US Supreme Court hears case on constitutionality of taking DNA samples from arrestees

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Last week the US Supreme Court heard oral argument in the case *Maryland v. King*, in which the State of Maryland has appealed a decision of its own appellate court that a Maryland law permitting police to take DNA samples from arrested persons violates the prohibition in the Fourth Amendment to the US Constitution on unreasonable searches and seizures.

Alonzo Jay King, Jr. was arrested on a felony assault charge. Maryland police took a DNA sample swabbed from his cheek. The results connected him to an unsolved "cold case," for which he was later prosecuted and convicted. King was not suspected of that crime at the time the DNA sample was taken.

The basic rule under the Fourth Amendment is that a search or seizure must seek evidence of a particular crime, and a judge must issue a warrant finding that there is probable cause to believe that the search will locate such evidence. Blanket DNA sampling of arrestees plainly violates this dual mandate.

Maryland nevertheless argued that persons arrested for more serious offenses should lose their right to privacy in their personal DNA information, despite the fact they have not been convicted of a crime and are presumed innocent under the Constitution. It asked the court to carve out an exception to the Fourth Amendment by balancing the general interest of law enforcement in solving crimes against what it termed a "minimal invasion" of individual privacy rights.

Under Maryland's tortured logic the houses of arrestees could be routinely searched for evidence of unspecified crimes. But the Constitution bars such searches and seizures even though they might turn up evidence of crime.

During the argument Justices Ruth Bader Ginsburg, Elena Kagan, and even arch reactionary Antonin Scalia, seemed to indicate the obvious, that Maryland law could not pass muster under the Fourth Amendment. Chief Justice John Roberts suggested that under Maryland's theory people pulled over for mere traffic violations could be subjected to taking DNA.

However, several justices—Samuel Alito, Anthony Kennedy, and even the ostensibly "liberal" Justice Stephen Breyer—appeared sympathetic to Maryland's crime-fighting pitch, evincing scant concern for privacy protections. Alito gushed: "I think this is perhaps the most important criminal procedure case that this Court has heard in decades. So this is what is at stake: Lots of murders, lots of rapes that can be—that can be solved using this new technology that involves a very minimal intrusion on personal privacy." Alito also referred to DNA as nothing more than the "fingerprint of the 21st century."

The notion that the government taking DNA samples from arrestees is a "very minimal intrusion" on personal privacy was debunked in "friend of the court" briefs filed by scientists and researchers. A brief from the Electronic Privacy Information Center aptly captured the gravity of the issue: "The collection of a DNA sample from an individual raises a profound and far-reaching privacy concern. Genetic traits can identify family members and reveal predispositions to disease and mental illness. DNA is a robust descriptor of an individual's entire physiological identity. DNA testing can also result in 'social stigma, discrimination in employment, barriers to health insurance, and other problems'… Even after analyzing a sample … the government does not destroy it … (government entities) retain entire DNA samples even after the … analysis is

complete.”

Any claim that the government can be trusted to use the samples for identification only, despite the fact that it maintains a vast, enduring database of all DNA samples taken, is ludicrous. The government has been doing all it can to spy and collect data on the population at large, as it erects the scaffolding of a police state.

Although the US was not party to the case in the Maryland court, Obama’s Justice Department nevertheless filed a friend of the court brief and sent a lawyer to orally argue, asking the Supreme Court to uphold the Maryland law. It cited other Supreme Court decisions in an attempt to establish that arrestees lose a number of rights compared to the population at large.

One recent decision cited was *Florence v. Board of Chosen Freeholders of the County of Burlington*, where the Supreme Court ruled patently invasive jail strip searches do not require reasonable suspicion that the detainee has contraband on his person. In that case the court held that strip searches of Albert Florence, who was wrongly arrested for failing to pay a traffic fine that he had, in fact, already paid, did not violate the Fourth Amendment.

If the Supreme Court upholds the Maryland DNA law in this case, its decision will be one more instance of an accelerating judicial onslaught on fundamental democratic rights.