Will Massachusetts permit taking arrestees' DNA?

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Of all the flashes of exasperation that can color a dissenting opinion in the U.S. Supreme Court, it is exceptional for a dissenter to denounce the majority's view as "scary."

Also unusual, though not unheard of, is for Justice Antonin Scalia to ally himself with three of the more liberal justices in dissenting from the more conservative ones.

But when it comes to the contentious subject of drawing Fourth Amendment boundaries between the state and its citizens, the extraordinary can happen.

In a 5-4 decision, the Supreme Court in *Maryland v. King* (No. 12-207) held that when the police properly arrest someone for a serious offense, they can take a buccal (cheek) swab to analyze the person's DNA as part of routine booking procedures, without running afoul of the Fourth Amendment.

Justice Anthony M. Kennedy wrote the majority opinion, over Scalia's spirited dissent.

The facts of the case stretch back a decade. In 2003, in connection with the rape of a Maryland woman, the perpetrator's DNA was collected but the offender was not immediately found. Six years later, in 2009, Alonzo Jay King was arrested on charges of assaulting a group of people with a shotgun.

Under Maryland's DNA Collection Act, which allows DNA to be taken as part of routine booking procedures for serious offenses (i.e., violent offenses or burglary), King's DNA was obtained by a buccal swab. Analysis of the DNA revealed a match with the DNA from the rape case.

King was tried and convicted of the rape. On appeal, a divided Maryland Court of Appeals reversed, finding the buccal swab was an unreasonable search under the Fourth Amendment.

A majority of the Supreme Court, however, concluded that the Maryland statute, and thus the search of King, was constitutional. Conceding that swabbing the inside of a person's cheek is a search for Fourth Amendment purposes, the court nonetheless held that, for someone lawfully taken into police custody, such a search is not unreasonable. Taking a buccal swab is hardly more invasive than taking a fingerprint but yields far more accurate information, Kennedy wrote. And the negligible intrusion on an arrestee's diminished expectation of privacy is outweighed by the government's legitimate interest in identifying him or her.

By comparing an arrestee's DNA to samples kept in DNA databases, the majority reasoned, the government can learn whether the person may have a violent past and pose a danger to others, and decide whether the suspect should be released on bail and, if so, on what conditions.

An added benefit, Kennedy said, was the possibility of freeing a person wrongfully imprisoned for the same offense for which the arrestee was detained.

Scalia's reaction: nonsense. Dismissing the notion that King's DNA was taken simply to identify King rather than to determine whether he could be connected to any unsolved crime, Scalia said the majority's view "taxes the credulity of the credulous."

When a search is done with the intent of discovering evidence of criminal wrongdoing, which the buccal swab here was, Scalia wrote, the government must have individualized suspicion. And that is true, according to Scalia, regardless of the relatively minimal intrusion of a buccal swab.

Kennedy's suggestion that King's DNA was useful for determining whether King should be released on bail was undermined by the fact that the Maryland statute forbids even beginning the process of testing DNA until after a suspect is arraigned. And it took four months after King's arrest to make the match between his DNA and the DNA from the 2003 rape.

More telling, the match did not "identify" King as King; it identified the 2003 DNA sample as King's. The purpose of the Maryland statute, Scalia explained, had nothing to do with identifying arrestees but with investigating crime, primarily cracking cold cases.

"Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches," Scalia said. "The Fourth Amendment must prevail."

Calling the vast scope of the majority's opinion "scary," despite the court's assurances that its holding was limited to persons arrested for "serious offenses," Scalia made this dire prediction: "your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason."

So what does the *King* decision mean for states like Massachusetts? To be sure, Massachusetts, like all other 49 states, already authorizes the collection of DNA from persons convicted of felonies. See G.L.c. 22E, §3; *Landry v. Attorney General*, 429 Mass. 336 (1999).

But Massachusetts is not one of the 28 states (or the federal government) that permit routinely collecting DNA from arrestees. Whether it will join those jurisdictions depends on whether Article 14 of the Massachusetts Declaration of Rights provides greater protection, in this context, than does the Fourth Amendment.

Although the Supreme Judicial Court has addressed efforts by the state to obtain DNA from both charged and uncharged persons under investigation or prosecution, the court has done so only when the DNA evidence was sought in connection with specific suspected crimes. See, e.g., *Commonwealth v. Draheim*, 447 Mass. 113, 117-120 (2006) (to obtain indicted defendant's DNA by buccal swab, commonwealth must have probable cause to believe defendant committed a crime and show, at an adversarial hearing, that DNA "will probably provide evidence relevant to the question of the defendant's guilt"; as for taking third party's DNA, commonwealth "must show probable cause to believe a crime was committed, and that the sample will probably provide evidence relevant to the question of the defendant's guilt"); *Commonwealth v. Maxwell*, 441 Mass. 773, 810-811 (2004) (discussing requirements for buccal swab of charged defendant); *Matter of Grand Jury Investigation*, 427 Mass. 221, 226 (1998) (discussing requirements for extracting blood, in connection with grand jury investigation); *Matter of Lavigne*, 418 Mass. 831, 835-836 (1994) (pre-arrest extraction of blood requires showing probable cause to believe suspect committed specific offense and that blood would aid in investigation of that offense); *Commonwealth v. Trigones*, 397 Mass. 633, 640 (1986) (discussing requirements for post-indictment blood extraction).

In each of those cases, the taking of blood or saliva related to specific crimes that the commonwealth was investigating or prosecuting. In none of those decisions did the court provide grounds for the commonwealth to take an arrestee's DNA simply for the purpose of entering it in a database to see if any matches come up.

Admittedly, the prior SJC decisions do not discuss potential differences between Article 14 and the Fourth Amendment, in taking a sample of blood or saliva. But even if the Supreme Court's decision in *King* clears away any Fourth Amendment impediments to taking buccal swabs from arrestees for serious crimes, Article 14 may still prohibit that type of search absent individualized suspicion.

It may be some time before the SJC takes up the question, but when it does it will have the power to grant the people of Massachusetts more protection than five justices of the Supreme Court thought was required by the federal Constitution. The *King* decision may have scaled back Fourth Amendment rights, but Massachusetts doesn't have to scale back Article 14 rights.

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