CALLING OUT MARYLAND V. KING: DNA, CELL PHONES, AND THE FOURTH AMENDMENT

Jennie Vee Silk
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ABSTRACT

In Maryland v. King, the Supreme Court narrowly upheld a Maryland statute that permits police to obtain a DNA sample from an arrestee without a search warrant. A year later, the Court drastically changed course and provided significantly more protection to an arrestee’s privacy. In a unanimous decision, the Court in Riley v. California held that police must obtain a search warrant before they can search the cell phone of an arrestee.

This article is the first to compare the Court’s conflicting decisions in Riley and King. Riley and King present the same issue: governmental invasion of privacy for purposes of general crime solving. The Court in King refused to admit that the true purpose of obtaining an arrestee’s DNA was for crime solving, and it justified the intrusion into the arrestee’s privacy largely on the grounds that the Government would use the DNA collected to identify the arrestees. Since DNA was merely a better, more advanced form of fingerprinting, the Court argued, the use of the DNA collected from arrestees significantly furthered the Government’s interest in identification. The Court in Riley, however, recognized that a search of an arrestee’s cell phone could be for nothing more than general criminal investigation.

The Court’s holding in King is impossible to square with its holding in Riley. If a search warrant is required for police to search an arrestee’s cell phone, it follows that a search warrant should be required to search a person’s DNA. Given the significantly broader protection granted to arrestees in the later Riley decision, King has been doctrinally eroded.

In light of this doctrinal erosion and the unlikelihood that the Court will overturn King in the near future, lower courts should interpret King narrowly. State DNA statutes should be upheld only if they match the specific holding in King. DNA searches should be permissible only if the person was arrested for a violent felony, and the arrest was supported by a judicial determination of probable cause. Furthermore, if the investigation into the arrestee ceases or the charges are dropped, the DNA sample should automatically be destroyed and the records automatically expunged from the state and Federal DNA databases.

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a. Cell phone searches are for crime-solving while traditional searches-incident-to-arrest are justified by the need to protect officers and preserve evidence.

b. DNA searches are for crime-solving while traditional booking searches such as fingerprinting are justified by the need to identify arrestees.

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A. Police should be allowed to obtain DNA only from a person arrested for a violent felony, not just any felony or misdemeanor.

B. Before DNA is collected from an arrestee, the arrest must be supported by a judicial determination of probable cause.

C. If a person is acquitted of the crime or the charges against him are dismissed, the person’s DNA sample should be destroyed and the information should be deleted from the databases.

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INTRODUCTION

In Maryland v. King, the Supreme Court narrowly upheld a Maryland statute that permits police to obtain a DNA sample from an arrestee without a search warrant. A year later, the Court drastically changed course and provided significantly more protection to an arrestee’s privacy. In a unanimous

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decision, the Court in Riley v. California held that police must obtain a search warrant before they can search the cell phone of an arrestee.\textsuperscript{2} The Court in King upheld a Maryland DNA collection statute largely on the argument that the Government had a strong interest in identifying persons arrested.\textsuperscript{3} The Court claimed that DNA was merely a better, more advanced form of fingerprinting\textsuperscript{4}, and the use of the DNA collected from arrestees significantly furthered the Government’s interest in identification.\textsuperscript{5}

This article argues that DNA is not just a more advanced form of fingerprinting, and the Government’s true interest in collecting DNA from arrestees is not identification but actually crime-solving. Since the true governmental interest in collecting DNA from arrestees is not identification, the Court’s reliance on the analogy that DNA is just a greater form of fingerprinting holds no water.

In contrast to King, the Court in Riley correctly recognized that the new technology of mobile phones gave rise to greater privacy implications, and it held that police must obtain a search warrant before police may search the cell phone of an arrestee.\textsuperscript{6} The Court applied a reasonableness balancing test to a warrantless search incident to arrest of an arrestee’s cell phone,\textsuperscript{7} and determined that cell phones contain such vast amounts of private information in the device itself as well as access to endless information stored on remote servers,\textsuperscript{8} that the privacy intrusion of such a search of an arrestee’s cell phone was unreasonable when weighed against the Government’s interest in searching the phone.\textsuperscript{9}

This article argues that Court’s holding in King is impossible to square with its holding in Riley. DNA, like a cell phone, contains vast amounts of personal information. Hidden in each person’s DNA is not only identification information, but also information about genetic predispositions, chromosomal abnormalities, familial relationships, and perhaps information that scientists have not even uncovered yet.\textsuperscript{10} Because of the breadth and vastness of the information contained in a person’s DNA, it follows that a search of DNA, just like a cell phone, falls outside the warrantless search exceptions. Certainly a person’s privacy interest in his DNA is just as great as his privacy interest in

\textsuperscript{2} Riley v. Cal., 134 S.Ct. 2473, 2494-95 (2014).
\textsuperscript{3} King, 133 S.Ct. at 1970.
\textsuperscript{4} Id. at 1976-77.
\textsuperscript{5} Id. at 1977.
\textsuperscript{6} Riley, 134 S.Ct. at 2494-95.
\textsuperscript{7} Id. at 2484-85.
\textsuperscript{8} Id. at 2489.
\textsuperscript{9} Id. at 2495.
his cell phone.

This article is the first to argue that Riley and King present the same precise issue: governmental invasion of privacy for purposes of general crime solving. Both cell phones and DNA searches involve new forms of privacy intrusion associated with new technologies that are not analogous to traditional searches recognized earlier by the Court. If a search warrant is required for police to search an arrestee’s cell phone, it follows, that at a minimum, an arrest warrant or probable cause should be required to search through a person’s DNA.

Given the significantly broader protection granted to arrestees in the later Riley decision, Riley’s unanimous opinion doctrinally erodes King. In light of this doctrinal erosion, state DNA statutes should be upheld only if they match the specific holding in King. The Maryland statute upheld in King limits the class of arrestees to those who committed a serious violent felony. Given the significantly broader protection granted to arrestees in the later Riley decision, Riley’s unanimous opinion doctrinally erodes King. In light of this doctrinal erosion, state DNA statutes should be upheld only if they match the specific holding in King. The Maryland statute upheld in King limits the class of arrestees to those who committed a serious violent felony. Furthermore, the arrestee must be arraigned in front of a judge before the DNA sample may be processed and its information placed in a database. If a judge determines there was insufficient probable cause for the suspect’s arrest or the investigation into the arrestee ceases, the arrestee’s DNA sample is destroyed and the records expunged from the databases automatically by the state.

Since it is unlikely King will be overturned in the near future, King should be interpreted very narrowly. Police should be allowed to obtain DNA samples only from persons arrested for violent felonies, and only after a judicial determination of probable cause. If the person was wrongfully arrested, acquitted, or the charges dropped, the DNA sample should be automatically destroyed and the DNA information expunged from the state and federal databases.

This article has four sections. First, I examine the Court’s opinions in King and Riley. Second, I explore post-King DNA Collection statutes and post-King litigation that could give the Court an opportunity to revisit its holding in King. Third, I will use the Court’s reasoning in Riley to show that King has been doctrinally eroded. Fourth, I will argue that since King will likely not be

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11 Md. Pub. Safety Code Ann. § 2-504(a)(3)(g) (2009). “In accordance with regulations adopted under this subtitle, a DNA sample shall be collected from an individual who is charged with: (1) a crime of violence or an attempt to commit a crime of violence; or (2) burglary or an attempt to commit burglary.”
12 § 2-504(a)(1).
13 § 2-504(d)(2)(i).
14 § 2-511(a)(1) (a)(1). An investigation ceases when (1) A criminal action does not result in an acquittal; (2) the conviction is vacated or reversed with no opportunity for a new trial allowed; or (3) the arrestee receives an unconditional pardon.
15 § 2-511(a)(1) (a)(1).
overruled in the near future, it should be interpreted very narrowly to exclude state statutes broader than the Maryland statute upheld in *King*. These include: (1) State statutes that allow DNA collection of persons arrested for non-violent felonies or misdemeanors, (2) state statutes that do not require a judicial determination of probable cause before the collection of DNA upon arrest; and (3) state statutes that do not require the automatic destruction and expunging of the DNA sample and information from the database of a person acquitted for the crime which triggered the arrest.

I. BACKGROUND

In this section, I discuss the Supreme Court’s opinions in *King* and *Riley*. Next I will review a sampling of state statutes broader in scope than the Maryland statute. Finally, I address three recent lower court cases decided in the wake of *King* that are ripe for consideration by the Supreme Court.

A. Maryland v. King: Privacy in DNA

1. Majority Opinion

   a. Facts

   Maryland established its statewide DNA database in 2003. The original statute proscribed the collection of DNA only from convicted felons. In 2008, Maryland broadened the statute to require that any person arrested for a serious crime provide a DNA sample to police upon arrest. This expanded legislation was intended to assist law enforcement by identifying DNA matches sooner, preventing crimes, and solving crimes.

   Alonzo King was arrested in 2009 for threatening people with a shotgun. At the police station, the police took a buccal swap of King’s DNA. Three months after his arrest, his DNA information was entered in the state’s DNA database. Three weeks after that, his DNA was linked to a rape case.

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16 Public Safety, 2003 Maryland Laws Ch. 5 (S.B. 1)
18 See Md. Pub. Safe. Code Ann. § 2-504(3)(i) (2009). A serious crime is defined as a crime of violence or an attempt to commit a crime of violence; or burglary or an attempt to commit burglary.
19 § 2-504(b)(1).
21 King, 133 S.Ct. at 1965.
22 Id. at 1966.
from 2003,23 and King was indicted for the 2003 rape.24

King argued that the state’s DNA collection policy violated his Fourth Amendment rights, and therefore the DNA evidence should be suppressed.25 The lower court judge upheld the constitutionality of the statute, and King appealed.26 The Maryland Court of Appeals reversed, and held, “that § 2–504(3) of the Maryland DNA Collection Act, which allows DNA collection from persons arrested, but not yet convicted, for crimes of violence and burglary, is unconstitutional, under the Fourth Amendment totality of the circumstances balancing test.”27

b. The Court’s Analysis

In June 2013, the Supreme Court narrowly reversed the Court of Appeals, and upheld the Maryland DNA statute as constitutional.28 The Court began its analysis by admitting that a buccal cheek swab for DNA is a search subject to the requirements and limitations of the Fourth Amendment.29

The Court then addressed the reasonableness of the warrantless search of a person’s DNA30, stating that in some special situations a warrant is not required to search, but the search must be “reasonable in its scope and manner of execution.”31 Justice Kennedy argued that the Court must use a balancing test to weigh the legitimate governmental interest of collecting DNA against the degree to which that DNA search invades the arrestee’s privacy.32

The Court decided that the legitimate governmental interest served by Maryland’s DNA act was the need for police to properly and safely identify those persons taken into custody.33 Furthermore, the Court classified a search of a person’s DNA, not as a search incident to arrest, but a “station house incident to booking” search.34 In classifying it as such, the Court concluded that the governmental interests in a custodial station-house search are

23 Id. at 1966.
24 Id. at 1966.
25 King, 133 S.Ct. at 1966.
26 Id. at 1966.
28 King, 133 S.Ct. 1958.
29 Id. at 1969.
30 Id. at 1969.
31 Id. at 1970.
32 Id. at 1970.
33 King, 133 S.Ct. at 1970.
34 Id. at 1971.
greater than the governmental interests in a traditional search incident to arrest.35

In explaining the importance of the police’s interest in identifying persons in custody, Justice Kennedy argued that DNA identification is just a better form of fingerprinting.36 “DNA is another metric of identification used to connect the arrestee with his or her public persona, as reflected in records of his or her actions that are available to the police.”37 He further argued that finding matches to previous crimes with DNA is no different than matching a person’s fingerprint to that same previous crime.38

Next the Court determined that a person’s criminal history is part of his identity and that his criminal history must be known to ensure officer safety.39 Furthermore, the state has important interests in the identification of persons in custody to ensure that the person is available for trial and in setting the person’s bail amount.40

Perhaps the most significant interest implicated by the Court is the “government’s interest in preventing crimes by arrestees.”41 Justice Kennedy explained that the DNA identification provides information essential about an arrestee’s violent past and possibly past crimes, that is vitally important for the judge to know before she allows an arrestee out on bail.

Finally, the Court, in one scant paragraph, pointed to the important interest of exonerating wrongfully imprisoned people with information obtained from an arrestee’s DNA.42

After analogizing DNA to fingerprints, the Court then spent considerable time distinguishing fingerprinting and DNA. The Court concluded that DNA is actually superior to fingerprinting43, even though DNA identification is not as fast as fingerprinting.44 Sweeping that aside, the Court argued that the rapidly changing technological advancements in the field of DNA will increase the speed in which it can be processed, and just like fingerprinting, is a reasonable intrusion into the privacy of an arrestee.45

Next the Court weighed the intrusion of a buccal cheek swab into a
person’s legitimate expectation of privacy.\textsuperscript{46} When a person is taken into police custody, the Court argued, his privacy expectations are diminished.\textsuperscript{47} The Court concluded that “DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure.”\textsuperscript{48} The Maryland DNA Statute was upheld.

2. Dissent

Justice Scalia, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented.\textsuperscript{49} Scalia responded to the majority in a spirited dissent insisting that the true governmental purpose for the collection of DNA is not identification, but the general investigation of crime.\textsuperscript{50} He argued that a suspicionless search must be have a purpose other than investigation of a crime.\textsuperscript{51}

The Dissent argued that there are very few instances where the Fourth Amendment allows suspicionless searches, and that none of those instances involve searches “whose primary purpose was to detect evidence of ordinary criminal wrongdoing.”\textsuperscript{52} Such a suspicionless search is not subject to the reasonableness balancing test that the Majority applied to the collection of DNA upon arrest.\textsuperscript{53} Because of this, Scalia argued, the Majority’s reasoning was flawed.\textsuperscript{54}

The Dissent pointed out that the Majority alluded to the collection of DNA as a search incident to arrest.\textsuperscript{55} If the collection of DNA is a traditional search incident to arrest, Scalia argued, then the purpose of the search must be either officer safety or preventing the destruction of evidence.\textsuperscript{56}

The Dissent took particular exception to the majority’s reliance on identification as the justification for the DNA collection upon arrest.\textsuperscript{57} “If identifying someone means finding out what unsolved crimes he has committed, then identification is indistinguishable from the ordinary law enforcement aims that have never been thought to justify a suspicionless

\textsuperscript{46} Id. at 1977.
\textsuperscript{47} King, 133 S.Ct. at 1978.
\textsuperscript{48} King, 133 S.Ct. at 1980.
\textsuperscript{49} King, 133 S.Ct. at 1980. (Scalia, J., dissenting).
\textsuperscript{50} Id. at 1982.
\textsuperscript{51} Id. at 1980.
\textsuperscript{53} King, 133 S.Ct. at 1982. (Scalia, J., dissenting).
\textsuperscript{54} Id. at 1982.
\textsuperscript{55} Id. at 1982.
\textsuperscript{56} Id. at 1982.
\textsuperscript{57} Id. at 1983.
search.”

The Dissent further argued that DNA processing is so slow that it cannot be effectively and efficiently used for identification at all. It argued that since it took three days for the police to obtain the DNA from King, that identification could not have been the primary purpose of the DNA collection and, therefore, did not satisfy any of the majority’s identification prongs. It asserted that the Majority’s reasoning in using DNA to determine if an arrestee should be out on bail was flawed. Since Maryland’s statute prohibits the collection of DNA until after the arrestee has been arraigned, then why does it not allow the collection of the DNA until after the bail hearing?

Furthermore, King’s DNA sample was not tested for three months following his arrest, and the results were not available until four months after his arrest. How could identification of King possibly be the motive for searching King’s DNA when it took four months to get the results of the DNA search?

Going further, Scalia argued that King’s DNA sample was not used to identify King, but rather it was the sample from the previous crime that was identified by its relationship to King. Moreover, since the purpose of the state and Federal DNA databases is to solve unsolved crimes, the identities of the people supplying the DNA samples is expected to already be known by the agency submitting the samples.

The Dissent also used the actual language from the Maryland statute as evidence of the true purpose of the Act. Md. Pub. Saf. Code Ann. § 2-205 has a section titled “Purpose of collecting and testing DNA Samples.” While identification of arrestees is not listed as a purpose of the Act, investigation of crime is listed.

The Dissent also attacked the Majority’s DNA-is-the-new-fingerprinting analogy. It argued that fingerprinting is done primarily to identify arrestees, but DNA collection is done primarily to solve crimes. Scalia further argued that the Court never had the opportunity to address the legitimacy of fingerprinting under the Fourth Amendment, because fingerprinting...

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58 King, 133 S.Ct. at 1983. (Scalia, J., Dissenting).
59 Id. at 1983.
60 Id. at 1983.
61 Id. at 1984.
62 Id. at 1984.
63 King, 133 S.Ct. at 1984. (Scalia, J., Dissenting).
64 Id. at 1985.
65 Id. at 1984.
66 King, 133 S.Ct. at 1984. (Scalia, J., Dissenting).
68 King, 133 S.Ct. at 1988. (Scalia, J., Dissenting).
69 Id. at 1988.
databases expanded “from convicted criminals, to arrestees, to civil servants, to immigrants to everyone with a driver’s license.”

The Dissent also refused to accept the Majority’s assertion that because the processing of DNA will be faster in the future, that someday it will be used for identification. The real issue for Scalia was if DNA can be used to identify arrestees in the present day.

Justice Scalia concluded with a dire warning about the ramifications of the holding: “your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason.”

3. King’s Unanswered Questions

The Court in King upheld a Maryland DNA Collection statute that permits police to obtain DNA from an arrestee if that person was arrested for a serious violent felony. The Maryland statute requires that a judge confirm the arrest was supported by probable cause before the arrestee’s DNA sample may be processed through the databases. Furthermore, the Maryland statute provides automatic expungement of the arrestee’s physical DNA sample as well as automatic deletion from the state and federal DNA databases if the arrestee is not convicted, if the charges against the arrestee are dropped, or if the arrestee is pardoned.

The holding in King was silent on whether it applied only to the very narrow Maryland statute, or if its holding applied to statutes different and broader than the Maryland statute. How does King apply to states with statutes broader than Maryland’s? Does King permit a state DNA statute that allows police to obtain DNA from a person arrested for any felony, whether violent or not? Does King permit states to require DNA collection from a person arrested for a misdemeanor? Does King mean that police could demand a DNA sample at a simple traffic stop? In California and twelve other states, legislators permit the collection of DNA from all felons, not just those persons arrested for serious crimes. Does King mean that every person arrested for even non-violent felonies can be subjected to a warrantless search of his DNA?

The Court in King also failed to address who must determine probable cause in order to collect and process DNA upon arrest. The Maryland statute requires a judicial confirmation of probable cause before the suspect’s DNA can

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69 Id. at 1988.
70 Id. at 1988.
71 Id. at 1988-89.
72 Id. at 1989.
73 See infra notes 137-38.
be processed. California and other states allow DNA collection from arrestees based solely upon the police officer’s determination of probable cause. Does King allow police officers to become the gatekeepers to state and federal DNA databases?

This is troubling in two ways. First, if a judicial determination of probable cause is not required, there is no system of checks and balances before a person’s most intimate personal information is uploaded for countless people to see. Second, if police may unfettered arrest persons with only a field officer’s determination of probable cause, the police might arrest those persons for the sole purpose of obtaining their DNA.

Perhaps the most troubling question left open by King, is what should happen to the DNA sample and information of the person arrested but not convicted. The Maryland statute calls for the automatic expungement of the arrestee’s DNA profile from the database, along with the destruction of the physical sample. Other states have complex and lengthy processes for which the innocent person, arrested rightly or wrongly, must complete before her private DNA information and sample are expunged from her record. Moreover, it is even possible that a state might adopt a DNA collection statute with no provision for expungement.

Taking these concerns to the extreme, it is entirely feasible that a state will enact a DNA collection statute that requires a DNA sample from every person arrested, even for something as minor as a traffic stop. If that person is found not guilty or the charges or dismissed, a state might not provide any method for that person to clear his DNA profile from the databases.

King’s unanswered questions leave open the very real possibility that every person in the United States could one day have his or her DNA forcibly taken for a minor crime, uploaded to state and Federal DNA databases for unlimited viewing by unlimited people, and with no provision to have it removed. Is this really the result the King Court intended? Does the Fourth Amendment allow it? And how can the Court square its reasoning in Riley with its reasoning in King? Surely a person’s privacy interest in DNA taken from his body is just as great as his privacy interest in a cell phone taken from his pocket.

B. Riley v. California: Privacy in Digital Devices

75 See infra notes 143, 151.
76 MD. PUB. SAFETY CODE ANN. § 2-511 (2009).
77 See infra note 144. In California, the arrestee must wait until the statute of limitations has expired before filing a petition for expungement.
1. Facts

The Court in *Riley* switched directions on the issue of arrestee’s privacy, and held that a search warrant is required to search through an arrestee’s cell phone upon arrest. The Court decided two cases simultaneously in June 2014: *People v. Riley* and *United States v. Wurie*. In *Riley*, David Riley was pulled over by police for expired tags. During the stop, the police discovered that Riley was also driving on a suspended license. After police impounded Riley’s car, they discovered two guns hidden in the car. Riley was arrested for possession of the handguns.

Police performed a search incident to arrest of Riley. During the search, the officer searched through Riley’s smart phone and found information linking Riley to a gang. The police took the smart phone to the station and had a gang-specialist search the phone. The detective admittedly searched through the phone looking for evidence of gang-related crimes. He uncovered a photo of Riley with a car that police believed may have been involved in a recent shooting. Riley was charged in connection with that shooting.

Riley moved to suppress the evidence discovered by police on his cell

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78 *Riley*, 134 S.Ct. at 2495.
80 *United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013) cert. granted, 134 S. Ct. 999, 187 L. Ed. 2d 848 (U.S. 2014) and aff’d sub nom. *Riley v. California*, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (U.S. 2014). In the companion case, police saw Brima Wurie selling drugs from his car, and arrested him. At the station, the police seized two of his cell phones. One of the phones, a flip phone, kept ringing. Police eventually opened the phone, accessed its call log, and traced the phone number that had been calling repeatedly. The officers showed up at the apartment complex associated with the phone number and noticed a woman they had seen in a photograph on Wurie’s phone. They got a warrant to search the apartment, and found large amounts of drugs, money, and weapons. Police charged Wurie with multiple crimes related to the search, and he moved to suppress the evidence found in the apartment on the grounds that it was a product of an unconstitutional search of his phone. After the motion was denied, Wurie was convicted and sentenced to over 21 years in prison. Wurie appealed, and a divided First Circuit reversed the motion to suppress the evidence and vacated Wurie’s convictions.
81 *Riley*, 134 S.Ct. at 2481.
82 *Wurie*, 728 F.3d 13, quoting *Thornton*, 541 U.S. at 632, 124 S.Ct. 2127 (Scalia, J., concurring)
83 *Riley*, 134 S.Ct. at 2480.
84 *Id.* at 2480.
85 *Id.* at 2481.
86 *Id.* at 2481. Riley was charged with attempted murder, assault with a semi-automatic weapon, and firing at an unoccupied vehicle. The State claimed these crimes were gang-related, which carried a longer prison sentence. *Id.*
phone. He argued that the police violated his Fourth Amendment rights by searching his phone without a warrant.\textsuperscript{87} The judge denied Riley’s motion and allowed into evidence many of the photographs and videos from his smartphone.\textsuperscript{88} Riley was convicted and sentenced to 15 years to life.\textsuperscript{89} Riley appealed, but the California Court of Appeals affirmed the lower court relying on a California case that held warrantless searches of cell phones were allowed as a search incident to arrest.\textsuperscript{90}

2. The Court’s Analysis

The Supreme Court framed its analysis of these two cases as a Fourth Amendment\textsuperscript{91} inquiry into reasonableness of a search incident to arrest.\textsuperscript{92} The Court acknowledged that searches incident to arrest fall within the exceptions to the warrant requirement, and summarized the history of the search incident to arrest jurisprudence in three cases: \textit{Chimel v. California}, United States v. Robinson, and Arizona v. Gant.\textsuperscript{93}

In \textit{Chimel}, the Court elucidated a bright line rule for determining the reasonableness of a search incident to arrest of an arrestee’s home.\textsuperscript{94} An officer may search the arrestee and the arrestee’s immediate reachable area for two reasons: (1) to remove any items that pose a potential threat to officer safety, and (2) to seize any evidence from the arrestee to prevent its destruction.\textsuperscript{95}

In \textit{Robinson}, the Court applied the \textit{Chimel} rule to searches of a person’s body and clothing incident to his arrest.\textsuperscript{96} Robinson was arrested for driving on a suspended license. The officer performed a pat down search, and discovered a cigarette pack in Robinson’s pocket. The officer looked in the cigarette pack and found heroin.\textsuperscript{97} The Court held that the search of Robinson was reasonable as a custodial arrest.\textsuperscript{98} Even though a search of the cigarette pack did not meet

\textsuperscript{87} Riley, 134 S.Ct. at 2481.
\textsuperscript{88} Id. at 2481.
\textsuperscript{89} Id.
\textsuperscript{90} Riley, 134 S.Ct. at 2481. People v. Diaz, 51 Cal.4th 84, 119 (Cal. 2011). Holding that warrantless searches of cell phones were permissible if the cell phone was easily associated with the arrestee.
\textsuperscript{91} U.S. CONST. amend. IV. The Fourth Amendment states: “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.”
\textsuperscript{92} Riley, 134 S.Ct. at 2482-83.
\textsuperscript{93} Id. at 2483.
\textsuperscript{94} Id.
\textsuperscript{96} Riley, 134 S.Ct. at 2483.
either of the two *Chimel* justifications, officer safety or preservation of evidence, the Court held the search lawful. Since the officer uncovered Robinson’s personal item during a lawful search, he was entitled to examine it.

In *Gant*, the Court extended the *Chimel* rule to searches of vehicles incident to arrest. Officers could now search a vehicle incident to arrest if the arrestee is unsecured and within reaching distance of the passenger compartment. Police may also perform a warrantless search of the vehicle under *Gant* if there is a reasonable basis to believe “evidence relevant to the crime of the arrest might be found in the vehicle.”

Because mobile phones and digital devices are new technology, the Court then attempted to fit a warrantless search of a cell phone within the existing exceptions for warrantless searches for the first time. The Court determined that a warrantless search of a cell phone failed to meet either of the *Chimel* exceptions to a search incident to arrest. The Court swiftly determined that a search of a mobile device failed the first *Chimel* exception because digital data contained in the device poses no threat to officer safety. While the Court admitted that there were certain situations in which data from the phone might alert an officer to a future danger, it determined that allowing searches of digital data for that purpose would be too broad an interpretation of *Chimel*.

Searches of cell phones also fail the second *Chimel* exception: prevention of the destruction or concealment of evidence. The Court concluded that once a cell phone is seized from the arrestee there is no risk of the arrestee deleting the evidence from the phone. While the Court conceded that there is some risk evidence could be destroyed by a “remote wipe,” those risks are not serious enough to dispense of the general warrant requirement.

Furthermore, the Court distinguished the search of a cell phone from a

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102 *Riley*, 134 S.Ct. at 2484.

103 *Id.* at 2485-86.

104 *Id.* at 2485.

105 *Id.* at 2486.

106 *Id.* at 2486-87.

107 *Riley*, 134 S.Ct. at 2486.

108 *Id.* at 2486-87.

109 *Id.* at 2487. (*pointing out that police have other means of dealing with remote wiping threats, such as turning the phone off or moving the phone to a protected area immune to radio waves*). *Id.*
search of a cigarette packet in Robinson. A warrantless search of a physical object, the Court argued, differs significantly from the search of digital content found on cell phones. The Court held that searches of cell phones are not at all like a search of a cigarette pack, and that “[c]ell phones . . . place vast quantities of personal information literally in the hands of individuals.”

The Court then weighed the rather minimal governmental interest in searching a cell phone incident to arrest against the significant privacy invasion of the arrestee. While it is true that an arrestee has diminished privacy interests, not all searches of an arrestee are Constitutional.

To properly assess the privacy interest implicated in a search of a cell phone incident to arrest, the Court evaluated the content and capabilities of a cell phone. Cell phones, the Court determined, are different than other items found on a person. The Court described the “immense storage capacity” of a person’s cell phone as so large that it is equivalent to “every piece of mail they have received for the past several months, every picture they have ever taken, or every book or article they have read.”

Furthermore, cell phones contain qualitatively different types of information than other personal objects. A cell phone contains, among other things, addresses, call logs, contact information, videos, browsing history, and bank statements. “The sum of an individual’s private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions.”

The Court explained that the personal information contained on a cell phone is immensely private and exhaustive. Chief Justice Roberts reasoned that before the advent of the modern cell phone, “people did not typically carry a cache of sensitive personal information with them as they went about their day.” Because of this, cell phones are different than other personal objects. He said that equating a search of a cell phone to a search of other physical items found on a person “is like saying a ride on horseback is materially indistinguishable from a flight to the moon.”

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110 Riley, 134 S.Ct. at 2484-85.
111 Id. at 2485.
112 Id. at 2488.
113 Id.
114 Id. at 2489.
115 Riley, 134 S.Ct. at 2489.
116 Id. at 2490.
117 Id. at 2489.
118 Id. at 2490.
119 Id.
120 Riley, 134 S.Ct. at 2490.
121 Id. at 2488.
An even more complex issue of the search of a cell phone is determining what data on the phone is searchable if the phone is linked to “the cloud.”\textsuperscript{122} The Court dismissed the analogy that a cell phone is just like any other container found on a person, because unlike a simple container, a mobile phone is often connected to the cloud. If so, the digital device could be used to access data never created nor stored on the phone itself.\textsuperscript{123}

While the Government conceded that searches of a cell phone should not be extended to digital data stored in the cloud that could be accessed via the cell phone, the Government failed to provide any suitable solutions to the problem. The Court determined that because a search of cell phone could easily extend “well beyond papers and effects in the physical proximity of an arrestee,” that the privacy interests in a cell phone are much greater than those in an ordinary container.\textsuperscript{124}

The Court then dismissed the Government’s remaining arguments for allowing searches of arrestee’s cell phones incident to arrest.\textsuperscript{125} The Court declined to import a \textit{Gant}-type search from the context of a vehicle to the context of a cell phone, even if the officers reasonably believed the cell phone contained evidence of the crime for which the person was being arrested.\textsuperscript{126} Furthermore, the Court held that a \textit{Gant}-type search, when applied to cell phones, would have no limits as to the amount and scope of evidence an officer might uncover. Allowing officers to search through an arrestee’s cell phone for evidence would give them “unbridled discretion to rummage at will among a person’s private effects.”\textsuperscript{127}

The Court rejected the Government’s proposal that police should be allowed to search the data on the cell phone if the same data would have been available on a “pre-digital counterpart.”\textsuperscript{128} The Court argued that even if a search of person might uncover a photograph in the pre-digital era that same search would not uncover thousands of photographs.\textsuperscript{129} A search of an arrestee’s cell phone could never be equated to a search of its pre-digital counterpart because is unlikely that a person “would have strolled around with video tapes, photo albums, and an address book all crammed into his

\begin{itemize}
  \item \textsuperscript{122} “The Cloud” is a term that refers to the place where data and programs are stored, instead of the computer or phone’s internal memory. “Cloud computing” means that the data and programs from a person’s digital device that are stored in the cloud are also accessible anywhere, anytime, from any device. PCNews.com, \url{http://www.pcmag.com/article2/0,2817,2372163,00.asp} (last visited 10/20/2014).
  \item \textsuperscript{123} \textit{Riley}, 134 S.Ct. at 2491.
  \item \textsuperscript{124} \textit{Id.}
  \item \textsuperscript{125} \textit{Id.} at 2491-2493.
  \item \textsuperscript{126} \textit{Id.} at 2492.
  \item \textsuperscript{127} \textit{Id.} at 2492. (Quoting \textit{Gant}, 556 U.S. at 345.)
  \item \textsuperscript{128} \textit{Riley}, 134 S.Ct. at 2493.
  \item \textsuperscript{129} \textit{Id.}
\end{itemize}
pockets.”

Chief Justice Roberts concluded the opinion by admitting that this unanimous decision would certainly affect the police officer’s ability to fight crime, but that “[p]rivacy comes at a cost.” The Court conceded that exigent circumstances would arise that would give rise to instances where officers would have to conduct a warrantless search of a cell phone, but those situations would be addressed by courts on a case-by-case basis.

Chief Justice Roberts stated that the Fourth Amendment’s very existence was a response to British searching through homes “in an unrestrained search for evidence of criminal activity.” He argued that the American Revolution was fueled by resistance to these searches. Even though cell phones were not foreseeable by the founders, Chief Justice Roberts argued that the Founders would not permit warrantless searches of cell phones “The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.”

The Court reversed the California Court of Appeals, and held that police must obtain a search warrant to search an arrestee’s cell phone seized incident to arrest.

C. Post-King Landscape

1. State DNA Collection Statutes

There are currently 29 states with DNA collection statutes. Thirteen states permit collection of DNA from anyone arrested for any felony. I will highlight a sampling of state statutes that are broader than the Maryland statute, and therefore, troublesome.

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130 Riley, 134 S.Ct. at 2493.
131 Id. at 2493.
132 Id. at 2494.
133 Id.
134 Id. at 2495.
135 Justice Alito wrote a concurrence in which he disagreed with the Majority’s reliance on the Chimel doctrine, but he agreed with the result. He also argued that the Majority’s holding was overbroad and would lead to contrary results depending on if the evidence was digital or physical. Justice Alito suggested that the legislatures address the issue and give law enforcement the guidelines required to perform lawful searches of cell phones incident to arrest. Riley, 134 S.Ct. at 2496-97 (Alito, J., Concurring).
136 Riley, 134 S.Ct. at 2495.
138 Id. (Alabama, Alaska, California, Colorado, Florida, Kansas, Louisiana, Nevada, New Mexico, North Dakota, Ohio, Vermont, Wisconsin.)
a. California

California originally enacted its DNA statute in 1998 to:

[A]ssist federal, state, and local criminal justice and law enforcement agencies within and outside California in the expeditious and accurate detection and prosecution of individuals responsible for sex offenses and other crimes, the exclusion of suspects who are being investigated for these crimes, and the identification of missing and unidentified persons, particularly abducted children.\(^{139}\)

California’s DNA Collection statute requires that anyone arrested for any felony submit a buccal swab DNA sample along with his fingerprint upon arrest.\(^{140}\) This differs significantly from the Maryland statute which limits DNA collection upon arrest to persons arrested for serious felonies.\(^{141}\)

If the arrestee in California refuses to provide the buccal swab sample to police upon arrest, law enforcement may use reasonable force to obtain the sample.\(^{142}\) Furthermore, there is no requirement that a detached judicial assessment of probable cause before the California arrestee’s DNA sample may be taken.\(^{143}\)

California allows arrestees not convicted to file a request for expungement of his DNA sample and deletion from the databases.\(^{144}\)

Even though this statute is significantly broader in scope than the statute upheld in *King*, the Ninth Circuit, sitting *en banc*, held the California statute to be Constitutional based upon the Supreme Court’s holding in *King*.\(^{145}\)

In December 2014, however, the California Court of Appeals held that California’s DNA statute was unconstitutional under its state Constitution.\(^{146}\)

It stated:

\(^{139}\) CAL. PENAL CODE § 295(1)(c) (2008). In § 295(1)(d), the statute states that the collection of DNA is an administrative function like fingerprinting “to assist in the accurate identification of criminal offenders.” *Id.*


\(^{143}\) CAL. PENAL CODE § 296 (2004).

\(^{144}\) CAL PENAL CODE § 299 (2004). This applies to persons with no other qualifying charges which qualifies them for inclusion within the state’s DNA database, and there is no “legal basis for retaining the specimen or sample or searchable profile.” *Id.*

\(^{145}\) Haskell v. Harris, 745 F.3d 1269 (9th Cir. 2014).

For the reasons we have set forth, we conclude that the DNA Act, to the extent it requires felony arrestees to submit a DNA sample for law enforcement analysis and inclusion in the state and federal DNA databases, without independent suspicion, a warrant or even a judicial or grand jury determination of probable cause, unreasonably intrudes on such arrestees' expectation of privacy and is invalid under article I, section 13, of the Constitution.\footnote{Id.}

The California Supreme Court will likely hear the State’s appeal of Buza, and it will have the opportunity to declare the DNA Act unconstitutional under its state constitution.\footnote{See Brian C. Stuart, Dethroning King: Why the Warrantless DNA Testing of Arrestees Should Be Prohibited Under State Constitutions, 83 Miss. L.J. ____ (forthcoming 2014). (arguing that State Supreme Courts should declare DNA Acts unconstitutional under the respective state constitutions).}

b. Kansas

Kansas adopted its original DNA collection statute in 1991, allowing law enforcement to obtain DNA from convicted felons.\footnote{KAN. STAT. ANN. § 21-2511(a) (West) (2014)} In 2008, Kansas amended its DNA Collection statute to allow police to obtain DNA not only from persons convicted of crimes, but also from persons arrested for crimes.\footnote{KAN. STAT. ANN. § 21-2511 (2014).} Like California’s statute, the Kansas statute does not discriminate on the seriousness of the felony for which the person is arrested. All potential felons are subject to DNA searches upon arrest in Kansas.\footnote{KAN. STAT. ANN. § 21-2511 (2014).}

Also like the California statute, the Kansas statute does not require a judicial determination of probable cause.\footnote{KAN. STAT. ANN. § 21-2511(b) (2014).} Kansas went even further and held that if a judge later determines that the arrest and collection of the arrestee’s DNA was not supported by probable cause, and, therefore, not lawfully obtained, the evidence acquired from that illegally obtained DNA sample would not be excluded in a criminal proceeding.\footnote{KAN. STAT. ANN. § 21-2511(f)(1) (2014).}

Similar to the statutes in California and Maryland, if the Kansas arrestee is not convicted or the case is dismissed, she may request an expungement of her DNA sample and information from the state and federal databases.\footnote{KAN. STAT. ANN. § 21-2511(f)(1) (2014).}
Despite the differences between the Maryland statute and the Kansas statute, the Kansas statute was upheld in *State v. Biery* in 2014.155

c. Vermont

Vermont enacted its DNA statute in 1997 to assist law enforcement with the investigation and prosecution of crimes by prescribing the collection of DNA from all convicted felons.156 Vermont amended the statute in 2009 to include persons arrested for any felony.157

The Vermont statute is even more protective of the arrestee’s privacy interests than either the California or Kansas statute in two ways. First, unlike the Maryland’s statute, the Vermont statute requires a judicial determination of probable cause before the DNA sample is ever obtained.158 Second, unlike the Kansas and California statutes which require the arrestee to file for expungement of his DNA sample, the Vermont statute demands that the DNA sample and records of a person not convicted be automatically expunged from the databases.159

Despite these added protections the Vermont statute was overturned in *State v. Medina* by the Vermont Supreme Court which held it to be unconstitutional under the Vermont Constitution.160

2. Post-*King* Litigation

a. *Haskell v. Harris*

In *Haskell v. Harris*, the Ninth Circuit Court of Appeals upheld California’s DNA Act.161 Lily Haskell was arrested at a peace rally in California for attempting to free another person taken into custody.162 At the police station, Haskell initially refused to provide the demanded DNA sample, but police warned her that her refusal would result in a misdemeanor

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159 20 V.S.A. § 1940 (west) (2011).
161 Haskell v. Harris, 745 F. 3d 1269, 1272 (9th Cir. 2014).
charge and she would be held in jail until arraignment.\footnote{Id.} She filed suit in 2009 seeking a preliminary injunction prohibiting the application of California’s DNA collection statute\footnote{CAL. PENAL CODE § 296(a)(2)(C).} to arrestees not yet convicted.\footnote{Haskell v. Harris, 745 F. 3d 1269, 1272 (9th Cir. 2014).} The Ninth Circuit heard oral arguments in the case in 2012, but reserved its ruling until the Court decided King.\footnote{Haskell v. Harris, 727 F.3d 916 (9th Cir. 2013).}

The Ninth Circuit Court of Appeals ruled \emph{en banc} that the Supreme Court’s ruling in \textit{King} defeated Haskell’s claims.\footnote{Haskell, 745 F.3d at 1272.} First, the Ninth Circuit held that California’s statute that permits DNA collection from anyone arrested for any felony, whether violent or nonviolent, was indistinguishable from the Maryland statute upheld in King which restricted DNA collection from arrestees detained for serious violent crimes only.\footnote{Id. at 1273-74.} The Court of Appeals stated, that by definition, a felony is a serious crime, and that the broad language of the King decision left the door open for statutes such as California’s law that applies to arrests for any felony.\footnote{Id. at 1274.} Furthermore, the Court of Appeals argued, since the governmental interest for DNA collection implicated in King was identification, the seriousness of the felony for which the person was arrested was irrelevant.\footnote{Id.}

The Ninth Circuit also refused to acknowledge a distinction between Maryland’s statute that requires a judicial determination of probable cause and the California statute that permits the processing of an arrestee’s DNA without a judicial determination of probable cause.\footnote{Id. at 1272-73.} Since DNA collection is an ordinary booking procedure, the Court of Appeals argued, a valid arrest supported by \textit{any} probable cause subjects a person arrested for any felony to the same DNA collection procedure.\footnote{Haskell, 745 F.3d at 1273.}

The Court of Appeals further argued that even if formal charges are never filed against the arrestee, the police may still process his DNA.\footnote{Id. at 1273.} Again, the Court of Appeals relied on the Government’s purported interest of identification to defeat the plaintiffs’ argument.\footnote{Id. Quoting King, 133 S.Ct. at 1966.} “The government’s interest
in identifying arrestees attaches ‘when an individual is brought into custody,’ irrespective of whether the suspect is ultimately charged.”\textsuperscript{175}

California’s DNA statute, unlike Maryland’s statute, does not provide the mechanism of automatic expungement of the arrestee’s physical DNA sample or the information from the DNA databases.\textsuperscript{176} The Court of Appeals recognized this difference, but held that since California provided a procedure for the arrestee to initiate the expungement, that provision did not run afoul of the holding in \textit{King}.\textsuperscript{177}

Shockingly, the Ninth Circuit relied on language from the dissent in \textit{King} to support its position. It quoted Scalia’s forewarning that as a result of the decision in \textit{King}, “your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason.”\textsuperscript{178} First, this statement by Scalia is non-precedential because it is dicta and in the dissent. More importantly, Scalia was not stating what the law is today, but what he feared it might become.\textsuperscript{179}

The Ninth Circuit upheld the California Statute.\textsuperscript{180} If the plaintiffs petition the Supreme Court for a writ of certiorari, the Court will finally have the opportunity to resolve the unanswered questions and residual doubts leftover from \textit{King}.

b. \textit{State v. Biery}

The Kansas Court of Appeals recently upheld the Kansas DNA Collection statute in \textit{State v. Biery}.\textsuperscript{181} The Kansas Court of Appeals, addressing the constitutionality of the Kansas DNA statute for the first time since the Kansas legislature required DNA samples to be taken at the time of arrest for all felonies, upheld the statute in light of \textit{King}.\textsuperscript{182}

Police arrested Willie Biery for an outstanding warrant for failing to appear for a probation hearing.\textsuperscript{183} During the station house booking process, police found methamphetamine in Biery’s pocket, and charged him with felony possession.\textsuperscript{184} Biery refused to provide the DNA buccal swab sample required

\textsuperscript{175} Haskell, 745 F.3d at 1274.
\textsuperscript{176} See supra note 144.
\textsuperscript{177} Haskell, 745 F.3d at 1274.
\textsuperscript{178} Id. Quoting \textit{King} at 1989 (Scalia, J. dissenting).
\textsuperscript{179} Scalia’s use of the term “predictable” proves that he did not believe this prediction to be the law at the time he wrote it. In fact, his dissent was a warning against such a ruling.
\textsuperscript{180} Haskell, 745 F.3d at 1275.
\textsuperscript{181} State v. Biery, 318 P.3d 1020 (2014). This was a \textit{per curiam} unpublished disposition.
\textsuperscript{182} Id.
\textsuperscript{183} Biery, 318 P.3d at 1.
\textsuperscript{184} Biery, 318 P.3d at 1.
by the Kansas statute, and was charged with an additional misdemeanor for his refusal. Biery was convicted, and appealed arguing that the Kansas statute violated the Fourth Amendment and the Kansas Constitution Bill of Rights.

While Biery argued that Kansas statute lacked “sufficient safeguards against the accidental disclosure or misuse of [DNA] samples.” The Kansas Court of Appeals dismissed that argument, and went further to hold that the facts of Biery’s case and the facts of King’s case were indistinguishable.

The Court of Appeals failed to address the differences in Maryland statute and the Kansas DNA statute. Unlike the Maryland statute, the Kansas statute permits DNA collection from a person arrested for any felony, whether violent or not. Neither the Kansas Court of Appeals nor Biery noted the most important difference between the facts in Biery’s case and the facts in King. King was arrested for a serious violent felony, rape, but Biery was arrested for a non-violent crime, possession of narcotics.

Furthermore, the Kansas Court of Appeals erred in relying on the stated governmental interest of identification of Biery as justification for the DNA collection. The police officer that arrested Biery identified him before he arrested him. In fact, the officer’s identification of Biery in the field resulted in the finding of the outstanding warrant, which further identified Biery. Biery was positively identified twice before he ever reached the station.

If Biery should appeal, the courts above will have the opportunity to address the differences in the broader Kansas statute that allows DNA collection from any felony arrest.

c. State v. Medina

In State v. Medina, the Vermont Supreme Court held the Vermont DNA Collection act unconstitutional under its state constitution. The Vermont Supreme Court considered the appeals of seven defendants in State v. Medina in July 2014. The Vermont court considered two possibilities for

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185 K.S.A.2011 Supp. 21-2511(e)(2) & (3).
186 Biery, 318 P.3d at 1.
187 Biery, 318 P.3d at 1. §15 of the Kansas Constitution Bill of Rights.
188 Biery, 318 P.3d at 3.
189 Biery, 318 P.3d at 4.
191 State v. Medina, 102 A.3d 661 (Vt. 2014). The Vermont court purposely delayed ruling on these cases until after King was decided. Id. at 2.
differentiating the consolidated cases from King. First, it considered if the Vermont statute differed significantly enough from the Maryland statute to produce a different result.\textsuperscript{192} Next it considered whether Vermont’s DNA statute could survive the heightened privacy requirements of the Vermont Constitution.\textsuperscript{193}

Since the Vermont Constitution provided significantly more Fourth Amendment protection to its citizens than the United States Constitution, the Vermont Supreme Court struck down the DNA collection statute under Article 11 of the Vermont Constitution.\textsuperscript{194}

The Vermont Court determined that a warrantless search of an arrestee’s DNA must be categorized as a special needs exception to the warrant requirement of Article 11.\textsuperscript{195} It analyzed the DNA statute in light of the state’s preexisting practice of DNA sampling of convicted felons.\textsuperscript{196} The purpose of creating Vermont’s DNA database was to assist in identifying persons who committed past crimes, not cataloging persons to assist with the investigation of future crimes.\textsuperscript{197} Using DNA to identify persons in future crimes is “a special need beyond normal law enforcement.”\textsuperscript{198}

After determining that a warrantless search of DNA fell within the special needs exception, the Vermont Court then performed the reasonableness balancing test to determine if the governmental interest in such a search outweighed the intrusion into the arrestee’s privacy.\textsuperscript{199}

The Vermont Court refused to apply King to uphold Vermont’s DNA statute for three reasons.\textsuperscript{200} First, the Vermont DNA collection statute is triggered after the suspect is arraigned for a felony.\textsuperscript{201} That suspect may not have been arrested and may never be arrested.\textsuperscript{202} This differs from the Maryland statute, which is triggered by the arrest.\textsuperscript{203}

\textsuperscript{192} Medina, 102 A.3d at 663.
\textsuperscript{193} Id.
\textsuperscript{194} Medina, 102 A.3d at 663. Article 11 states: That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.” Vt. CONST. ch. 1, art. 11.
\textsuperscript{195} Id. at 663.
\textsuperscript{196} Id. at 669.
\textsuperscript{197} Id. at 669. Citing State v. Martin, 955 A.2d 1144, 1152 (Vt. 2008).
\textsuperscript{198} Id. at 670-72.
\textsuperscript{199} Medina, 102 A.3d at 674.
\textsuperscript{201} Medina, 102 A.3d at 674.
\textsuperscript{202} Id. at 674. See also Md. Pub. Saf. Code Ann. § 2-504(d)(1).
Second, the Vermont Court rejected the significance of King’s purported governmental interest in DNA, the identification of an arrestee. Vermont’s current arrestee identification processes of fingerprinting and photographing are sufficient to identify an arrestee. Furthermore, the Vermont Court worried that King’s reliance on identification left the door open for broader DNA collection and possibly even a more detailed analysis of the DNA samples collected to determine “who the person really is.”

Third, the Vermont Court held that King’s ruling authorized broad warrantless searches, and those broad warrantless searches were inconsistent with Article 11 of the Vermont Constitution. Vermont’s jurisprudence holds that for a warrantless search incident to arrest to be acceptable under Article 11, the police must show that there were exigent circumstances present that necessitated the warrantless search. Furthermore, those exigent circumstances are limited to officer safety or preservation of evidence.

Furthermore, the Vermont Court flatly rejected the King Court’s assertion that DNA is like fingerprinting. “We do not equate a procedure that takes a visible image of the surface of the skin of the finger with the capture of intimate bodily fluids, even if the method of doing so is speedy and painless.” Moreover, the Vermont Court argued that the true purpose of the Maryland statute upheld in King was “solv[ing] open criminal cases or ones that may occur in the future.” The Court also feared that because the physical DNA sample is retained by the State, the law could easily be amended to allow greater use of that sample. “[T]he retention of the DNA sample suggests that expanded use is possible in the future.”

Finally, the Vermont Supreme Court weighed the State’s interest in collecting DNA from arrestees post arraignment against the privacy interest of the arrestee prior to conviction, and concluded that the balance tipped to the arrestee’s privacy interest. It overturned the Vermont DNA Collection statute, holding that it violated Article 11 of the Vermont Constitution.

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204 Id.
205 Id.
206 Medina, 102 A.3d at 675.
207 Id. at 677.
209 Medina, 102 A.3d at 677.
210 Id. at 678.
211 Id.
212 Id.
213 Medina, 102 A.3d at 682.
214 Id. at 683.
215 Medina, 102 A.3d at 683. See also supra note 148. (Brian Stuart, Dethroning King: Arguing that States should limit the application of King by amending their state constitutions to afford more protection to its citizens.)
II. RESIDUAL DOUBTS ABOUT *KING*

Many doubts remain about the Court’s decision in *King*. In *King*, the Court for the first time granted law enforcement the authority to conduct warrantless, suspicionless searches of an arrestee’s DNA for the implied purpose of routine criminal investigation. However, the search of an arrestee’s DNA cannot possibly be viewed as a tool for identification. Furthermore, the search of a person’s DNA cannot possibly be for the purpose of protection of officer safety or prevention of destruction of evidence. Therefore, the search of an arrestee’s DNA must be for purposes of crime-solving which requires a warrant or probable cause. Moreover, the residual doubts about *King* are more glaring in light of the fact that *King’s* unanswered questions were presented in amicus briefs to the Court. Finally, *King* is especially troubling when viewed in the shadow of the more recent decision of *Riley*.

A. The DNA search cannot plausibly be viewed as an identification search.

Despite the Majority’s insistence that the purpose of Maryland’s DNA Act was for proper and effective identification of arrestees, the limitations and time delays of DNA sample processing effectively eliminates identification as the true governmental interest. Justice Scalia noted in his dissent that accepting this assumption by the Majority “taxes the credulity of the credulous.”

The Dissent argued that the Majority’s holding and the route it traveled to arrive at its holding is completely dependent on the idea that the purpose of a search of an arrestee’s DNA is not for general crime-solving, but for identification. Since suspicionless searches must always be justified by “special needs” other than crime-solving, then the only additional permissible purposes of a search incident to arrest are protection of officer safety or preservation of evidence. The Majority, Scalia argued, “[s]ens[ed] (correctly) that it need[ed] more,” and attempted to back the DNA search into the permissible administrative purpose of identification.

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216 *King*, 133 S.Ct. at 1983.
217 *Id.* at 1980.
218 *Id.* at 1982.
219 *Id.* at 1981.
220 *Id.* at 1982.
221 *King*, 133 S.Ct. at 1982–83.
B. The DNA search cannot plausibly viewed as a search for protection of officer safety or a search to prevent destruction of evidence.

Since identification is not the true purpose of a search of an arrestee’s DNA, then it must fall within one of the two traditional search incident to arrest exceptions. The object of a search incident to arrest must be either for “weapons or evidence that might easily be destroyed.”

Clearly, DNA poses no threat to officer safety so it must meet the alternative search incident to arrest purpose of preventing the destruction of evidence. Since an arrestee has absolutely no ability to destroy his own bodily DNA, the search of DNA fails this search incident to arrest exception.

C. The DNA Search is a crime-solving search which requires a warrant or probable cause.

Since a DNA search is not for identification, nor for the protection of officer safety, nor for the prevention of the destruction of evidence, it must be for general crime-solving purposes. The Maryland DNA Act contains language that states that one of the five purposes of the collection of DNA upon arrest is “as part of an official investigation into a crime.” Furthermore, the Dissent in *King* correctly points out that identification of arrestees is not even listed as one of the five purposes of the Act.

Because the search into an arrestee’s DNA is for general crime-solving, the privacy implications should be reevaluated. Since the Court has never allowed warrantless, suspicionless searches for the purpose of general crime-solving, it should not start allowing such searches now.

D. The Problem with King’s Unanswered Questions and the Privacy Implications of DNA

Other commentators share Scalia’s concerns about *King*. Erin Murphy noted that the Majority ignored *King*’s unanswered questions (violent vs. non-violent felonies; judicial determination of probable cause v. field officers’ determination; automatic v. non-automatic expungement). Even though each of those issues was presented to the Court in briefs advocating for

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222 Id. at 1982.
224 *King*, 133 S.Ct. at 1985.
defendant King, the Court purposely declined to offer any guidance on those issues. The failure of the decision to offer express guidance on these matters is thus a silence that speaks at least as loudly as words, especially since the Court not only resisted declaring such safeguards as essential, but also planted seeds suggesting the contrary.

George M. Dery III argued that the Court underestimated the privacy interest implicated by discounting the significant physical intrusion of the buccal cheek swab search. “DNA is collected by invading several barriers of the body to collect information that is so sensitive it could offer insight into devastating neurological conditions and hundreds of common diseases.” Furthermore, he argued that the Government is now demanding that its citizens “open their mouths for royal inspection,” and that is something our founding fathers would certainly have refused to do.

E. The Problem with King when viewed in the light of Riley

Moreover, King is especially troubling when viewed in the shadow of the unanimous decision in Riley. Both cases required the Court to assess the reasonableness of warrantless, suspicionless searches-incident-to-arrest. In Riley, the Court correctly recognized that a search of person’s private digital data was not subject to a search-incident-to-arrest exception because such a search was not justified under the Chimel exceptions, and also because of the significant privacy implications associated with a search of a cell phone. Riley held that police must obtain a search warrant to search the phone of an arrestee. That holding sits in stark contrast with the holding in King which permits police to physically invade a person’s body in order to search his private genetic history without any type of warrant at all. If the Court were to revisit its five-to-four holding in King in light of its unanimous decision in Riley, we might end up with a different result.

III. Riley Has Doctrinally Eroded King

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226 Id. at 167-69.
227 Id. at 69.
228 2 Va. J. Crim. L. 116, 149-50 (2014) (quoting King, 133 S. Ct. at 1989 (Scalia, J., dissenting)). Dery listed several other privacy concerns with the buccal cheek swab: the aggressive rubbing required to remove the cells from the cheek; probing of the mouth is the usual province of a medical professional; and the subsequent intrusion into the cells once retrieved to access the DNA information. Id.
The Court’s analysis in *Riley* does not square with its reasoning in *King*. I will show that *King* has been doctrinally eroded by *Riley* for three reasons. First, *Riley* and *King* deal with the same issue, which is governmental invasion of privacy for purposes of crime-solving. Furthermore, the *Riley* Court failed to distinguish *King* even though the issue was presented to it in amicus briefs. Moreover, the unanimous opinion in *Riley* undermines the narrow 5-4 holding in *King*.

A. *Riley* and *King* Present the Same Precise Issue: Governmental Invasion of Privacy for Purposes of General Crime-Solving

1. Both cell phone and DNA searches involve new forms of privacy intrusion associated with new technologies that are not analogous to traditional searches recognized earlier by the Court

Because DNA and cell phone technologies emerged around the same time, the technological advancements in which they both bring to the efforts of law enforcement to fight crime and the potential for significant invasions of personal privacy should be treated with the same scrutiny. The Court in *Riley* dealt with new mobile phone technology that was not foreseeable by the Court thirty years ago. Similarly, the Court in *King* was also dealing with new DNA technology not foreseeable thirty years ago. The *Riley* Court correctly assessed the privacy implications the new technology of mobile devices brought upon arrestees but the Court in *King*, failed to recognize the privacy implications of the new technology of DNA.

The Court determined in *Riley* that mobile phones are not like any other physical object a person might carry on himself at the time of arrest. A cell phone is a “minicomputer” that has not only vast storage capacity, but qualitatively broad personal information stored on it. Unlike a package of cigarettes or a wallet, a cell phone has enormous storage capacity. A standard smart phone has the capacity to store thousands of photos, files, and

229 The first cell phone network was established in the United States in 1983. Just three years later, the first instance of DNA used as a crime fighting tool was 1986. See [http://www.corp.att.com/attlabs/reputation/timeline/46mobile.html](http://www.corp.att.com/attlabs/reputation/timeline/46mobile.html) (last visited Jan. 21, 2015). See also HISTOR Y OF DNA PROFILING, [http://www2.le.ac.uk/departments/emfpu/genetics/explained/profiling-history](http://www2.le.ac.uk/departments/emfpu/genetics/explained/profiling-history) (last visited Jan. 21, 2015).
230 *Riley*, 134 S.Ct. at 2484.
231 Id. at 2489.
232 Id.
233 Id.
videos. A cell phone’s storage capacity is akin to a “trunk” a person would have to “drag behind” him filled with “every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read.”

The Riley Court held that a cell phone deserved higher privacy protection than other physical items contained on a person because a cell phone is “a cache of sensitive personal information” that people carry “with them as they [go] about their day.” Not only does a cell phone contain files stored by the arrestee such as photos, emails, and videos, a cell phone also contains the person’s internet browsing history. Additionally, apps and the GPS location feature of some phones leave a locational history of the person that, prior to the digital-device era, would never have been accessible through a search of an item in an arrestee’s pockets.

Similarly, DNA is both a physical item as well as a storage device for vast amounts of private genetic information. The physical sample obtained by police is either a blood sample or a buccal swab of the arrestee’s cheek. This physical sample is similar to a cell phone because, on its face, it is merely a piece of bodily tissue. Like a cell phone, though, once it is cracked open, the amount and diversity of information contained within it is incomprehensible.

DNA contains vast types and quantities of information. Currently, CODIS and NDIS only store copies of the information contained on 13 loci of a person’s DNA. Those stored physical samples, however, provide more than just the arrestee’s identification information.

CODIS now allows different types of searches within its system to generate different levels of matches. At the highest level, all the alleles of the 13 loci found on the arrestee’s DNA must match the alleles found on the loci of

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the crime scene evidence. This type of match produces the traditional DNA “cold hit.”

The arrestee’s DNA sample also contains genetic information about the arrestee’s closely-related family members. Using the arrestee’s DNA information, law enforcement now have the technology to use a partial match created by it to generate a familial match to him. CODIS uncovers partial matches of less than all the alleles of the two samples to find partial matches between profiles stored in CODIS and DNA evidence obtained at a crime scene. These searches produce a list of the arrestee’s family members which might lead police to the suspect. Familial searching is troubling because it expands the DNA databases to include not only the private genetic information of the arrestee, but also the private genetic information of the arrestee’s family.

In addition to familial information, an arrestee’s DNA also contains intensely private medical information only accessible via a search of the person’s DNA. Along with information about a person’s ethnic background, the “genetic polymorphisms” of DNA reveal private information about a person’s current health condition as well as probabilities of the person’s future health problems. DNA’s predictive ability extends not only to future medical conditions, but also behavioral traits that law enforcement might one day have an interest in matching with a suspect, traits such as tendencies to violent behavior, propensity for substance abuse, and sexual inclinations.

Like a cell phone, a DNA also contains information about a person’s locational history. DNA evidence can link a suspect, or as shown above, a member of the arrestee’s family to physical location.

The Court in Riley stated that information stored in the cloud blurs the line at what officers can search for, and a warrant clears up that blurriness.
Similarly, a DNA sample contains far more information than the identification loci used for processing purposes, and the line is blurry as to what police can actually search for within that sample in the future. Therefore, a search warrant should be required for DNA, just as it is for a cell phone.

Because DNA has vast amounts and types of information contained within it, a search of it should be treated with the same level of scrutiny as the search of a cell phone. Since the Court in Riley held that a warrant is required to search through a person’s cell phone, it follows that a search warrant should be required to search through a person’s DNA. Absent this specific requirement, law enforcement may use the arrestee’s DNA for more than identification of that person. Since these types of searches have privacy implications not only for the arrestee’s privacy, but also for those of his family, a person’s DNA should be afforded the same level of protection as a person’s cell phone.

2. The true purpose of both cell phone and DNA searches is general crime-solving, not narrower purposes which fit within special Fourth Amendment Doctrines

a. Cell phone searches are for crime-solving while traditional searches-incident-to-arrest are justified by the need to protect officers and preserve evidence.

The Court in Riley understood that a search of an arrestee’s cell phone was a suspicionless search, and as such, a warrant was required.\footnote{Id. at 2493.} Certainly a cell phone could be used to identify an arrestee, but the Riley Court realized that a cell phone contains so much private information that a search of it could be for nothing other than crime-solving.\footnote{Id. at 2492.}

In Riley, the Court recognized that warrantless searches of cell phones upon arrest could “become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals.”\footnote{Riley, 134 S.Ct. at 2493.} However, “[p]rivacy comes at a cost.”\footnote{Id. at 2484-85. See supra notes 110-11.}

The Riley Court declined to apply the Robinson standard to a warrantless search of a cell phone.\footnote{Id. at 2484-85. See supra notes 110-11.} Robinson, the Court argued, applies only to searches of a physical objects, not digital content contained within the
physical object. Therefore, the search of the digital data of the cell phone is not at all similar to looking inside an arrestee’s cigarette pack.

The Court then attempted to fit a warrantless search of cell phone data within the *Chimel* exceptions to a search incident to arrest. Since digital data poses absolutely no threat to officer safety, such a search fails the first *Chimel* exception. Searches of cell phones also fail the second *Chimel* exception which justifies a warrantless search to prevent the destruction of evidence. Once police have physical possession of the arrestee’s cell phone, however, there is no formidable risk of the arrestee destroying evidence from the phone.

Furthermore, the *Riley* Court refused to import the *Gant* standard to searches of a cell phone. A search of a cell phone is not like a search of a vehicle because a person has a reduced expectation of privacy in his vehicle, and vehicles create greater law enforcement needs that justify certain warrantless searches. Moreover, since a cell phone contains such vast amounts of information, a warrantless *Gant*-like search of a cell phone under the guise of searching for evidence of past crimes would open the door to a limitless search of the person’s private information. *Gant* restricts the search of the vehicle to evidence related to the crime at hand, but such a search would be practically impossible in the context of a cell phone.

Moreover, even if the cell phone fell within the narrow exception of permitted warrantless suspicionless searches, the privacy intrusion would far outweigh whatever governmental interest might exist for searching the phone.

b. DNA searches are for crime-solving while traditional booking searches such as fingerprinting are justified by the need to identify arrestees.

The true governmental interest in DNA collection is not identification...
of the arrestee, but crime-solving. Justice Scalia harshly disclaimed the Majority’s statement that identification was the government’s legitimate interest in the collection of DNA\textsuperscript{270}, “unless what one means by ‘identifying’ someone is ‘searching for evidence that he has committed crimes unrelated to his arrest.’”\textsuperscript{271} Furthermore, \textit{King} expanded “the idea of ‘identity’ to include criminal history and other information.”\textsuperscript{272} Moreover, never in the nation’s history has the Fourth Amendment allowed suspicionless searches for the ordinary purpose of crime-solving.\textsuperscript{273}

Much of the Court’s argument in \textit{King} rests on the analogy that DNA is just a better form of fingerprinting,\textsuperscript{274} and therefore, the collection of DNA upon arrest is justified as a suspicionless station-house search of the arrestee for administrative identification purposes.\textsuperscript{275} Thus, the Court applied a reasonableness balancing test, which weighed the legitimate governmental interest for the search against the intrusion into the arrestee’s privacy.\textsuperscript{276} Since DNA is the new fingerprinting, the Court argued, the governmental interest implicated in the collection of DNA is identification.\textsuperscript{277} Since identification of an arrestee is a significant governmental interest\textsuperscript{278}, that interest outweighs the intrusion into the arrestee’s privacy and no search warrant is required.\textsuperscript{279}

DNA is not the same as fingerprinting, however, and the purpose of searching a person’s DNA is not solely identification. The purpose of a search of a person’s DNA upon arrest is the same as the purpose of a search of an arrestee’s cell phone: crime-solving, and both searches should be conducted with a warrant.

DNA is not the same as fingerprinting because fingerprinting is only used for identification purposes. “A fingerprint reveals only unique patterns of loops and whirls . . . [A] DNA sample is the information-containing blueprint of human life, revealing one’s genetic predispositions to disease, physical and mental characteristics, and a host of other private facts not evident to the public.”\textsuperscript{280} A copy of a person’s fingerprint reveals none of those things.

Furthermore, a DNA sample is not like a fingerprint because the

\begin{thebibliography}{99}
\item \textit{King}, 133 S.Ct. at 1980.
\item \textit{Id.} at 1983.
\item Erin Murphy, \textit{License, Registration, Cheek Swab: DNA Testing and the Divided Court}, 127 Harv. L.Rev. 161, 177 (2013).
\item \textit{King}, 133 S.Ct. at 1981.
\item \textit{Id.} at 1976-1977.
\item \textit{Id.} at 1975.
\item \textit{Id.} at 1970.
\item \textit{Id.} at 1970-75.
\item \textit{King}, 133 S.Ct. at 1970-75.
\item \textit{Id.} at 1980.
\end{thebibliography}
A physical sample of DNA is retained indefinitely along with the data gleaned from it. A fingerprint is just an image of a person’s fingertip. Surely society would object to fingerprinting if the process required police to retain the tip of one’s finger indefinitely.

DNA collection is not like fingerprinting because DNA collection often cannot occur until after arraignment. Fingerprinting is done automatically upon every custodial arrest at the police station. Furthermore, there is no judicial determination of probable cause required to take a fingerprint.

Moreover, DNA is unlike fingerprinting in the amount of time it takes to get the results. Fingerprinting analysis response time is approximately 27 minutes. DNA analysis is far from instantaneous, taking on average 20 days to generate a profile. Since DNA processing takes almost three weeks to process, it is not similar in process or speed to fingerprinting, and, therefore, its primary purpose cannot possibly be identification of an arrestee.

In King, the Majority did not even attempt to fit the search of DNA into the traditional search incident to arrest exceptions because a search of an arrestee’s DNA would most certainly fail the Chimel test. An arrestee’s DNA does not pose a threat to officer safety, nor is there any threat the DNA sample might destroy evidence of the crime. Since the true governmental interest is not identification, but crime-solving, and since a search of DNA does not meet the traditional search-incident-to-arrest warrantless requirements, a search of DNA deserves as much or protection than a search of a cell phone.

Since the Majority failed to fit the search of an arrestee’s DNA into one of the traditional search incident to arrest exceptions, it re-categorized the search as an administrative booking search. The Court went so far as to quote the search-incident-arrest of a person language from Robinson, “‘The validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged.’” However, the Dissent argued that the Majority was then forced to classify the search of an arrestee’s DNA as an administrative station-house search in order to trigger the “identification” interest it used to justify a suspicionless warrantless search for the real purpose of crime-solving.

In both Riley and King, the court refused to classify the search of an arrestee’s personal, private information as a traditional search incident to

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283 King, 133 S.Ct. at 1976. (Citing press releases from Ohio and Louisiana.)
284 Id. at 1982.
286 King, 133 S.Ct. at 1974.
arrest under Robinson or Chimel. How then did we end up with such differing results? Neither DNA nor cell phones pose threats to officer safety. A search of either an arrestee’s DNA or her cell phone does nothing to prevent the possible destruction or concealment of evidence. Both DNA and cell phones contain vast amounts of intensely private information. Since the true purpose of searching either an arrestee’s cell phone or an arrestee’s DNA is obviously crime-solving, the Fourth Amendment requires that both have the same level of protection.

B. The Court’s Failure in Riley to Distinguish King

Although both cases deal with precisely the same issue, new technology and crime-solving searches, the Court in Riley failed to distinguish King. In fact, the Riley Court quoted dicta from King to support its argument that the Fourth Amendment requires a warrant to search an arrestee’s cell phone upon arrest.

The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. Not every search “is acceptable solely because a person is in custody.” To the contrary, when “privacy-related concerns are weighty enough” a “search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.”

Furthermore, the Riley Court’s silence on the contradictory holding of King is glaring in light of the fact that King’s holding was presented to the Riley court in briefs for the Government. In the State of California’s brief, California asserted that the decision in King reinforced the search incident to arrest warrant exception as a matter of course, and searches of cell phones incident to arrest fall within that same category. Furthermore, California used King’s reliance on identification as justification for a search of an arrestee’s DNA incident to arrest to bolster its argument that a search of a cell phone could provide the same identification interest for law enforcement.

Similarly, the United States submitted a brief as Amicus Curiae Supporting Respondent in which the Solicitor General noted that, “Last Term, the Court twice reiterated that an arrest categorically authorizes the full search of the person of the arrestee. See Maryland v. King, 133 S. Ct. 1958, 287

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Despite the briefing by respondent and in support of respondent comparing the two cases, the Riley Court completely sidestepped the inevitable comparison of a search incident to arrest of a person’s cell phone and the search incident to arrest of a person’s DNA.

C. Riley’s Unanimous Opinion Erodes King’s Narrow Five-to-Four Majority

The Court’s unanimous decision in Riley represents significant doctrinal erosion from the five-to-four decision handed down just one year prior in King. Doctrinal erosion occurs when “subsequent constitutional developments . . . disturb, [or] threaten to diminish, the scope of recognized protection accorded to the liberty.” Once a more recent case doctrinally erodes a prior decision, the prior decision is then ripe for overruling.

The concept of stare decisis usually prevents the Court from overruling its prior decisions. Stare decisis is “[f]idelity to precedent” and “vital to the proper exercise of the judicial function.” The principle of stare decisis “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” Stare decisis does not prevent the Court from overruling a prior decision, but there must be an important justification for it.

In Planned Parenthood v. Casey, the Court outlined four conditions under which it is appropriate to overturn a prior ruling. First, if the rule from the prior case proves to be unworkable, overruling the case would be appropriate. Second, if there has been significant reliance on the old rule that overruling it would mean a significant hardship on some people, then overruling it would not be appropriate. Third, if the underlying facts on which the prior ruling was based have changed, overturning the prior decision might be appropriate. Finally, if “the law’s growth in the intervening years has left [the prior decision’s] central rule a doctrinal anachronism discounted by society,” overturning the prior decision is acceptable. In other words,
doctrinal erosion is a permissible basis for abandoning *stare decisis* and overturning a past decision.

*Riley* represents doctrinal erosion of *King*. *Riley* is a subsequent Constitutional development that awarded an arrestee a scope of protection greater than the scope of protection granted in *King*. *Riley* demands that police obtain a search warrant to search the private digital information of an arrestee. Since neither a search warrant nor even an arrest warrant was required by the Court to search an arrestee’s DNA in *King*, the subsequent, more protective decision in *Riley* doctrinally trumps the holding in *King*.

Since only four cases in the history of the Court have ever been overturned without a change in judicial make-up, it is very unlikely *King* will be overruled in the near future. In the meantime, lower courts should interpret the holding in *King* very narrowly.

**IV. Since KIng Has Been Doctrinally Eroded by Riley, King Should Be Interpreted by Lower Courts Very Narrowly**

Although *King* has been doctrinally eroded by the Court’s unanimous decision in *Riley*, it is unlikely to be overturned in the near future. Lower courts are currently interpreting state statutes in light of *King*, and they should interpret the holding in *King* very narrowly. Automatic DNA collection upon arrest should only apply to persons arrested for serious violent felonies. Furthermore, the arrest of that person should be supported by a judicial determination of probable cause. If the arrestee is not convicted or the charges against him are dropped, the state should automatically destroy his physical DNA sample and automatically remove his DNA profile from the state and federal DNA databases.

“As the text of the Fourth Amendment indicates, the ultimate measure of the Constitutionality of governmental search is “reasonableness.” A search “must be reasonable in its scope and manner of execution.” To determine whether a warrantless search is reasonable, courts must apply a reasonableness balancing test. We must weigh “the nature and extent of the

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299 *King*, 133 S.Ct. at 1970.
governmental interests involved”300 against “the degree to which [the search] intrudes upon an individual’s privacy.”301

An arrestee in police custody has a diminished expectation of privacy.302 This does not mean, however, that all searches of a person in police custody are reasonable. Interestingly, the Riley Court quoted the Majority opinion from King stating that “not every search “is acceptable solely because a person is in custody.”303

A. Police should be allowed to obtain DNA only from a person arrested for a violent felony, not just any felony or misdemeanor.

The Government’s purported interest in obtaining DNA of an arrestee is identification.304 The government’s interest in identification of a person arrested for a serious violent felony is much higher than its interest in identification of person arrested for a non-violent felony. The person arrested for a violent felony is likely to be more dangerous to the police and the general public than a person arrested for a non-violent felony. Police have a lesser interest in identifying a person arrested for a non-violent crime because that person poses potentially less of a threat to police officers and the general public than a person arrested for a violent crime. Furthermore, a person arrested for a violent crime is more likely to flee an impending possible prison sentence, and the Government has a strong interest in positively identifying that person to ensure her availability for the criminal proceedings.

A person suspected of a violent crime such as murder or rape understandably has a lower expectation of privacy than someone arrested for a non-violent crime like mail fraud. The privacy intrusion of such a possibly violent person is reasonable when weighed against the alternative result of that person walking around free.

The privacy intrusion of DNA collection from a person arrested for a non-violent crime is unreasonable when weighed in the balancing test against the Government’s interest in identification. A person arrested for a non-violent crime is not as much of a potential threat to police and to the public as someone arrested for a violent crime. Moreover, a person arrested for a non-violent crime does not have the same incentive to flee the upcoming criminal proceeding and the Government has lesser interest in ensuring such a person is available for trial.

300 Terry v. Ohio, 392 U.S. 1, 22 (1968).
304 See supra note 33.
Furthermore, a person arrested for a non-violent crime has a greater expectation of privacy than someone arrested for a crime that could imprison him for months or years. DNA collection from a non-violent felon is a greater privacy intrusion because the non-violent felon has not committed a crime that might take away his freedom. It is more reasonable for police to do a thorough search through the DNA of a person that could be locked away for years, than it is for a person who might not do any jail time at all.

Even if we admit that the Government’s actual interest in collecting DNA evidence from an arrestee is not identification as stated in King, but crime-solving, the government still has a lesser interest in linking the non-violent felon arrestee to unsolved crimes than a person arrested for a violent offense. If a person is arrested for a non-violent crime, the fact that he is suspected of a non-violent crime does not indicate a possible pattern of violence that should subject him to a suspicionless search of his DNA. In contrast, a person arrested for a violent crime might have a history of violence, and the government’s interest in solving other violent unsolved crimes is much higher. A search of a non-violent suspect’s DNA fails the reasonableness balancing test even if we accept the Government’s legitimate interest is actually crime-solving.

B. Before DNA is collected from an arrestee, the arrest must be supported by a judicial determination of probable cause.

State statutes that do not require a judicial determination of probable cause for an arrest prior to the collection and processing of the DNA of the arrestee violate the arrestee’s Fourth Amendment right against unreasonable search or seizure. This judicial determination of probable cause can be in the form of a pre-arrest arrest warrant or a post-arrest Gerstein hearing. Because the government’s stated interest in identification of an arrestee is lower when the person was not arrested based upon a detached neutral magistrate’s determination of probable cause, the privacy intrusion into the person’s DNA is substantial. If there is a judicial determination of probable cause for the arrest, however, the police’s interest in correctly identifying that person is overwhelmingly higher and the arrestee’s reasonable expectation of privacy is much lower. In contrast, the search of a person’s DNA arrested based solely upon police suspicion fails the reasonableness balancing test.

305 Gerstein v. Pugh, 420 U.S. 103 (1975) “Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.” Id. at 114.
Moreover, if an arrest warrant is required to enter a person’s home for the purpose of arrest, at a minimum an arrest warrant or its equivalent should be required to enter a person’s body for the purpose of a search incident to arrest. The Court has already held that an arrest warrant is required before police may enter a suspect’s home to arrest him. In Payton v. New York, the Court reasoned that a search warrant would offer more protection to the arrestee, but that such a requirement would be impractical for law enforcement. The Court stated that in lieu of the search warrant, the police must have an arrest warrant issued by a detached judicial official before the police may enter the home.\footnote{Payton v. New York, 445 U.S. 573, 602-03 (1980).}

That same reasoning applies to the search of a person’s DNA. Just as an arrest warrant gives derivative privacy protection to the home of the arrestee, an arrest warrant would similarly give derivative privacy protection to the body of the arrestee.

The Court should apply the same reasonableness balancing test applied to the search of cell phones in Riley to a search of DNA collected from arrestees. Since the Court in Riley held that a warrant is required to search a person’s cell phone upon his arrest, King should now be interpreted post-Riley to require, at the least, an arrest warrant, before an arrestee’s DNA can be searched upon arrest.

If no judicial determination of probable cause is required before police may obtain DNA from a person, police may arrest people for any reason or no reason at all to gain access to that person’s DNA.

C. If a person is acquitted of the crime or the charges against him are dismissed, the person’s DNA sample should be destroyed and the information should be deleted from the databases.

The Government’s interest in retaining DNA information in the federal and state databases is much higher when the person was convicted of the crime. If the person is acquitted of the crime or the charges are dropped, the Government’s interest in retaining that private information is lessened, if not eliminated.

Applying the reasonableness balancing test, the Government’s stated interest in identification of a person not convicted of a crime is far outweighed by the significant intrusion into that person’s privacy. The acquitted person is no longer a potential danger to police. The acquitted person should no longer be a potential suspect in past or future crimes. Any future search of an acquitted person’s DNA is unreasonable.
Furthermore, a state statute that does not automatically require the destruction of the DNA sample obtained from a person found not guilty of the crime that triggered the collection of DNA is unreasonable because it is a significant intrusion into the person’s privacy interests.

A person has four different types of privacy interests in his DNA sample: (1) Bodily privacy; (2) Informational Privacy; (3) Familial/Relational Privacy; (4) Locational Privacy. The Court in King addressed only bodily privacy and informational privacy. If the physical DNA sample itself is not destroyed, the acquitted arrestee’s privacy interest in familial/relational privacy is also in danger. Police have and may use the DNA sample to perform partial matches that point to family traits or characteristics.

Applying the Fourth Amendment balancing test to this type of search, the Government’s interest in “identification” of the arrestee is no longer even an interest of the Government once the person has been acquitted. Since the Government interest is so much lower, the intrusion into the person’s familial/relational privacy tips the reasonableness scale as a violation of the person’s Fourth Amendment rights.

Moreover, once the arrestee is no longer a suspect in the crime for which he was arrested, retention of the arrestee’s DNA sample should be considered an unlawful seizure of that person’s DNA. The First Circuit ruled in Boroian v. Mueller that the government’s retention of the person’s DNA profile in the databases and the retention of a physical sample were lawful seizures and searches. The Boroian case, however, is easily distinguishable from the issue of whether a non-convicted arrestee’s DNA information and physical DNA sample may be retained. Unlike my example where the arrestee is acquitted of the crime for which he was arrested or the charges against him were dropped, the petitioner in Boroian was a convicted felon who submitted a physical DNA sample pursuant to The DNA Analysis Backlog Elimination Act of 2000. Furthermore, Boroian was decided in 2010, three years before the Court narrowly permitted the search and seizure of DNA upon arrest. The Supreme Court has not yet addressed the question of whether retention of a person’s physical DNA sample is an unreasonable seizure, but the issue is ripe for determination.

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308 Boroian v. Mueller, 616 F.3d 60, 62 (1st. Cir. 2010).
309 Boroian, 616 F.3d at 64. The DNA Analysis Backlog Elimination Act of 2000 requires “individuals who have been convicted of a qualifying Federal offense and who are incarcerated or on parole, probation, or supervised release to provide government authorities with a DNA sample.” Id. at 63.
310 See Alyssa Mandara, COMPULSORY COLLECTION AND RETENTION OF DNA UPON ARREST: FOURTH AMENDMENT IMPLICATIONS, Seton Hall Law eRepository, 11-13 (2013).
Furthermore, Federal Rule of Criminal Procedure 41(g) states that a person subjected to an unlawful seizure of property may move for the property’s return.\textsuperscript{311} A DNA sample is a piece of the arrestee’s body that is the property of the arrestee, and he is entitled to its return upon request and after the termination of all criminal proceedings.

Additionally, DNA information obtained from an arrestee’s physical DNA sample and codified into data that is entered into state and Federal DNA databases is a “copy” of the person’s property subject to the same Fed. R. Crim. P. 41(g) property return procedures. Circuit Courts have routinely held that copies of original information obtained by police must be destroyed or returned to the arrestee if the Government no longer has a legitimate interest in the copied information.\textsuperscript{312} Since DNA is a copy of a person’s DNA, once the government has no legitimate interest in the person as a suspect of the crime, the copied DNA information entered into the state and federal databases should be deleted.

\textbf{CONCLUSION}

Just one year after granting police the authority to perform warrantless, suspicionless searches of an arrestee’s DNA, the Court completely changed course in \textit{Riley}, and declared that the Fourth Amendment requires a search warrant to search an arrestee’s cell phone. Although the triggering event for both searches is an arrest, and the things to be searched both contain vast amounts of very private information, the Court reached drastically different results. Police must have a warrant to search an arrestee’s home or his cell phone, but no warrant is required at all to search that same arrestee’s DNA. If an arrestee is entitled to Fourth Amendment privacy protection of his home and his cell phone, he deserves the same protection for his DNA. Because \textit{King} is completely inconsistent with \textit{Riley}, \textit{King} should be overruled. Since that is unlikely in the near future, lower courts should interpret \textit{King} very narrowly and limit the holding to the parameters of the Maryland statute upheld in \textit{King}. The Fourth Amendment requires nothing less.

\textsuperscript{311} \textit{Fed. R. Crim. P.} 41.

\textsuperscript{312} United States v. Cvijanovich, 359 F. App’x 675, 676-77 (8th Cir. 2010) and Sovereign News Co. v. United States, 690 F.2d 569, 577 (6th Cir.1982) \textit{cert. denied 464 U.S. 814}. 