

MARYLAND'S DNA DATABANK: THE NEED FOR BAR OVERSIGHT

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In July, 2004, a majority of the Maryland Court of Appeals reversed a ruling by Montgomery County Circuit Court Judge S. Michael Pincus which had, in turn, suppressed the state's DNA evidence against Charles Raines, the defendant in a pending criminal prosecution. *State v. Raines*, Sept. 2003 Term, No. 129 (July 13, 2004) (*per curiam*). As required by Maryland's DNA collection statute, Mr. Raines had surrendered a DNA sample to the state because of his status as a previously convicted felon, and the DNA was later used to identify him as a suspect in an eight-year-old rape. Judge Pincus found that the seizure of Mr. Raines' DNA without a warrant, probable cause, or even individualized suspicion violated the fundamental Fourth Amendment principle that before the state subjects anyone to a search or seizure for a law enforcement purpose, there must be at least *some* objective evidence of criminal wrongdoing.

The Court of Appeals' *per curiam* decision indicated that an opinion explaining the majority's reasoning would not be forthcoming until some later date. Although the majority's rationale for overturning Judge Pincus' suppression order is, therefore, unknown at the time of this writing, it seems likely from the tenor of exchanges during oral argument of the state's appeal that the proposition that convictees enjoy at best only very diminished expectations of privacy will figure centrally in the majority's thinking. It will be most unfortunate, however, if an analysis premised on the theory that those convicted of crimes are constitutionally different

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and less worthy of protection than the rest of us is permitted to obscure the threat posed by the state's DNA databank to the privacy of *all* Marylanders.

DNA is not simply an improved fingerprinting technique. Unlike the ridges and whorls of a fingerprint – which reveal nothing about a person other than identity – DNA carries within it information that can provide insights into the most intimate workings of the human body.

Beyond that, there are already scientists who predict that DNA's genetic markers will soon be decoded for sexual preference, substance abuse, and other personality traits, and it is quite likely that the emerging discipline of behavioral genetics will eventually assert the capability to predict, through DNA analysis, the likelihood of future violent or otherwise antisocial conduct. *See generally Genetics and Criminal Behavior* (David Wasserman & Robert Wachbroit eds., 2001). When that claim is someday made, it will inevitably trigger proposals to identify potential offenders through use of widespread genetic screening, and to preventively isolate them *before* they commit criminal acts. One commentator – one who assumes that such genetic tests will be developed, and that “[s]ociety will simply not ignore the reality of being able to predict and thereby prevent harm to its innocent members” – observes that:

Perhaps more serious problems than whether individuals should be genetically screened are posed when we try to decide *when* in an individual's life he or she is to be tested for genetic aberration. Should children be subjected to such tests? If a six-year-old child is found to carry a dangerous genetic characteristic, is he to be taken away immediately and committed? ... Do we go further back and test newborn babies, requiring by law that the infants not be permitted to live – much as done in more primitive cultures with babies displaying such defect as Down's Syndrome or malformed limbs? Will we go even further back and test the unborn fetus in every pregnancy? If the fetus is found to have “bad” genes, are we to require an abortion by law?

Lawrence E. Taylor, *Genetically - Influenced Antisocial Conduct and the Criminal Justice*

System, 31 Clev. St. L. Rev. 61, 74 - 75 (1982). It is essential, in light of such predictions about the future of DNA testing, that not only criminal law practitioners but all members of the Maryland bar become familiar with the history of the state's DNA statute, and closely attentive to legislative proposals to widen the scope of mandatory DNA collection.

The Maryland DNA collection statute was originally enacted by the General Assembly in 1994 to create a statewide DNA database collection system and repository for access by law enforcement agencies investigating past and future crimes. Act of 1995, Art. 88B, § 12A, *codified at* Maryland Code Ann., Public Safety Art., §§ 2-501 – 2-512 (2003). The statute mandates the seizure of a DNA sample from every person convicted of a qualifying crime without any showing of either individualized suspicion that the person has or will commit another offense, or the need for a sample to aid the investigation of a particular crime. *Id.* §2-504. A DNA “profile” is developed from the sample, digitized, and placed in a database that is accessible by any agency that participates in the federal DNA database (known as “CODIS”). DNA profiles developed from evidence collected at a crime scene are searched against the profiles in the database, and a comparison that results in a match is statutorily deemed to be probable cause for the issuance of a search warrant to obtain an additional DNA sample from an identified individual. *Id.* § 2-510.

As originally enacted, the statute limited qualifying crimes to convictions for child sexual abuse, rape in any degree, or a sexual offense in the first, second, or third degrees. Act of 1995, Art. 88B, § 12A(a)(8)(i)(ii)(iii). In 1999, the offenses of murder, robbery or robbery with a deadly weapon, first degree assault, or attempts to commit these offenses were added to the categories of qualifying offenses. Act of 1999, Art. 88B, § 12A(a) 2(8)(iv)-(vii). Finally, in 2002, the list of qualifying offenses was broadened beyond violent crimes to include convictions

for all felonies and certain misdemeanor burglary charges. Maryland Code Ann., Public Safety Art., § 2-504(2)(including as qualifying offenses convictions for such charges as willfully filing false income tax return, injuring a racehorse, election offenses, and other nonviolent crimes).

Today, in addition to Maryland, every other state, the District of Columbia, and the federal government have enacted DNA collection statutes that mandate the seizure of DNA – without any individualized suspicion of criminal wrongdoing – from classes of individuals ranging from certain arrestees in Virginia, California, Texas, and Louisiana, to all persons convicted of felonies and certain misdemeanants, as in Maryland.

Early challenges led some courts to conclude that DNA collection statutes similar to Maryland's satisfied the reasonableness requirement of the Fourth Amendment even though the DNA samples were seized without individualized suspicion of criminal conduct. *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995), is an illustrative example; in that case the court rejected a Fourth Amendment challenge to a state DNA collection statute on the theory that "[e]ven in the law enforcement context," suspicionless searches were permissible if the intrusion was a "minimal" one that was "justified by law enforcement purposes." *Id.* at 1559. Another recurring theme was the conflation of Supreme Court decisional law in cases involving searches for general law enforcement purposes – where individualized suspicion is *always* required for the search to be reasonable – with the Court's "special needs" case law, where the reasonableness of the search is assessed under a more relaxed "totality of the circumstances" balancing test. Examples of such permissible "special needs" searches, conducted for purposes other than detecting and punishing crime, include urine testing of students engaged in extracurricular activities to prevent health and safety risks resulting from drug use, *Board of Education v. Earls*, 536 U.S. 822 (2002); urine testing of student athletes to prevent injury and drug dependency, *Veronia School District v.*

Acton, 515 U.S. 646 (1995); urine and blood testing of railroad employees to prevent railway accidents, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); and urine testing of U.S. Customs Services employees seeking transfer or promotion to positions in drug interdiction or to duties that require the carrying of firearms, *National Treasury Employees v. Von Raab*, 489 U.S. 656 (1989).

Despite lower courts' occasional blurring of the doctrinal line between the two categories of cases, the Supreme Court has *never* sanctioned a search for the primary purpose of crime detection without a showing of, at an irreducible minimum, individualized suspicion to justify it. Indeed, more recent Supreme Court decisions have made it plain that *Rise* and other DNA collection statute cases like it were based on a fundamental misunderstanding of Fourth Amendment doctrine. In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the issue was the constitutionality of an automobile checkpoint program operated by the police to discover and interdict illegal drugs. In holding the checkpoint program unconstitutional under the Fourth Amendment, the Court emphasized that when the primary purpose of such a program is the detection of criminal activity (rather than, for example, the "special" non-criminal law enforcement objectives of maintaining border security, as in *United States v. Martinez-Fuente*, 428 U.S. 543 (1976), or ensuring highway safety, as in *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990)), the "stops can only be justified by some quantum of individualized suspicion." 531 U.S. at 47.

One year later, in *Ferguson v. City of Charleston*, 532 U.S. 57 (2001), the Court repeated and again underscored the central and controlling principle that the Fourth Amendment does not tolerate suspicionless searches when the primary purpose is the detection of evidence of criminal wrongdoing. At issue in *Ferguson* was a hospital's policy of testing pregnant women for illegal

drug use and providing positive results to police for use in criminal prosecutions. The hospital contended that the drug testing program was constitutionally permissible because its ultimate objective was protection of the health of mothers and children, but the Court was unpersuaded:

While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes.... Because law enforcement always serves some broader social purpose or objective, under [the hospital's] view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate purpose. Such an approach is inconsistent with the Fourth Amendment.

Id. at 83-84.

The Maryland DNA collection statute expressly states that its immediate and primary purpose is advancement of the public interest in prosecuting crimes. The statute cannot, therefore, be validated under the interest balancing approach of the “special needs” cases; as *Edmond* and *Ferguson* make clear, searches and seizures to gather evidence of criminal wrongdoing require, at a constitutional minimum, a showing of individualized suspicion. Most decisions upholding DNA statutes were rendered before the Supreme Court clarified the governing Fourth Amendment doctrine in *Edmond* and *Ferguson*; the principal case addressing the constitutionality of a DNA collection statute decided after the decisions in *Edmond* and *Ferguson* correctly understood the holdings of those cases to require invalidation of the federal DNA Backlog Collection Act, 42 U.S.C. Sec. 14135a. *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003), *reh’g en banc granted*, 345 F.3d 1095 (9th Cir. 2003).

Like Maryland’s statute, the federal act requires individuals convicted of federal crimes to provide DNA samples without a showing of suspicion that any particular individual has committed or will commit another offense. The *Kincade* court found that “[w]hatever benign

secondary purposes these searches may happen to serve, the primary purpose is to provide law enforcement officials ... with information about individuals that can be used to identify them as criminals and prosecute them for their crimes,” *id.* at 1113; the court accordingly held that, under the teaching of *Edmond* and *Ferguson*, such suspicionless DNA seizures for law enforcement purposes cannot pass Fourth Amendment muster. *See also United States v. Miles*, 228 F. Supp.2d 1130 (E.D. Cal. 2002)(same).

Attempts to distinguish *Edmond* and *Ferguson* on the ground that neither case involved the search of a person previously convicted of a criminal offense are unpersuasive in light of *United States v. Knights*, 534 U.S. 112 (2001), where the Court sustained the warrantless search of a probationer’s home, *but only upon a showing of individualized suspicion*. 534 U.S. at 122. *Knights* did not hold, and the Court has never held elsewhere, that the mere status of criminal conviction strips one of all Fourth Amendment privacy protections. Even for prisoners, parolees, and probationers whose privacy interests are lesser than others, the Supreme Court has not relaxed the requirement that individualized suspicion is an essential element of a “reasonable” search for a general law enforcement purpose.

Collecting the DNA of convictees cannot, moreover, be justified on the theory that there is some “legitimate penological interest,” *Turner v. Safley*, 432 U.S. 78, 89 (1987), in subordinating their privacy interests. Accumulating the DNA of inmates is not necessary for prison “supervisory” purposes, *see Griffin v. Wisconsin*, 483 U.S. 868, 875-79 (1987), since the biological information gathered under the statute obviously does not assist in monitoring an inmate’s behavior. And although the Court in *Hudson v. Palmer*, 468 U.S. 517 (1984), held that the Fourth Amendment does not apply within a prison cell, and in *Bell v. Wolfish*, 441 U.S. 520 (1979), that prisoners are subject to suspicionless body-cavity searches, those cases

involved Fourth Amendment intrusions for the “special” non-law enforcement purpose of insuring real-time prison security; the relevance of those decisions to a search designed to secure evidence of past or future criminal wrongdoing – which is the express aim of the Maryland’s DNA collection statute – is not immediately apparent.

The analysis and permanent retention of *any* individual’s DNA with minimal safeguards to prevent later misuse constitutes a significant invasion of individual privacy, dignity, and autonomy that extends far beyond any legitimate governmental purpose. DNA contains large amounts of intensely private information about a person’s physical and mental characteristics, pedigree, predisposition to future diseases, and behavioral traits. Misuse of this genetic information can result in disruption, stigmatization, and discrimination in the areas of family relationships, community ties, housing, employment, and insurance. *See generally* D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 Cornell J. L. & Pub. Pol’y 455, 503-04 (2001); M. Hibbert, *DNA Databanks: Law Enforcement’s Greatest Surveillance Tool?* 34 Wake Forest L. Rev. 782, 813-14 (1999). Moreover, the suggestion that a DNA profile does not create the potential for misuse because it is solely a record of identity that does not contain any other information about the person – such as physical or medical characteristics – is simply inaccurate, for at least three reasons.

First, the Maryland DNA collection statute does not impose any restrictions upon which genetic markers derived from a DNA sample can be analyzed and typed to develop a DNA profile for inclusion in the DNA database. § 2-505. Thus, even if the markers relied upon came from “noncoding” regions of the human genome that reveal nothing more about an individual than his identity, the statute does not preclude law enforcement from profiling “coded” sections for inclusion in the DNA database.

Second, even assuming that the current “noncoded” genetic markers continue to be those used in the development of a DNA profile (a highly dubious proposition, given the ever-accelerating pace of scientific knowledge about the human genome), the assumption that such so-called “junk” DNA reveals no information about a person other than identity has been persuasively challenged. See M. Hibbert, *supra* at 817-18 (noting uncertainty in light of quickly advancing scientific knowledge about what information may be ultimately gathered from genetic markers); see also W. Wayt Gibbs, *The Gems of “Junk” DNA*, *Scientific American*, Nov. 2003, at 29-37. It is, for example, well established that “junk” DNA can already be sorted by sex, race, and ethnic characteristics. Eric Juengst, *I-DNA-Fication, Personal Privacy, and Social Justice*, 75 *Chi-Kent L. Rev.* 61, 70-73 (1999); see also Christine Rosen, *Liberty, Privacy and DNA Databases*, *The New Atlantis* (Spring, 2003)(reporting link between “junk” DNA and susceptibility to Type 1 diabetes). As technology continues to advance and scientists continue to study the human genome, researchers are discovering that other genetic materials previously referred to as “junk” DNA actually contain essential biological instructions for growth and survival of an organism. See *An Ancient Helper – Useful “Junk” DNA*, *The Economist* (Sept. 6, 2003); Justin Gillis, *“Junk DNA” Contains Essential Information*, *Washington Post* (Dec. 4, 2002).

Third, and most significantly, under the Maryland DNA collection statute the state’s DNA repository permanently retains all DNA samples from which DNA profiles are developed for a wide range of later uses, including testing for unspecified “research and administrative purposes.” §§ 2-505, 2-506. So long as the requestor of any “individually identifiable” DNA information contained in the statewide DNA repository is “entitled to receive the information,” the statute does not restrict the requestor’s use or further dissemination of the DNA information,

§ 2-512, nor does the law contain any clear prohibition against the release of the DNA samples themselves from the Maryland DNA repository. *Id.* The failure of the statute to limit or check future “research and administrative purposes” suggests the substantial potential for *authorized* misuse of the large amount of personal information contained in the DNA maintained by the state.

The Fourth Amendment is the principal constitutional barrier standing between the citizenry and incremental evolution toward the kind of total surveillance society that would result from widespread DNA data collection and profiling. The court got it right in *Kincade*:

However intermingled with good intentions, DNA statutes. . . represent an “alarming trend whereby the privacy and dignity of our citizens [are] being whittled away by [] imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen – a society in which government may intrude into the secret regions of man’s life at will.” The fact that these statutes currently affect only those individuals most susceptible to state supervision renders this threat no less important .

..

[T]he rest of us might not be far behind. Privacy erodes first at the margins, but once eliminated, its protections are lost for good, and the resultant damage cannot be done.

354 F. 3d at 1113-14 (citation and footnotes omitted). If, however – as the *Raines* decision seems to suggest – the Maryland courts are not presently willing to vigorously enforce the Fourth Amendment against the state’s DNA collection schemes, then it becomes all the more important for the bar to scrutinize closely and to be heard on any forthcoming legislative proposals to sweep ever-widening groups of people within the state’s DNA dragnet. The General Assembly already has twice expanded the reach of Maryland’s DNA collection statute, and during its last legislative session a bill was introduced to authorize the seizure of DNA from those arrested and merely charged with, but not yet convicted of committing felonies and certain

misdemeanors. Officials in the neighboring state of Virginia are discussing a proposal to require surrender of a DNA sample as a condition for obtaining a driver's license, and some are now urging mandatory DNA collection from the entire population of the country. *See, e.g.,* D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide_Coverage*, 2003 Wis. L. Rev. 413. As the singer Bob Dylan once famously put it, it does not take a weatherman to tell which way the wind is blowing.

The Fourth Amendment embodies constitutional values that define the relationship between the state and its citizens. It is imperative that the bar remain vigilant to protect Marylanders against further erosion of fundamental Fourth Amendment principles, even when it is done in the name of more efficient criminal law enforcement through expanded DNA data banking.