to "vitiate much of the force of [petitioner's] allegations of irreparable harm."). The State advances no reason to explain the delay, is short on the specifics of its claimed harm, and provides misleading data about the collection of DNA from arrestees to exaggerate the impact of the decision below. The lower court is in the best position to evaluate the State's factual allegations and its decision denying the State's request for a stay is entitled to deference. *See*, *e.g.*,

Houchins v. KQED, Inc., 429 U.S. 1341, 1345 (1977) (Rehnquist, J., in chambers) (lower court's assessment of request for stay entitled to "due deference"); *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers) (noting a "presumption of correctness" attends lower court's decision to deny stay). This presumption of correctness makes sense especially in cases where, as here, the State has made exaggerated claims of irreparable harm that cannot be sustained.

The State claims that the decision of the court below makes investigating crime harder and complicates pending prosecutions. As a preliminary matter, it is worth pointing out that these generalized concerns arise whenever a court construes the Fourth Amendment (or any other provision of the Constitution) in a way that puts limits on law enforcement. If concerns of this nature were enough to obtain a stay, this Court would grant a stay in every criminal case where the court below ruled in favor of the defendant. That obviously is not the Court's practice.

In any event, the State greatly overstates the degree to which the decision below inconveniences law enforcement and prosecutors. For starters, the State's estimate for the number of profiles in the Federal Bureau of Investigation's Combined DNA Index System ("CODIS") that are affected by the decision below is grossly inflated. The State claims that Maryland's "33,575 arrestee profiles" have been withdrawn from the database. (State's Application, p. 17). But the Maryland State Police Forensic Science Division's Annual Report cited by the State in its application states that only 14,570 arrestee DNA profiles have actually been analyzed and uploaded to CODIS since Maryland started participating in the program. (Statewide DNA Database 2011 Annual

Report, p. 7, 9) ("As 2011 ended, cumulative totals in CODIS reached over 98,300 convicted offender samples with over 14,000 samples from individuals charged with qualifying offenses.") (available at http://www.mdsp.org/Downloads.aspx). And even this figure likely overstates the number of profiles that can no longer be accessed by law enforcement, because it fails to account for the overlap between arrestee profiles (which are the only ones that have been withdrawn) and convicted offender and probationer profiles, which are unaffected by the decision below.

The CODIS database contains multiple indices, including a convicted offender index and an arrestee offender index. (Available at http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet/). These indices may overlap because a person arrested for a qualifying offense that subjects him to DNA collection may already have a qualifying felony conviction that caused his DNA profile to be placed in the convicted offender index. Likewise, a person who is convicted for the offense that subjected him to DNA collection upon arrest will also end up in the convicted offender index. *See, e.g.,* CODE OF MARYLAND REGULATIONS, §29.05.01.14 (I) & (J) (Specifying that a DNA profile of an arrestee eligible for expungement is removed only from the arrestee index and not from indices where it may be present for other reasons.). The State ignores this practical reality that the indices overlap to make the claim that excluding arrestee DNA profiles from CODIS prevents other states from investigating all suspects included in the arrestee index.

It is incumbent upon the State, when seeking the extraordinary relief of a stay, to support its claim of irreparable harm with reliable data. To do so here, it would need to

accurately state the number of arrestee DNA profiles uploaded to CODIS, and account for any overlap between the arrestee and convicted offender indices.[1] It has not done so.

Also overblown is the State's unsupported argument that the decision below has "cast a cloud" over "all" existing prosecutions in other states that involve a hit to a Maryland arrestee offender sample. (State's Application, p. 17). Despite the State's lengthy delay in seeking a stay, it does not identify any prosecutions that have been aborted, or even articulate precisely how a decision of the Maryland Court of Appeals

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[1] In particular, the State has failed to account for two statutory requirements unique to Maryland: (1) A DNA sample collected from an arrestee cannot be tested and uploaded to CODIS prior to the first scheduled arraignment date (which, in Maryland, ordinarily occurs 30 days or more after arrest), MD. CODE ANN. PUB. SAFETY ART., §2-504(d)(2) (2011 Repl. Vol.); and (2) a DNA sample and profile of an arrestee is automatically expunged if a criminal action begun against the arrestee relating to the qualifying offense does not result in a conviction of the arrestee. §2-511(a)(1)(i).

The Maryland State Police Annual Report cited by the State explains how these statutory criteria impact the number and timing of arrestee DNA profiles analyzed and uploaded to CODIS:

> In the first year of its implementation, the newly expanded portion of the law resulted in the collection of over 11,600 DNA samples. Samples from those individuals charged and having arraignment dates, a total of 5,047, were subjected to analysis. The DNA profiles from those samples eligible for entry into the database and not subject to automatic expungement, a total of 4,213, were uploaded and searched.

(Statewide DNA Database 2011 Annual Report, Executive Summary, p. ii). Indeed, this section of the report suggests that the only arrestee DNA profiles uploaded to CODIS are those not subject to expungement, *i.e.*, arrestees who are convicted of the offense that triggered the collection of DNA upon arrest. The State makes no attempt, however, to clearly explain the process that makes DNA profiles available to other states or the federal government. Nor does the State provide any data about the number of DNA profiles in the arrestee index that are not contained in the convicted offender index. Without this information, the State's claims that five suspects will evade prosecution in the ninety days until a petition for certiorari will be filed, as well as the number of formal charges that result only from a DNA "hit" to the arrestee index, are pure makeweight.

would interfere with another state's prosecutions. At best, it is an exceedingly attenuated harm that is so indirect it cannot serve as a basis for the granting of a stay.

B. The Court Is Unlikely To Grant Certiorari In This Case

The State claims the decision below "deepens a significant split in state and federal authorities regarding statutes mandating the collection of DNA samples from arrested people." (State's Application, p. 9). The State further claims that the case at hand is an "ideal vehicle" for the Court to resolve an issue "that has divided lower courts…." (State's Application, p. 10). The State then counts what is essentially a three-to-one split: The United States Courts of Appeals for the Third and Ninth Circuits, and the Supreme Court of Virginia, have affirmed the warrantless search and seizure of DNA from arrestees, *see United States v. Mitchell*, 652 F.3d 387 (3rd Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012), *Haskell v. Brown*, 669 F.3d 1049 (9th Cir. 2012), *Anderson v. Commonwealth*, 650 S.E.2d 703 (Va. 2007), while the Maryland Court of Appeals has reached the opposite conclusion in this case. In the middle is the Arizona Supreme Court, which in the context of juvenile offenders, permits the collection of DNA upon arrest, but forbids its analysis until a juvenile has been adjudicated delinquent. *Mario W. v. Kaipio*, 2012 Ariz. LEXIS 153 (Ariz. 2012). The conflicting decisions of Vermont's trial courts cited by the State do not deepen the State's claimed conflict. (State's Application, p. 11, n. 2).

This is an area where the lower courts and states should be permitted to more fully develop the factors surrounding an assessment of the reasonableness of arrestee DNA collection. Recently, the California Supreme Court granted certiorari in *People v. Buza*,

129 Cal. Rptr. 3d 753 (Cal. Ct. App. 2011), *cert. granted*, 262 P.3d 854 (Cal. 2011), to address these factors, and there are other cases presenting the same issue that are currently in various stages of litigation in state and federal courts. The State invites a quick resolution of the issue, but as Justice Frankfurter presciently observed in *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (in chambers): "It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." As Justice Alito explained in *United States v. Jones*:

> Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.

132 S. Ct. 945, 962 (2012) (concurring in judgment). That is precisely the situation at hand, and caution is appropriate when considering the full implications of a technology that gives law enforcement a vastly more powerful tool without the practical limitations and protections that exist with other forms of biometric information. Moreover, continuing advances in the science of DNA may result in rapidly expanded uses of DNA profiles that are not yet fully anticipated.

Even if the Court were prepared to resolve any conflict, the decision below is not a good vehicle for doing so because there is an important and substantial difference between the Maryland statutory scheme governing the collection of DNA from persons arrested for certain qualifying offenses and the analogous federal law. 42 U.S.C.

§14135a (a)(1)(A)(2012). Significantly, Maryland's DNA collection statute contains a "sunset provision." The section requiring collection of DNA samples from individuals charged with specified crimes will expire on December 31, 2013, and the Maryland legislature has taken no action to extend the statute's lifespan. MD. CODE ANN., PUB. SAFETY ART., §2-504 (2011 Repl. Vol.). Without affirmative legislative action in the 2013 session, the Maryland statutory provision requiring the collection of DNA from persons arrested of certain qualifying offenses will cease to exist, rendering the question presented in this case moot.

C. The Decision Below, When Properly Understood, Was Correct And Is Unlikely To Be Reversed

The lower court correctly applied the decisions of this Court that govern the collection and use of evidence from an individual for the primary purpose of investigating him for criminal wrongdoing. *See Ferguson v. City of Charleston*, 532 U.S. 67, 85 (2001) (Fourth Amendment does not tolerate suspicionless searches when the primary purpose is the detection of evidence of criminal wrongdoing); *Schmerber v. California*, 384 U.S. 757, 769-70 (1966) (Fourth Amendment prohibits warrantless seizure of biological evidence for law enforcement purpose absent probable cause and exigent circumstances that make obtaining a warrant impracticable).

The lower court properly held—and the State does not dispute—that the compulsory seizure of body tissue by law enforcement for the purposes of DNA testing constitutes a search. *King*, 42 A.3d at 594; *see also Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989) (breath and urine tests for drugs trigger Fourth

Amendment protections). The decision below also appropriately recognized that a further search occurs when the government analyzes the seized body tissue, prior to uploading the resulting DNA profiles into CODIS. *King*, 42 A.3d at 594; *see also Skinner*, 489 U.S. at 616 ("The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests."). According to the State, the Fourth Amendment framework this Court articulated in *Skinner* and *Schmerber*, which is the doctrinal framework that was applied by the lower court, is a gross and "unworkable" distortion of the Fourth Amendment. (State's Application, p. 15). The State cites no history or experience since *Skinner* and *Schmerber* that judicial enforcement of a person's reasonable expectation of privacy in his biological information is "unworkable."

Moreover, the lower court's decision is consistent with the decisions of this Court regarding the application of the Fourth Amendment to the collection of fingerprints. The Fourth Amendment requires a showing of individualized suspicion before fingerprints can be taken for the ordinary law enforcement purpose of investigating a person for a criminal offense. *See Hayes v. Florida,* 470 U.S. 811, 815-16 (1985) (obtaining fingerprints for investigative purposes triggers Fourth Amendment protections even when conducted during otherwise lawful detention); *see also Davis v. Mississippi,* 394 U.S. 721, 727 (1969) (detentions for the sole purpose of obtaining fingerprints for investigative purposes are subject to Fourth Amendment protections). The decision below does not, as the State erroneously claims, hold that a person has the right to remain anonymous after being arrested. (State's Application, p. 3). The lower court simply

recognized that there was absolutely no showing that the State was using, or could use, a DNA profile to identify an arrestee, as that term is ordinarily understood. *King,* 42 A.3d at 580. The court below explained:

> The State posits that because King's DNA swab obtained only evidence of his identity the evidence is not suppressible. This argument runs counter to the Supreme Court's holdings in *Hayes*, 470 U.S. at 817, … and *Davis*, 394 U.S. at 727, … which concluded that fingerprints obtained illegally were suppressible under the Fourth Amendment. King's identity was not the evidence that served as probable cause for his grand jury rape indictment. A driver's license, fingerprint, photograph, or social security card, all accepted generally as forms of identification, could not have stood in the place of King's DNA sample before the grand jury. What was presented to the grand jury was a match between biological evidence collected from King's 2009 buccal swab and the evidence collected during a sexual assault forensic exam from the 2003 rape victim. This biological match is not analogous to a person's name or address, which the Court of Special Appeals held not to be suppressible in *Gibson v. State*, 138 Md. App. 399, 414, 771 A.2d 536, 545 (2001). Assuming *arguendo* that fingerprints and DNA present an apt analogy, they are both suppressible evidence when obtained illegally.

King, 42 A.3d at 580.

In its application, the State does not directly address this point, but blurs the primary purpose of the collection of DNA (to investigate a person) by drawing a false analogy to the taking of fingerprints at booking to confirm a suspect's identity. (State's Application, p. 15). The two are plainly inapposite. The State presented no evidence below that it was unable to determine Mr. King's identity or that collecting his DNA would assist it in identifying him. Despite the State's attempt to conflate the distinct concepts of investigation and identification, the decision below does not create "an unworkable distortion of Fourth Amendment law which could have ramifications outside

the DNA context." (State's Application, p. 15). The State's claim that it is likely to succeed on the merits is therefore misplaced.

D. The Balance Of Equities Decisively Points Against Granting A Stay

The State has established neither irreparable harm nor a likelihood of possibility of success on the merits. Either conclusion is a sufficient basis for denying the State's application. Further, the State's tardiness in seeking a stay is a decisive factor in the balance of equities pointing against granting a stay. The State waited nearly eight weeks—more than half the time it has to file a petition for a writ of certiorari—to seek a stay of the mandate and enforcement of the judgment it claims will cause such dramatic harm. The State offers no explanation for its delay.

The State's claim of harm here is simply that the lower court has deprived it of the opportunity to investigate arrestees through programmatic, warrantless searches and seizures of their DNA that are unsupported by any individualized suspicion or exigency. On the other side of the balance, the State admits that of the 10,666 samples it seized last year, only 4,327 of them were even eligible to be entered into the CODIS databank, and only 19—0.18%—led even to an arrest (and fewer than half of those led to a conviction). (Statewide DNA Database 2011 Annual Report at ii). A program of warrantless collection and search of DNA where 99.82% of the persons subjected to mandatory collection of their genetic blueprint are not arrested as a result of the search represents a substantial public interest in upholding Fourth Amendment protections that greatly outweighs the State's claim of harm. The balance of interests, therefore, decisively

points to denying the State's request for extraordinary relief.

CONCLUSION

For the foregoing reasons, the State's motion for a stay pending the filing of its petition for a writ of certiorari should be denied.

Respectfully submitted,

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/s/ (signature on original)
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