

ALONZO JAY KING

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IN THE

Appellant

\*

COURT OF APPEALS

v.

\*

OF MARYLAND

STATE OF MARYLAND

\*

September Term, 2011

Appellee

\*

Case No. 68

\* \* \* \* \*

MOTION FOR RECONSIDERATION OR, ALTERNATIVELY,  
FOR STAY OF ENFORCEMENT OF THE MANDATE

The appellee, the State of Maryland, through counsel, moves, under Rule 8-605, for reconsideration of the Court’s April 24, 2012, decision in this appeal and, alternatively, for a stay of enforcement of the mandate pending further appeal.

1. In its April 24 opinion, this Court reversed the conviction of the appellant, Alonzo King, and the sentence of life without parole that he received for the first-degree rape that he committed when he broke into the home of a 53-year-old woman and raped her at gunpoint.

2. Mr. King was identified as a suspect for the unsolved 2003 rape case by comparing DNA collected from the victim with DNA collected from Mr. King after he was arrested and charged with first-degree assault in 2009.

3. The Court’s decision holds that DNA obtained from an arrestee, during the booking process after the arrestee has been charged, by rubbing a sterile cotton swab on the interior of the cheek in the arrestee’s mouth, violates the Fourth Amendment, at least where the DNA collection is not needed to identify the arrestee in connection with the charged

crime. Slip op. at 8.

4. The Court's decision thereby undermines important public safety objectives that the General Assembly sought to achieve when it amended the State's DNA Collection Act, in 2008, to authorize the collection of DNA from arrestees charged with certain qualifying offenses. The 2008 amendments have bolstered law enforcement efforts and have led to the apprehension of violent criminals who committed crimes that might otherwise have gone unsolved.

5. The 2008 amendments to Maryland's DNA Collection Act already have generated evidence that could help to resolve 190 unsolved cases. Moreover, as other courts have recognized, this aid to effective law enforcement also frequently serves the interests of justice by exonerating those who have been wrongly convicted and by eliminating other suspects in an investigation.

6. The State's DNA Collection Act, including its authorization to collect DNA samples from arrestees charged with certain qualifying offenses, is not unique. The federal government and half the states have enacted similar laws.<sup>1</sup>

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<sup>1</sup> See, e.g., 42 U.S.C. §14135a(a)(1)(A); Ala. Code §36-18-24; Alaska Stat. §44.41.035; Ariz. Rev. Stat. §13-610; Ark. Stat. Ann. §§12-12-1006, 1105; Cal. Penal Code §§296, 296.1, 299; Colo. Rev. Stat. §§16-23-103; Fla. Stat. §943.325; 730 Ill. Comp. Stat. 5/5-4-3(a-3.2); Kan. Stat. Ann. §21-2511; La. Rev. Stat. Ann. §15:609; Mich. Comp. Laws §750.520m; Minn. Stat. §§299C.11, .105; Mo. Rev. Stat. §650.055; N.J. Stat. §53:1-20.20 (effective Feb. 1, 2013); N.M. Stat. Ann. §29-3-10; N.C. Gen. Stat. §§15A-255.3A, 502A; N.D. Cent. Code §31-13-03; Ohio Rev. Code Ann. §§2901.07; S.C. Code Ann. §23-3-620; S.D. Codified Laws Ann. §§23-5A-5.2, 5A-1.; Tenn. Code Ann. §40-35-321; Tex. Gov't Code Ann. § 411.1471; Utah Code Ann. §53-10-403; Vt. Stat. Ann. Tit. 20 §§1932, 1933; Va. Code § 19.2-310.2:1.

7. Because the states and the federal government cooperate in making the DNA samples available to law enforcement officials nationwide, through the Federal Bureau of Investigation's Combined DNA Index System (commonly known as "CODIS"), the Court's ruling could impede the prosecutions of crimes committed against Maryland victims by offenders whose DNA was collected in connection with an arrest by a federal law enforcement agency for a federal crime or in connection with an arrest by Virginia authorities, for instance, even though courts have upheld the collection of DNA from arrestees under the pertinent federal and Virginia statutes.

8. Indeed, the controlling case law in most jurisdictions to have examined the collection of DNA from arrestees under the authority of these state and federal statutes finds no Fourth Amendment impediment to the DNA collection. *See, e.g., Haskell v. Harris*, 669 F.3d 1049, 1059 (9th Cir. 2012); *United States v. Mitchell*, 652 F.3d 387, 415-16 (3d Cir. 2011), *cert. denied*, \_\_\_ U.S. \_\_\_, 182 L. Ed. 2d 558 (2012); *State v. Franklin*, 76 So. 3d 423, 424 (La. 2012); *Anderson v. Commonwealth*, 650 S.E.2d 702, 706 (Va. 2007), *cert. denied*, 553 U.S. 1054 (2008).<sup>2</sup>

9. As the dissenting opinion observes, the intrusiveness of the buccal swab of Mr. King's cheek is "fairly characterized as d[e] minimis" and pales in comparison to other,

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<sup>2</sup> One of the cases cited in the majority opinion as having reached a contrary result is *People v. Buza*, 192 Cal. Rptr. 3d 753 (Cal. Ct. App. 2011). Slip op. at 24-26, 36-37. Because the California Supreme Court has granted certiorari to review that decision, *see* 262 P.3d 854 (Cal. 2011), the intermediate appellate court's decision has been depublished, *see* Cal. Rule 8-1005(e), and may not be cited "in any action." Cal. Rule 8.1115(a).

commonly-accepted and constitutionally-validated procedures that suspects undergo following their arrest. Slip op. at 3-6 (Barbera, J., dissenting). By contrast, DNA collection serves important public interests, including “identifying arrestees, solving past crimes, and exonerating innocent individuals.” Id. at 9. Furthermore, advancements in technology have made DNA superior to other methods, like fingerprinting, in serving these interests effectively and efficiently. Maryland law enforcement officials should not be deprived of this valuable tool.

10. Finally, it should not be forgotten that this case involves a heinous crime against a real, life-and-blood victim, where the identity of the perpetrator and his actual guilt are not in genuine dispute. Yet, as the majority opinion predicts, the new trial that the Court’s ruling directs is one where the strongest piece of evidence linking the perpetrator to the crime cannot be considered. Slip op. at 1 n.2, 56-57 & n.34.<sup>3</sup> For this reason, above all others, the Court should reconsider its ruling.

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<sup>3</sup> The majority opinion notes that, after Mr. King’s 2009 arrest for first-degree assault—the qualifying offense under the DNA Collection Act that justified the collection of his DNA and led to his apprehension for the 2003 rape—prosecutors nolle prossed the charges that are qualifying offenses under the Act, and he was convicted of the lesser charge of second-degree assault, which is not a qualifying offense under the Act. For that reason, the Act would not have authorized the collection of his DNA based on his conviction and the Court’s holding in *State v. Raines*, 383 Md. 1 (2004). While the nature of the charge on which he was convicted for his 2009 offense is relevant to the operation of the statute, it has very little bearing in the *Knights* balancing test weighing the State’s legitimate governmental interests against Mr. King’s interest in privacy; that privacy interest is diminished by Mr. King’s status as a convict, regardless of the way the conviction offense is categorized under the State’s DNA Collection Act. Cf. 42 U.S.C. § 14135a(a)(1)(A) (federal statute authorizing collection of DNA from arrestees charged with either felony or misdemeanor federal offenses).

11. If the Court does not reconsider its ruling in this case, the State intends to seek review of the judgment before the United States Supreme Court. For all of the reasons discussed above in support of the State's request for reconsideration, the Court should stay enforcement of the mandate in this case, pending a further appeal.

12. Mr. King's conviction, which would be upheld if those further appellate proceedings are successful, justifies his continued detention in accordance with the sentence imposed by the Circuit Court for Wicomico County. The interest in public safety demands that a convicted rapist should not be given a reprieve from his sentence until appellate proceedings are concluded.

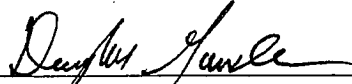
13. The constitutional validity of the 2008 amendments to the State's DNA Collection Act also would be affirmed if further appellate proceedings are successful, and the strong presumption of constitutionality enjoyed by State statutes, slip op. at 48 (citing *Koshko v. Haining*, 398 Md. 404, 426 (2007)), justifies a stay of enforcement of the mandate, to allow State law enforcement officials to implement the requirements of the DNA Collection Act while appellate proceedings continue.

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The Court should reconsider its decision and should affirm the judgment of the Circuit Court for Wicomico County. Alternatively, the Court should stay enforcement of its mandate until the Supreme Court has had an opportunity to address the issues to be raised in the State's petition for a writ of certiorari to review this Court's judgment. Proposed orders reflecting

these alternative dispositions are attached.

Respectfully submitted,

  
DOUGLAS F. GANSLER  
Attorney General of Maryland

KATHERINE WINFREE  
Chief Deputy Attorney General

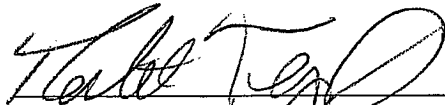
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of May, 2012, a copy of the foregoing Motion to Stay Mandate was hand delivered to Celia Anderson Davis, Assistant Public Defender, Office of the Public Defender, Appellate Division, William Donald Schaefer Tower, 6 Saint Paul Centre, Suite 1302, Baltimore, Maryland 21202.

  
ROBERT TAYLOR, JR.  
Assistant Attorney General

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ORDER

Upon consideration of the foregoing Motion to Stay Mandate, and any response thereto, it is this \_\_\_\_\_ day of \_\_\_\_\_, 2012, by the Court of Appeals of Maryland,

ORDERED, that the motion be GRANTED in part and DENIED in part; and it is further

ORDERED, that the mandate be STAYED until further notice from this Court.

\_\_\_\_\_  
Chief Judge

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ORDER

Upon consideration of the foregoing Motion to Stay Mandate, and any response thereto, it is this \_\_\_\_ day of \_\_\_\_\_, 2012, by the Court of Appeals of Maryland,

ORDERED, that the motion be GRANTED; and it is further

ORDERED, that this Court shall reconsider its opinion in this case, and the mandate be STAYED until further notice from this Court.

\_\_\_\_\_  
Chief Judge