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DNA COLLECTION ACTS AND THE FOURTH AMENDMENT: A CALL FOR LEGISLATIVE REFORM IN GEORGIA TO IMPLEMENT COLLECTION OF ARRESTEES' DNA

M. Binford Griffin*

INTRODUCTION

In *Maryland v. King*, the Supreme Court upheld the constitutionality of Maryland's DNA Collection Act (the Act),¹ which permits the warrantless collection of deoxyribonucleic acid (DNA) from arrestees who have not yet been convicted.² In the *King* decision, the Court was called upon to determine whether law enforcement's taking and analyzing an arrestee's DNA were searches or seizures under the Fourth Amendment.³ The Court combined the two separate Fourth Amendment issues of collecting an arrestee's DNA with a buccal swab⁴ and analyzing the DNA in the Federal Bureau of Investigation's (FBI's) Combined DNA Index System ("CODIS").⁵ While the Court's opinion analyzes only Maryland law,

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1. *See generally* *Maryland v. King*, 133 S. Ct. 1958, 1979 (2013); MD. CODE ANN., PUB. SAFETY § 2-504 (LexisNexis 2011) (requiring collection of a DNA sample from individuals charged with violent crimes or attempted violent crimes; as well as burglary or attempted burglary).

2. § 2-504(a)–(b).

3. *See generally* *King*, 133 S. Ct. 1958; U.S. CONST. amend. IV. Strictly speaking, the Fourth Amendment applies only to the federal government, but the Fourteenth Amendment extends the same standards to the states. *See* U.S. CONST. amend XIV; *see also* *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that the Fourth Amendment's right to privacy is applicable to the states through the Due Process Clause of the Fourteenth Amendment).

4. *King*, 133 S. Ct. at 1965. A buccal swab is obtained from the arrestees by rubbing a "flocked synthetic swab" against the parotid gland area of the mouth (cheek) for 30 seconds to collect samples of nuclear DNA. *See Materials and Methods for Specimen Collection, Storage, and Shipment*, CTR. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/mumps/lab/specimen-collect.html> (last updated May 29, 2015); *see also How to Collect a Buccal Swab Sample for Forensic Analysis*, PURITAN MED. PRODS. (Aug. 25, 2014, 11:24 AM), <http://blog.puritanmedproducts.com/how-to-collect-a-buccal-swab-sample-for-forensic-analysis>.

5. *King*, 133 S. Ct. at 1968. Combining the issues has caused much confusion in lower courts. *See*,

the implications of the holding are national.⁶ Other state legislatures with similar arrestee DNA collection laws must conform their respective statutes with the specific factors enumerated in *King* to remain constitutional.⁷

Georgia's current DNA collection law limits collection to convicted felons,⁸ but should be extended to include arrestees as a result of the *Maryland v. King* holding.⁹ In applying a reasonableness balancing test, the Court held in *Maryland v. King* that the government's interests in promoting safety and identifying arrested individuals outweighed the privacy interests of the arrestee, thus making collection of DNA from arrested individuals a reasonable search under the Fourth Amendment.¹⁰ Weighing against the government interests, the Court evaluated the Act's individual privacy protections, noting that the Act limited the collection to those arrested for violent felonies, expressly limited the scope of genetic information that police could obtain from arrestees, and provided procedures for automatic expungement.¹¹ Georgia's current statute regarding DNA collection does not include strict limits on these issues, except to leave the procedures for collecting and

e.g., *Raynor v. State*, 99 A.3d 753 (Md. 2014), *cert. denied*, 135 S. Ct. 1509 (2015) (holding that the collection of DNA by scraping skin cells of a suspect who voluntarily entered the police station was constitutional under the Fourth Amendment because the suspect had abandoned his skin cells and no longer had a reasonable expectation of privacy in regards to what the skin cells contained); *see also* Elizabeth E. Joh, *Maryland v. King: Policing and Genetic Privacy*, 11 OHIO ST. J. CRIM. L. 281, 282 (2013).

6. *King*, 133 S. Ct. at 1968.

7. *Id.* at 1967–69. *See People v. Buza*, 180 Cal. Rptr. 3d 753 (Cal. Ct. App. 2014), *petition for review granted*, 342 P.3d 415 (Cal. 2015), for an example of a non-compliant statute deemed unconstitutional under the state constitution.

8. O.C.G.A. § 35-3-160(b) (2012).

9. S.B. 77, 153d Gen. Assemb., Reg. Sess. (Ga. 2015) (Senate Committee Substitute) (proposing legislation to amend O.C.G.A. § 35-3-160 to include arrestee DNA in the federal database). Senate Bill 77 was introduced during the 2015 Regular Session, but did not pass out of the Senate Chamber. *Id.* Due to the structure of the Georgia General Assembly, the bills still remaining at the end of the even-numbered calendar year are eligible to carry over into the next calendar year's session. GA. CONST. art. III, § 4, para. 1. Therefore, Senate Bill 77 will begin the 2016 legislative session as substituted by the Senate Committee on Judiciary Non-Civil. Ga. S.B. 77.

10. *King*, 133 S. Ct. at 1980 (holding that because the “valid arrest supported by probable cause,” which diminished the arrestee's reasonable expectation of privacy, was outweighed by the state's interest in identifying the individual through the use of a “routine booking procedure,” collecting the arrestee's DNA was considered reasonable under the Fourth Amendment).

11. *Id.* at 1967.

disseminating the genetic information to the judgment of the Division of Forensic Sciences of the Georgia Bureau of Investigations.¹² Out of the important factors to the Court, Georgia's proposed legislation only addresses the types of serious offenses that would trigger DNA collection upon arrest.¹³ Contrasting Maryland's statute, Georgia's proposed statute allows DNA collection from individuals arrested for "serious offenses,"¹⁴ does not prohibit familial searches, and requires action by the arrestee to expunge his DNA profile, which the Supreme Court could deem too broad and unspecific.¹⁵ Federal law limits CODIS database access to states that carefully control privacy issues in DNA collection protocol;¹⁶ so without further restrictions, Georgia's lenient regulations could cause the federal government to deny Georgia continued CODIS privileges.

This Note compares Maryland's DNA Collection Act to Georgia's statutory equivalent, focusing on the factors established in *Maryland v. King*. Part I describes what DNA is and how law enforcement uses DNA information.¹⁷ It further details how DNA collection fits into current Fourth Amendment law and its exceptions as well as the problems with Georgia's DNA collection statute based on the *King* decision.¹⁸ Part II compares the decision in *King* and the foundational Act behind it with leading cases on DNA from Georgia and Georgia's proposed DNA Collection Act.¹⁹ Part II also discusses,

12. § 35-3-160(c) ("The analysis shall be performed by the division."); see also GA. BUREAU OF INVESTIGATION - DIV. OF FORENSIC SCIS., DNA OPERATIONS MANUAL (2013), <https://gbi-dofs.com/QualitySystem/documentbrowser.aspx> (follow "Official Manuals" folder in left pane; then follow "Operations" folder; then follow "DNA" folder; then follow "DNA OPERATIONS" hyperlink); GA. BUREAU OF INVESTIGATION - DIV. OF FORENSIC SCIS., CODIS OPERATIONS MANUAL (2014), <https://gbi-dofs.com/QualitySystem/documentbrowser.aspx> (follow "Office Manuals" folder in left pane; then "Operations" folder; then "CODIS" folder).

13. Ga. S.B. 77.

14. *Id.*

15. Compare § 35-3-160(b), and Ga. S.B. 77 (allowing collection from individuals arrested for a "serious offense"), with MD. CODE ANN., PUB. SAFETY § 2-504 (LexisNexis 2011) (providing that DNA may be collected from individuals charged with violent crimes upon a finding of probable cause).

16. 42 U.S.C. § 14132(c) (2012). "Failure to comply. Access to the index established by this section is subject to cancellation if the quality control and privacy requirements described in subsection (b) . . . are not met." *Id.*

17. See *infra* Part I.A.

18. See *infra* Part I.B–C.

19. See *infra* Part II.

through exposure of the shortcomings of Georgia's proposed DNA collection Act, why reform is necessary.²⁰ Part III proposes a commission to regulate Georgia's DNA collection laws as well as specific changes that must be made to Georgia's proposed DNA collection Act before it is passed.²¹

I. DNA COLLECTION AND THE LAW

A. DNA: What Is It And How Does Law Enforcement Use It?

DNA is genetic material used to identify individuals based on the specific genome sequences contained within each cell of the body.²² The type of DNA typically used to identify an individual is contained in samples of body fluids, skin cells, bones, or hair follicles.²³ Within the DNA molecule, the genetic locations used only for identification purposes are referred to as the CODIS 13 or the CODIS Core Loci.²⁴

DNA technology has been very useful to law enforcement through its "unparalleled ability both to exonerate the wrongly convicted and to identify the guilty."²⁵ DNA technology "has the potential to significantly improve both the criminal justice system and police investigative practices."²⁶ DNA has become a powerful tool for law enforcement through the implementation and use of DNA databases nationwide.²⁷ In response to congressional passage of the DNA

20. See *infra* Part II.B.

21. See *infra* Part III.A.

22. *Deoxyribonucleic Acid (DNA)*, NAT'L HUM. GENOME RES. INST., <http://www.genome.gov/25520880> (last updated June 16, 2015).

23. *DNA Casework Unit (DCU)*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/about-us/lab/biometric-analysis/dna-casework-unit-dcu-1> (last visited Jan. 13, 2016) ("Nuclear DNA (nDNA) . . . is typically analyzed in evidence containing body fluids, skin cells, bones, and hairs that have tissue at their root ends. The power of nDNA testing lies in the ability to identify an individual as being the source of the DNA . . .").

24. *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited Jan. 13, 2016) [hereinafter *FBI FAQs on CODIS and DNA*].

25. *Dist. Att'y's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 55 (2009).

26. *Id.*

27. See NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, USING DNA TO SOLVE COLD CASES 9 (2002), <http://www.ncjrs.gov/pdffiles1/nij/194197.pdf> (describing a "success story" where a Florida man who died in a drug deal was connected to seven unsolved rape cases in Washington, D.C. by including his DNA profile in the national forensic index); see also *Rapid DNA Act 2015: Hearing on*

Identification Act of 1994,²⁸ the FBI created a national system for maintaining and storing DNA profiles of certain individuals in collaboration with state and local laboratories.²⁹ The DNA Identification Act of 1994 established requirements for federal, state, and local law enforcement participation in the national program, including limiting the classes of individuals from whom DNA is collected,³⁰ laboratory qualifications and standards,³¹ procedures to expunge samples,³² and limiting collection to “DNA identification records.”³³ Because of the strict compliance requirements of the national database, some states and localities have created their own—largely unregulated—“offline” DNA databases with samples taken from anyone and everyone encountering law enforcement, including crime victims and witnesses.³⁴

Scholars disagree on the potential impact of implementing a national DNA database³⁵ and many arguments focus on the negative

H.R. 320 Before the Subcomm. On Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary, 114th Cong. 14 (2015) (prepared statement of Amy S. Hess, Executive Assistant Director, Science and Technology Branch, Federal Bureau of Investigation) (describing the importance of an “expanded scope of collection, the commitment to analyze sexual assault evidence kits and the use of a John Doe indictment” to allow prosecution of a 20-year old sexual assault which was accomplished through the collection of arrestee DNA and the CODIS database).

28. 42 U.S.C. § 14132 (2012) (allowing the development of a National DNA Index System).

29. See *FBI FAQs on CODIS and DNA*, *supra* note 24.

30. 42 U.S.C. § 14132(a) (allowing the FBI to establish an index of: DNA samples from crime scenes, DNA samples recovered from unidentified human remains, DNA samples voluntarily contributed from family members of missing persons, and “DNA identification records of: persons convicted of crimes; persons who have been charged in an indictment or information with a crime; and other persons whose DNA samples are collected under applicable legal authorities” as long as that individual provided the sample to be excluded as a suspect).

31. 42 U.S.C. § 14132(b)(2) (stating that the CODIS database shall only include information on DNA profiles that are prepared in laboratories that are accredited by a “nonprofit professional association of persons actively involved in forensic science that is nationally recognized within the forensic science community; and” that “undergo external audits” every two years that ensure compliance with the standards determined by the FBI Director).

32. 42 U.S.C. § 14132(d) (stating that the director of the FBI and the State are responsible for expunging DNA profiles of individuals convicted of a federal offense or a local offense, respectively, whose conviction has been overturned or has been dismissed prior to trial).

33. See generally 42 U.S.C. § 14132; *FBI FAQs on CODIS and DNA*, *supra* note 24.

34. Joh, *Policing and Genetic Privacy*, *supra* note 5, at 286; see also Joseph Goldstein, *Police Agencies Are Assembling Records of DNA*, N.Y. TIMES (June 12, 2013), <http://www.nytimes.com/2013/06/13/us/police-agencies-are-assembling-records-of-dna.html?smid=pl-share>.

35. See generally Andrea Roth, *Maryland v. King and the Wonderful, Horrible DNA Revolution in Law Enforcement*, 11 OHIO ST. J. CRIM. L. 295 (2013); see also David H. Kaye, *Maryland v. King: Per Se Unreasonableness, the Golden Rule, and the Future of DNA Databases*, 127 HARV. L. REV. F. 39, 47

effects of expanding the databases to include arrestees.³⁶ Yet the most troublesome aspect of DNA collection laws is the growing number of unregulated databanks, which will continue to increase unless and until legally restricted.³⁷

B. The Fourth Amendment, Reasonableness Balancing, And DNA Collection

The Fourth Amendment protects individuals from unreasonable searches and seizures by imposing a requirement for probable cause to issue a warrant.³⁸ Over time, the rules requiring probable cause and warrants have amalgamated with a “form of reasonableness balancing” to determine whether a search was justified under the Fourth Amendment.³⁹ To discern what is reasonable, the Court

(2013); Mark A. Rothstein & Meghan K. Talbott, *The Expanding Use of DNA in Law Enforcement: What Role for Privacy?*, 34 J.L. MED. & ETHICS 153, 154 (2006); Rana Santos, *Why DNA Databasing is Good for Maryland: A DNA Analyst's Perspective*, 42 U. BALT. L. REV. 591, 608 (2013) (“From a purely scientific point of view, more data is better.”).

36. *Maryland v. King*, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting) (“Make no mistake about it: As an entirely predictable consequence of today’s decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason.”); Joh, *supra* note 5, *Policing and Genetic Privacy*, at 285 (claiming that the expansion to arrestees gives police an incentive to make more arrests); *see also* Kelly Ferrell, Comment, *Twenty-First Century Surveillance: DNA “Data-Mining” and the Erosion of the Fourth Amendment*, 51 HOUS. L. REV. 229, 243 (2013) (arguing that the federal statute is the most expansive in including all arrestees, causing problems when the states individually impose more specific restrictions); Carlos Jordi, Comment, *Diminished Returns: The Exorbitance of Collecting DNA From All Arrestees*, 26 ST. THOMAS L. REV. 346, 348 (2014) (seeking to “examine the effects of a criminal justice system where DNA is collected from everyone who is arrested, regardless of the seriousness of the charge”); Brian Clark Stuart, Comment, *Dethroning King: Why the Warrantless DNA Testing of Arrestees Should Be Prohibited Under State Constitutions*, 83 MISS. L.J. 1111, 1132–56 (2014).

37. *See* Ferrell, *supra* note 36, at 233; *see also* SHELDON KRIMSKY & TANIA SIMONCELLI, GENETIC JUSTICE: DNA DATA BANKS, CRIMINAL INVESTIGATIONS, AND CIVIL LIBERTIES 29–30, 36 (2011) (suggesting stricter federal regulations since, historically, the states have followed the federal government’s lead in DNA database regulations as a means “toward forensic DNA harmonization”); Elizabeth E. Joh, *Artificial Intelligence and the Law: Essay: Policing by Numbers: Big Data and the Fourth Amendment*, 89 WASH. L. REV. 35, 67–68 (2014) (concluding that the use of “big data” is likely to become a normal part of police procedures, so courts and legislatures should plan to impose limits on its use).

38. U.S. CONST. amend. IV (“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”); *see also* *Kyllo v. United States*, 533 U.S. 27, 40 (2001); *Katz v. United States*, 389 U.S. 347 (1967) (Harlan, J., concurring); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 395 (1974); Morgan Cloud, *Searching Through History: Searching for History*, 63 U. CHI. L. REV. 1707, 1721–22 (1996).

39. Sam Kamin & Justin Marceau, *Double Reasonableness and the Fourth Amendment*, 68 U.

balances the interests of the government against the privacy interests of the individual and degree of the search's intrusiveness.⁴⁰ The Court measures an individual's privacy interests through the relevant facts and circumstances of the situation to establish whether that individual had a reasonable expectation of privacy in the target of the search.⁴¹ If the government interest outweighs the individual interest, the Supreme Court considers the search reasonable.⁴²

Despite the presumption that "reasonableness generally requires a warrant," the Supreme Court has excused warrantless searches under certain circumstances.⁴³ In some circumstances, the Court has simply relaxed the need for a warrant based on reduced expectations of privacy.⁴⁴ "Special needs" searches are also considered an exception to the warrant requirement.⁴⁵ The Court has used the special needs

MIAMI L. REV. 589, 602 (2014). *See also* *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985) (upholding the search of a student's purse in a public school based on reasonable suspicion and lacking probable cause); *Terry v. Ohio*, 392 U.S. 1 (1968) (serving as the foundation of "reasonableness" searches); *Camera v. Mun. Court of S.F.*, 387 U.S. 523, 538–40 (1967) (upholding the constitutionality of a warrantless house inspection not based on individualized suspicion).

40. Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 271–73 (2011) (noting that special subpopulation searches have typically been conducted in order to "further important government interests independent of law enforcement").

41. *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (reasoning that there is a "twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"). *See also* Steven D. Schwinn, *Does the Fourth Amendment Allow a State to Collect and Analyze DNA from People Arrested for, but Not Convicted of, Serious Crimes?*, 40 PREVIEW U.S. SUP. CT. CASES 214, 215 (2013), http://www.americanbar.org/content/dam/aba/events/public_education/MarylandvKing_ABA_Preview5_021913.authcheckdam.pdf.

42. *See, e.g., Maryland v. King*, 133 S. Ct. 1958, 1977–78 (2013).

43. *See T.L.O.*, 469 U.S. at 351 (1985) (Blackmun, J., concurring); Schwinn, *supra* note 41, at 215; *see also, e.g., Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 633–35 (1989); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 678–679 (1989).

44. *See* Schwinn, *supra* note 41, at 215; *see also Samson v. California*, 547 U.S. 843, 853 (2006) (holding that a parolee had a lower expectation of privacy than a probationer would have); *Hudson v. Palmer*, 468 U.S. 517, 536 (1984) (holding that a prisoner had no reasonable expectation of privacy inside his jail cell).

45. *Von Raab*, 489 U.S. at 668 ("[I]n certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion."); *see also Skinner*, 489 U.S. at 624. "Therefore, in the context of safety and administrative regulations, a search unsupported by probable cause may be reasonable 'when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822, 829 (2002) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

exception to uphold suspicionless drug testing of railway workers,⁴⁶ high school students involved in extracurricular activities,⁴⁷ and Treasury employees;⁴⁸ but government interests were not strong enough to apply the exception to political candidates.⁴⁹ The Court has also upheld searches of public school students and their belongings, which lacked individualized suspicion,⁵⁰ illegal immigrants crossing at border checkpoints,⁵¹ and vehicles stopped during roadblocks to discover drunk driving⁵²—but not to uncover drugs because the primary purpose of the search was to discover criminal activity.⁵³ With the *King* decision, “reasonableness” has moved to the forefront of the special needs exception’s application to Fourth Amendment jurisprudence.⁵⁴

The Supreme Court applied this “reasonableness balancing” in *Maryland v. King* by comparing the government’s need to properly identify arrestees, with the arrestee’s right to privacy in light of the minimally invasive nature of the buccal swab.⁵⁵ The Court determined that the legitimate government interest to protect was “the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody.”⁵⁶ The Court weighed this government interest against the

46. *Skinner*, 489 U.S. at 624.

47. *Earls*, 536 U.S. at 829–30 (applying the special needs exception to all high school students wishing to participate in extracurricular activities); *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) (applying the special needs exception to searches of high school athletes).

48. *Von Raab*, 489 U.S. at 679.

49. *See generally* *Chandler v. Miller*, 520 U.S. 305 (1997).

50. *New Jersey v. T.L.O.*, 469 U.S. 325, 341–43 (1985).

51. *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976).

52. *See generally* *Mich. Dep’t of State Police v. Stiz*, 496 U.S. 444 (1990).

53. *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000).

54. *Maryland v. King*, 133 S. Ct. 1958, 1978 (2013) (stating that the special needs precedent cases did not have a bearing on the issues presented in this case, yet formulating the outcome in the same manner that special needs cases are analyzed—by balancing government interests against personal interests to determine reasonableness). *See also* Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 HARV. L. REV. 161, 183 (2013).

55. *King*, 133 S. Ct. at 1977 (In order to justify a warrantless, suspicionless search, “[t]he government interest must outweigh the degree to which the search invades an individual’s legitimate expectations of privacy.”).

56. *Id.* at 1970–75 (qualifying the government interests on five grounds: (1) the individual was lawfully arrested based on probable cause and it could be considered a routine booking procedure used to identify the individual properly, which is an important aspect of all criminal cases because; (2) law enforcement has the responsibility of keeping the jail safe and knowing criminal history to a certainty

arrestee's reduced expectation of privacy due to his relationship with the state, leading the Court to conclude that both taking and analyzing King's DNA were reasonable.⁵⁷

The Supreme Court held the Maryland DNA Collection Act constitutional because it authorizes DNA collection from individuals arrested for violent crimes⁵⁸ and the DNA is not entered into the CODIS database until after arraignment.⁵⁹ Further, DNA samples are destroyed if the individual is never convicted or is pardoned,⁶⁰ and there are limits on the type of genetic information included in a DNA profile⁶¹ and how it may be used.⁶² The *Maryland v. King* factors are

may help prevent risks; (3) the State has a substantial interest in ensuring the correct individual accused will be present for trial; (4) knowing the identity concretely may help determine whether the offender may be released on bail, without fear he or she will pose a threat to the community; and (5) the possibility that the DNA of an arrestee links to the perpetrator could free an innocent person being held for the crime).

57. *Id.* at 1977–80 (holding the search reasonable because King was arrested on probable cause, reducing his expectation of privacy, and the DNA collection procedure was minimally intrusive—without threat to King's safety or privacy).

58. *Id.* at 1967; MD. CODE ANN., PUB. SAFETY § 2-504(a) (LexisNexis 2011).

59. *King*, 133 S. Ct. at 1967; § 2-504(d)(1).

60. *King*, 133 S. Ct. at 1967; §§ 2-504(d)(2)(i); § 2-511(a)(1). Many states have a similar requirement: COLO. REV. STAT. § 16-23-104(b) (2013) (Colorado: expunging the DNA sample and profile without confirmation of a felony charge within one year of receiving the sample); MD. CODE ANN., PUB. SAFETY § 2-511(a) (LexisNexis 2011) (Maryland: making expungement automatic if the person is not convicted); MO. REV. STAT. § 650.055(10)–(11) (2013) (Missouri: automatically expunging the DNA sample and profile if the prosecutor declines to prosecute, if the charges are dropped or dismissed, there was no probable cause to support the arrest, or the arrestee is acquitted); N.C. GEN. STAT. ANN. § 15A-266.3A(h)(1) (West 2013) (North Carolina: making the prosecutor responsible for handling expungement if the charge is dismissed, the person is acquitted, the person is convicted of a misdemeanor not included in list of charges for which DNA may be collected, the statute of limitations arrives with no charge, or if the individual is not convicted within three years of the sample being taken); S.C. CODE ANN. § 23-3-600(A) (2009) (South Carolina: making the prosecutor responsible for expunging the DNA sample and profile if the charges are dropped, dismissed, reduced to a charge not listed in statute, or if the person is acquitted); TENN. CODE ANN. § 40-35-321(e)(2) (2013) (Tennessee: making the clerk of court responsible for alerting the state laboratory of the final disposition of the criminal charge and instructing the laboratory to destroy the DNA sample and profile if the individual is acquitted or the charge was dismissed); TEX. GOV'T CODE ANN. § 411.1471(e) (West 2012) (Texas: making the court responsible for ordering the state to destroy the sample if the individual is acquitted or the case is dismissed); UTAH CODE ANN. § 53-10-406(1)(i) (LexisNexis 2010) (Utah: expunging the DNA sample and profile if criminal charges are not filed within ninety days of booking); VT. STAT. ANN. tit. 20, § 1940(b) (2011) (Vermont: making the court responsible for instructing the state to destroy the DNA sample and profile if the charge is dismissed or downgraded to a misdemeanor under a plea agreement, the person is acquitted, or if the person is convicted of a lesser offense than one that requires collection).

61. *King*, 133 S. Ct. at 1967; MD. CODE ANN., PUB. SAFETY § 2-505(b)(1) (LexisNexis 2011) (“Only DNA records that directly relate to the identification of individuals shall be collected and stored.”); § 2-512(c) (“A person may not willfully test a DNA sample for information that does not

foundational requirements for a state DNA collection statute to be constitutional and Georgia's proposed statute does not include these factors.⁶³

C. Problems With Georgia's Current Statute

Georgia's DNA collection statute begins in O.C.G.A. § 35-3-160, which allows DNA collection from convicted felons.⁶⁴ In February 2013 and again in February 2015, members of the Georgia Senate proposed a bill to expand the statute to include arrestees, but despite the *King* decision, the Georgia legislature has not yet passed a bill on the topic.⁶⁵ Georgia's current proposed bill allows DNA collection from individuals arrested for "serious offenses," does not include explicit limits on what genetic information may be extracted from analysis of that DNA, does not limit familial searches, does not require an arraignment hearing prior to collection, and does not provide procedures for automatic expungement.⁶⁶ The factors absent from Georgia's bill were important to the Supreme Court in

relate to the identification of individuals").

62. *King*, 133 S. Ct. at 1967; § 2-506(d) ("A person may not perform a search of the statewide DNA data base for the purpose of identification of an offender in connection with a crime for which the offender may be a biological relative of the individual from whom the DNA sample was acquired.").

63. *See generally* *People v. Buza*, 180 Cal. Rptr. 3d 753 (Cal. Ct. App. 2014) (holding the California DNA collection statute unconstitutional under the more restrictive state constitution because the statute has no limit on familial searches, allows retention of the physical sample, and allows creation of arrestee DNA profiles prior to arraignment), *petition for review granted*, 342 P.3d 415 (2015); *State v. Medina*, 102 A.3d 661 (Vt. 2014) (holding the Vermont DNA collection statute unconstitutional under the state's constitution, because the state's constitution has a more stringent warrant requirement than the U.S. Constitution, despite the statute limiting the use of DNA to identification and prohibiting use for genetic or medical testing, including automatic expungement procedures, and requiring arraignment before collection); S.B. 77, 153d Gen. Assemb., Reg. Sess. (Ga. 2015).

64. O.C.G.A. § 35-3-160(b) (2012) ("Any person convicted of a felony offense . . . shall . . . have a sample of his or her blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person.").

65. Ga. S.B. 77 (Senate Bill 77 was read on the Senate floor on February 3, 2015, and referred to the Senate Judiciary Non-Civil Committee. The Committee favorably reported the bill by substitute on March 5, 2015, and it was read for a second time on the Senate floor on March 9, 2015. At the end of the 2015 Regular Session, the bill remained in the Senate to be debated during the 2016 Regular Session.); S.B. 135, 152d Gen. Assemb., Reg. Sess. (Ga. 2013) (Passed the Georgia Senate on February, 26 2013 to the Georgia House of Representatives, then read for a second time in the House on February 28, 2013.).

66. *See generally* Ga. S.B. 77.

Maryland v. King,⁶⁷ so, Georgia Senate Bill 77, as currently written, may not pass constitutional muster.

II. THE LAW OF IMPLEMENTING ARRESTEE DNA COLLECTION IN GEORGIA

The constitutional grounds upon which criminal defendants have challenged state DNA collection statutes are important considerations for shaping the ideal Georgia statute, so that the legislature may avoid its future abolition.⁶⁸ Implementing the proper legislative restrictions for DNA collection will allow expanded and continued use of this important law enforcement tool and will simultaneously protect the rights of arrestees.⁶⁹

A. Applying “Reasonableness Balancing” To DNA Collection Acts

When police collect DNA from individuals, two Fourth Amendment searches are involved, and each must survive constitutional scrutiny.⁷⁰ It is undisputed that the act of collecting buccal swabs from inside the arrestee’s cheek is a Fourth Amendment “search,”⁷¹ but this search is considered reasonable when police make the initial arrest based on probable cause.⁷² The second search occurs when police analyze the DNA to create an individual profile, which is entered into the CODIS database for

67. *King*, 133 S. Ct. at 1967.

68. *Id.*; Alex Sugzda, Note, *You’re Under Arrest—Say Ah: Suggestions for Legislatures Drafting Statutes Allowing DNA Extraction from Arrestees*, 70 WASH. & LEE L. REV. 1443, 1459–60 (2013).

69. *See King*, 133 S. Ct. at 1968 (maintaining that, although the Court was specifically addressing the Maryland statute, many states have similar statutes which the result of the decision will affect); *see also* Sugzda, *supra* note 68, at 1459–60.

70. U.S. CONST. amend. IV (“The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches . . . shall not be violated . . .”); *King*, 133 S. Ct. at 1968–69.

71. U.S. CONST. amend. IV; *King*, 133 S. Ct. at 1968–69; *Schmerber v. California*, 384 U.S. 757, 770 (1966) (holding that any “intrusio[n] into the human body” is subject to constitutional scrutiny); *see also Terry v. Ohio*, 392 U.S. 1, 24–25 (1968) (reasoning that whenever “cherished personal security” is interfered with without a warrant based on probable cause, there should be a constitutional analysis to determine if the search was reasonable).

72. *Arizona v. Gant*, 556 U.S. 332, 339 (2009) (holding a search incident to arrest reasonable when the search is of the arrestee’s person and the area within his immediate control, no matter the reason underlying the search).

comparison with other DNA profiles.⁷³ For the second search to be constitutional without police first having a search warrant, the legitimate interests of the government must outweigh the interests of the arrestees' right to individual privacy.⁷⁴

1. A Well-Established Governmental Interest: The Benefits of Collecting Arrestee DNA

The governmental interests the Court cited in *Maryland v. King* are useful as a guideline to all state legislatures in creating and implementing arrestee DNA collection statutes.⁷⁵ Implementing DNA collection and testing before pre-trial determinations are made can reduce the chance that an offender will be released to commit another crime, even for a short time.⁷⁶ The Court focused on the importance of DNA analysis technology for law enforcement to ensure safety by accurately processing and identifying the individuals they take into custody.⁷⁷

DNA is an identifying factor for an individual that cannot be altered; therefore, it is the most reliable form of identification.⁷⁸ Knowing the proper identity of an individual can help ensure the safety of law enforcement officers, other inmates, and the public community.⁷⁹ However, using DNA as an identification factor

73. *United States v. Davis*, 690 F.3d 226, 243–44 (4th Cir. 2012) (determining that searching the defendant's DNA profile in the database was a separate search under the Fourth Amendment); *Haskell v. Harris*, 669 F.3d 1049, 1059–60 (9th Cir. 2012) (determining that searching defendant's DNA profile through the database is a reasonable Fourth Amendment search because of its substantial similarity to fingerprinting analysis); *United States v. Mitchell*, 652 F.3d 387, 407 (3d Cir. 2011) (en banc) (determining that since the government interest in the Pennsylvania arrestee DNA collection Act was so acute that it outweighed the personal privacy invasion).

74. *King*, 133 S. Ct. at 1970; *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 633–35 (1989); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 678–679 (1989).

75. See generally Sugzda, *supra* note 68.

76. *King*, 133 S. Ct. at 1973.

77. *Id.* at 1970.

78. *Id.* at 1972 (“The DNA collected from arrestees is an irrefutable identification of the person from whom it was taken.”). See also Kimberly N. Brown, *Anonymity, Faceprints, and the Constitution*, 21 GEO. MASON L. REV. 409, 433 (2014) (describing that, while facial recognition technology is a significant technological advancement, there is still “significant potential for errors and abuse” since an individual may alter facial measurements).

79. *King*, 133 S. Ct. at 1972; *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 186 (2004) (asserting that knowing the true identity of an individual can help determine propensities for aggression while

presents a paradox:⁸⁰ the identification of arrestees is necessary at an early stage, but it takes significant time to perform DNA analysis tests.⁸¹ Additionally, it would be improper to enter a DNA profile into a DNA database before a neutral magistrate has established probable cause for the charge on which the individual was arrested, but the identity of the arrestee is important at the probable cause hearing.⁸² In *Maryland v. King*, the Court dismissed the dissenting Justices' argument that extensive DNA processing time negates the purpose of identification by establishing that the importance of identification goes beyond "ensuring that the proper name is typed on the indictment,"⁸³ and that the time it takes to process DNA "goes only to the efficacy of the search for its purpose of prompt identification, not the constitutionality of the search."⁸⁴

While officer safety and clerical accuracy are important, proper identification of arrestees is also critical for public policy interests.⁸⁵ DNA collection from arrestees helps police apprehend individuals released on bail for other violent felonies before they commit additional crimes.⁸⁶ Law enforcement having accurate DNA profiles

incarcerated based on prior arrests or convictions and can keep the public safe when judicial officers are asked to make a bail determination).

80. *King*, 133 S. Ct. at 1984 (Scalia, J., dissenting).

81. *DNA Casework Unit (DCU) Case Acceptance*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/about-us/lab/biometric-analysis/dna-casework-unit-dcu> (last visited Jan. 21, 2016) (last visited Jan. 21, 2016) (stating that the average processing rate is at least thirty days). *But see Rapid DNA or Rapid DNA Analysis*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/rapid-dna-analysis> (last visited Jan. 21, 2016) (describing how the federal government has planned to develop and integrate a form of rapid DNA analysis technology to return information to local law enforcement in between one and two hours).

82. *King*, 133 S. Ct. at 1967 (justifying the length in timeline through the text of the Maryland statute, § 2-504(d)(1) that allows collection at the time of arrest, but the DNA profile is expunged if no probable cause is found during the probable cause hearing).

83. *Id.* at 1971.

84. *Id.* at 1976.

85. *See id.* at 1972.

86. *Id.* at 1973–74; BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 245 (2000); *see also Denver's Study on Preventable Crimes*, DENVER DISTRICT ATT'Y, http://www.denverda.org/DNA_Documents/Denver's%20Preventable%20Crimes%20Study.pdf (last visited Jan. 20, 2015); *Chicago's Study on Preventable Crimes*, CITY OF CHI. (2005), <http://www.dnaresource.com/documents/ChicagoPreventableCrimes-Final.pdf>; *Maryland Study on Preventable Crimes*, DENVER DISTRICT ATT'Y, http://www.denverda.org/DNA_Documents/Arrestee_Database/MarylandDNAarresteestudy.pdf (last visited Jan. 21, 2016).

for additional individuals increases the probability that the correct individual is incarcerated for a crime and may exonerate a wrongly convicted individual.⁸⁷ These public policy issues establish the proper foundation for the creation of a legitimate government interest in extending DNA collection to arrestees.⁸⁸

2. Arrestees Have a Lower Expectation of Privacy than Free Citizens

Based on an arrestee's reduced expectation of privacy, the Supreme Court determined that the government's interests undoubtedly outweighed the individual privacy rights, making the search reasonable within the limits of the Fourth Amendment.⁸⁹ The Court reasoned that a cheek swab is minimally intrusive and that the restrictions Maryland placed on the type of extractable genetic information from DNA protected the privacy interests of the arrestee.⁹⁰

A cheek swab causes an insignificant bodily invasion that does not endanger the physical health of the individual from whom it is taken.⁹¹ Cheek swabs are less intrusive than drawing blood⁹² and other procedures in the administrative processes of booking arrested individuals that have also fallen under similar analyses.⁹³

87. *The Cases: DNA Exonerate Profiles*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA (last visited Jan. 21, 2016) (explaining that 337 individuals have been exonerated based on DNA evidence and that almost fifty percent of exonerations have led to identifying the correct perpetrator of the crime).

88. *See generally King*, 133 S. Ct. 1958.

89. *Id.* at 1980.

90. *Id.* at 1977–79.

91. *Id.* at 1979; *see also* *Winston v. Lee*, 470 U.S. 753, 761 (1985) (determining that a critical factor in determining the magnitude of the intrusion is the “extent to which the procedure may threaten the safety or health of the individual”).

92. *King*, 133 S. Ct. at 1969; *see also* *Schmerber v. California*, 384 U.S. 757, 772 (1966) (upholding the constitutionality of drawing blood during jail booking procedures). *But see Winston*, 470 U.S. at 760 (holding that compelling a surgical intrusion into the arrestee's muscle to remove a bullet was too much of a personal privacy intrusion to be reasonable under the Fourth Amendment).

93. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 54, 57–58 (1991) (determining that it is well settled that probable cause to arrest both permits police to take an individual into physical custody and to obtain his identifying information); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616 (1989) (stating in dicta that even a breath test requires a Fourth Amendment analysis because the deep breath needed to provide accurate readings); *Bell v. Wolfish*, 441 U.S. 520, 558–59 (1979) (upholding the

The Court distinguished the search of an arrestee from the search of a free citizen by illustrating that when an individual is processed after arrest, the booking procedures “involve a relatively extensive exploration.”⁹⁴ These procedures sometimes involve the arrestees “lift[ing] their genitals or cough[ing] in a squatted position,”⁹⁵ which is inherently more intense invasions of privacy than a mere cotton swab against the inner-cheek wall.⁹⁶ The invasive procedures are not designed specifically to demean the arrestee or harm individual dignity; they are performed for the safety of law enforcement personnel to prevent arrestees’ smuggling contraband into the jail.⁹⁷ Thus, the safety interests of the community outweigh the individual privacy interferences imposed in these procedures.⁹⁸ Determining the proper identity of an individual using DNA analysis is equally important to protecting the safety interests of the community, both inside and out of the correctional facility.⁹⁹

The Supreme Court has previously held that minor bodily intrusions are reasonable to determine identifying characteristics of arrestees.¹⁰⁰ The thirteen CODIS loci do not reveal any genetic information to police besides identification characteristics.¹⁰¹ With the statutory protection limiting analysis to identifying information, the remaining problem is law enforcement’s ability to keep an individual’s physical DNA sample indefinitely with no requirement

constitutionality of body-cavity searches for pre-trial detainees); *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (upholding the scraping of an individual’s fingernails to obtain trace evidence); *United States v. Kelly*, 55 F.2d 67, 70 (2d Cir. 1932) (upholding the constitutionality of fingerprinting arrestees).

94. *United States v. Robinson*, 414 U.S. 218, 227 (1973).

95. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1520 (2012).

96. *See King*, 133 S. Ct. at 1978.

97. *Id.* at 1978–79.

98. *Id. But cf. Josh Bowers, Probable Cause, Constitutional Reasonableness, and The Unrecognized Point of a “Pointless Indignity”*, 66 STAN. L. REV. 987, 1010 (2014) (arguing that, instead of advocating for personal privacy protections, the Court should focus on whether the individual’s dignity has been infringed upon).

99. *See King*, 133 S. Ct. at 1979.

100. *United States v. Dionisio*, 410 U.S. 1, 14 (1973) (holding that an individual’s voice is an identifying characteristic that is outside the protection of the Fourth Amendment); *United States v. Mara*, 410 U.S. 19, 20 (1973) (holding that handwriting may also be considered an identifying characteristic); *United States v. Kelly*, 55 F.2d 67, 69 (2d Cir. 1932) (upholding the constitutionality of fingerprinting); *see also* *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 58 (1991) (fingerprinting); *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963) (fingerprinting);

101. *See FBI FAQs on CODIS and DNA*, *supra* note 24.

to destroy the sample.¹⁰² Note that destroying the physical DNA sample is different from expunging the DNA profile.¹⁰³ With a statutory requirement to destroy physical DNA samples, convicted individuals could have their DNA sample expunged, yet their DNA profile containing only identifying information would remain in the DNA database, protecting individuals from future privacy intrusions.¹⁰⁴

Many states have adopted statutory schemes requiring DNA collection from arrestees.¹⁰⁵ Most states with such DNA collection statutes list the specific crimes that trigger law enforcement's ability to collect DNA.¹⁰⁶ Most statutes also mention expungement of the DNA sample.¹⁰⁷ Following precedent from the *Maryland v. King* decision and from other state legislatures, Georgia can craft a similar statute that will be reasonable under both the State and Federal Constitution.

B. "Georgia On My Mind"

The Georgia Supreme Court has indirectly acknowledged that collecting and analyzing DNA consists of two separate Fourth Amendment searches.¹⁰⁸ With this acknowledgement, Georgia courts have used a reasonableness balancing test to determine that DNA

102. Kaye, *supra* note 35, at 47 (proposing a universal database of DNA profiles that does not allow the retention of the physical sample); *see also* Ferrell, *supra* note 36, at 257–58 (determining that whether or not an individual's charges are dropped, the state may retain their DNA sample indefinitely).

103. *Compare* Ferrell, *supra* note 36, at 258, *with* Suggza, *supra* note 68, at 1468–69 (describing when there are procedures in place to remove DNA profiles from databases after a charge has been dropped, it undermines the argument that DNA collection is for identification purposes only).

104. Destroying the physical DNA sample would help prevent its further testing by law enforcement once technology advances, should the law fail to keep pace with evolving technology. *People v. Buza*, 180 Cal. Rptr. 3d 753, 773 (Cal. Ct. App. 2014), *petition for review granted*, 342 P.3d 415 (Cal. 2015).

105. *See* Stuart, *supra* note 36, at 1158–77 (listing the twenty-nine states that have implemented statutory schemes to allow DNA collection from arrestees).

106. *See id.* *But see* CAL. PENAL CODE § 296(a)(2)(C) (West 2004) (stating that "any adult person arrested or charged with any felony offense" must provide a DNA sample). The statute was later held unconstitutional under the California State constitution. *Buza*, 180 Cal. Rptr. 3d at 795–96.

107. Stuart, *supra* note 36, at 1158–77.

108. *Pace v. State*, 524 S.E.2d 490, 498 (Ga. 1999) (stating it would be unreasonable for law enforcement to obtain separate consent or a separate search warrant every time a properly obtained DNA profile is used for comparison in another investigation).

collection and analysis from convicted felons is proper.¹⁰⁹ Georgia's legislature has already recognized the importance of including arrestee DNA profiles in DNA databases by drafting bills during two different legislative sessions to implement the process into law enforcement booking procedures.¹¹⁰ The most recent bill has enumerated the "serious offenses" that can trigger DNA collection upon arrest, but it has not rectified all of the problems with the law.¹¹¹ If passed as written, the proposed bill could be overruled based on the application of a reasonableness balancing test.¹¹²

1. Georgia's Legitimate Interest in Arrestee DNA Collection

Violence in Georgia correctional facilities has risen in the past decade.¹¹³ Georgia is among the five states with the highest number of prison and jail inmate deaths.¹¹⁴ When an offender receives a prison sentence, he is sent to the Georgia Diagnostic and Classification State Prison to be screened and classified according to his threat level, but these procedures are not currently in place for individuals arrested and remaining in jail.¹¹⁵ The significant state

109. *See, e.g.*, *Padgett v. Ferrero*, 294 F. Supp. 2d 1338, 1342–44 (N.D. Ga. 2003) (noting that the search of a prisoner need not fall within the Fourth Amendment's "special needs" exception, so long as the search is still reasonable in that the government interests outweigh the personal privacy interests of the inmates, whose expectation of privacy is reduced as a result of incarceration), *aff'd sub nom.* *Padgett v. Donald*, 401 F.3d 1273 (11th Cir. 2005).

110. S.B. 77, 153d Gen. Assemb., Reg. Sess. (Ga. 2015) (Senate Committee Substitute); S.B. 135, 152d Gen. Assemb., Reg. Sess. (Ga. 2013).

111. Ga. S.B. 77.

112. *Compare* Ga. S.B. 77, with MD. CODE ANN., PUB. SAFETY § 2-504 (LexisNexis 2011). *See, e.g.*, *People v. Buza*, 180 Cal. Rptr. 3d 753, 773 (Cal. Ct. App. 2014), *petition for review granted*, 342 P.3d 415 (Cal. 2015).

113. Tyler Jett, *After 34 Inmate Deaths, Group Seeks Probe of Ga. Prisons*, CORRECTIONSONE.COM (July 4, 2014), <http://www.correctionsone.com/corrections/articles/7348722-After-34-inmate-deaths-group-seeks-probe-of-Ga-prisons> (citing Bureau of Justice statistics that "[s]ince 2010, Georgia inmates have killed 33 fellow prisoners and one officer"); *see generally* OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 247448, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2012 – STATISTICAL TABLES (2014), <http://www.bjs.gov/content/pub/pdf/mljsp0012st.pdf>.

114. Joy Lukachick Smith, *Georgia Prison Violence Rises*, TIMESFREEPRESS.COM (Apr. 14, 2013), <http://www.timesfreepress.com/news/2013/apr/14/georgia-prison-violence-rises/>.

115. *See generally* *Male Diagnostics & Classification*, GA. DEP'T OF CORRECTIONS, http://www.dcor.state.ga.us/Research/Fact_Sheets/Info_Sheets_MaleDC.pdf (last visited Jan. 20, 2016).

interest in reducing inmate violence adds to the government interest posited to outweigh personal privacy interests of arrestees.¹¹⁶

DNA provides an extraordinary ability for the criminal justice system to function properly in its ability to pinpoint precisely the individual who committed a crime.¹¹⁷ Georgia is among many states with an Innocence Project.¹¹⁸ These organizations seek to reverse convictions where DNA evidence was collected at the crime scene but DNA analysis was either not used in the course of investigation or the technology was not available at that time.¹¹⁹ The Georgia Innocence Project is responsible for exonerating seven individuals based on DNA evidence, who served an average of seventeen years for crimes they did not commit.¹²⁰ With an expanded base of DNA profiles to test against, the Georgia Innocence Project can better solidify convictions of the proper individuals and the entire criminal justice system will function more smoothly, minimizing the frequency of wrongful convictions.¹²¹

2. Georgia Arrestees Have a Previously Stipulated Reduced Expectation of Privacy

The Constitution's presumption of innocence underscores the legal difference between arrestees and convicted felons.¹²² Georgia has

116. *Cf.* *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013) (stating that “the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody” obviously serves a legitimate government interest).

117. *Stories: The FBI and DNA, Part 1*, FED. BUREAU INVESTIGATION (Nov. 23, 2011), http://www.fbi.gov/news/stories/2011/november/dna_112311; *see also* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 63 n.28 (2008) (explaining that the probability of another person matching a DNA profile may be more than one in one trillion, which is more than all of the humans that have ever lived).

118. *See Innocence Network Member Organizations*, INNOCENCE NETWORK, <http://www.innocencenetwork.org/members> (last visited Jan. 20, 2016) (listing 60 state and international members of the Innocence Network, including Georgia).

119. *See* THE INNOCENCE PROJECT, <http://www.innocenceproject.org> (last visited Jan. 20, 2016).

120. *Exonerees*, GA. INNOCENCE PROJECT, <http://www.georgiainnocenceproject.org/exonerees/> (last visited Jan. 20, 2016).

121. Jordi, *supra* note 36, at 367 (describing how deterrence theories support the idea that comprehensive DNA databanks would reduce crime, but noting that there is minimal research on the actual effect of including arrestees in the DNA databanks).

122. *Murphy*, *supra* note 54, at 175; *see also* *Coffin v. United States*, 156 U.S. 432, 453 (1895) (establishing the presumption of innocence as a fundamental right of a criminal defendant).

acknowledged that while pre-trial detainees and arrestees have more rights to privacy than convicted individuals, that right is substantially diminished once they have been lawfully arrested.¹²³ The Georgia Supreme Court determined that so long as the search of an arrestee is not conducted solely for the purpose of uncovering additional crime, the search is reasonable when there is a legitimate security or maintenance purpose.¹²⁴ The search of an arrestee also cannot be solely to “further the prosecution’s effort to obtain a conviction against [the defendant].”¹²⁵

Georgia’s statute allowing DNA collection from convicted felons has already withstood multiple court challenges and may give insight into how courts will evaluate an amended statute including arrestees.¹²⁶ The Georgia Supreme Court has upheld the statute based on the rational intent of the legislature in protecting incarcerated individuals and the public.¹²⁷ While the court only upheld the statute for collecting DNA from convicted felons, because of previous treatment of arrestees, the rationale may extend to pre-trial detainees as long as the legislature exhibits a rational reason for doing so.¹²⁸

The Georgia Constitution is stricter than the Federal Constitution regarding individual privacy,¹²⁹ but the Georgia Supreme Court has plainly stated that including explicit statements regarding legitimate government interests in a statute can assist in outweighing an individual’s privacy interests to find a warrantless search reasonable.¹³⁰ Because Georgia pre-trial detainees do not have the

123. *State v. Henderson*, 517 S.E.2d 61, 63 (Ga. 1999) (adopting the application of the Supreme Court case *Bell v. Wolfish*, 441 U.S. 520 (1979) that arrestees have a diminished expectation of privacy due to the duty prison officials have to safeguard the detention facility).

124. *Id.* at 64.

125. *Id.*

126. *Padgett v. Donald*, 401 F.3d 1273 (11th Cir. 2005); *Quarterman v. State*, 651 S.E.2d 32 (Ga. 2007); *State v. Henderson*, 517 S.E.2d 61 (Ga. 1999).

127. *Quarterman*, 651 S.E.2d at 34.

128. *Id.*; *see also Henderson*, 517 S.E.2d at 63 (stating that, although there is a distinction between a “prisoner” and a pre-trial detainee, pre-trial detainees have a diminished expectation of privacy in their cells than free citizens in the community).

129. *Compare* GA CONST. art. I, § 1, with U.S. CONST. amend. IV.

130. *Donald*, 401 F.3d at 1282 (quoting *King v. State*, 535 S.E.2d 492, 495 (Ga. 2000)) (“The state may constitutionally intrude upon a protected privacy interest ‘pursuant to a statute which effectuates a compelling state interest and which is narrowly tailored to promote only that interest.’ Law enforcement constitutes a compelling state interest.”).

same privacy interest in their physical property as free individuals¹³¹ and the state government has a legitimate interest in the collection of arrestee DNA,¹³² the legislature may summarize the government interests in the statute to solidify their intent in passing the bill. In doing so, the above stated interests may be properly and consistently weighed against personal privacy interests at stake.

III. CHANGING GEORGIA'S LAW

The Supreme Court's decision that Maryland's arrestee DNA collection act was constitutional should lead other state legislatures to follow, but legislatures should also strive to make their own DNA collection acts superior to other states' statutes.¹³³ There is a legitimate interest in having all states implement these collection procedures to strengthen the national criminal justice system.¹³⁴ The Court focused on many factors,¹³⁵ all of which should be included in the Georgia statute to avoid any future misconceptions or its unconstitutionality.¹³⁶

The Georgia legislature should implement stricter regulations to manage the procedures involved in maintaining the DNA database, taking it away from the Georgia Bureau of Investigations so that they may impose punishments for the use of "offline" databases and

131. *Henderson*, 517 S.E.2d at 62–63 (adopting the *Hudson v. Palmer*, 458 U.S. 517 (1984) holding that arrested individuals have limited constitutional protections in comparison to those protections enjoyed by free citizens).

132. See discussion *supra* Part II.B.1. (detailing how violence has risen in correctional facilities, the technological advantages of building a larger DNA database, and how that would help the Georgia Innocence Project accurately assist those who have been wrongly convicted).

133. See generally Sugzda, *supra* note 68. See also Marc Jonathan Blitz, *Third Party Records Protection on the Model of Heightened Scrutiny*, 66 OKLA. L. REV. 747, 786 (discussing how the American Bar Association's new Standards for Law Enforcement Access to Third Party Records "provide some hints as to how lawmakers might [require procedural protections the Court has refused to require] in the sections on de-identification, retention and maintenance, and disclosure and dissemination").

134. 42 U.S.C. § 14132 (2012). The statute itself is entitled "Index to Facilitate Law Enforcement Exchange of DNA Identification Information." *Id.*

135. See generally *Maryland v. King*, 133 S. Ct. 1958 (2013).

136. See discussion *supra* Part II.A. Even with the included factors, courts may still hold the statutes unconstitutional under respective state constitutions, which are stricter than the U.S. Constitution, but the Georgia legislature's increasing protections on personal privacy may assist in avoiding a similar ruling. See, e.g., *State v. Medina*, 102 A.3d 661 (Vt. 2014).

comply with the federal requirements.¹³⁷ The use of DNA technology is widespread and unavoidable, so greater legislative regulation is necessary: through the implementation of a commission, the inclusion of the state's interests in the statute, and the incorporation of the specific factors discussed in *Maryland v. King*.¹³⁸

A. Establishing A Commission

In order to promote the *Maryland v. King* factors¹³⁹ while continually monitoring the changing science of DNA,¹⁴⁰ states should individually establish a commission to maintain the goals of the Supreme Court's opinion.¹⁴¹ The commission should bear responsibility for persistently examining the relevant laws and technology, and for maintaining conformity in the event that science exceeds the scope of the current law and infringes on personal privacy rights of arrestees.¹⁴² In order to facilitate technological implementations, the FBI has already implemented a Rapid DNA Program Office to facilitate and oversee the use of Rapid DNA Testing devices in law enforcement.¹⁴³ Having a state-run commission in addition to the federal organization will ensure that the federal goals are properly applied to Georgia's laws.

137. O.C.G.A. § 35-3-160(c) (2012); see 42 U.S.C. § 14132(b) (2006) (including extensive requirements for states to continually partake in the federal DNA database program, states must regulate the laboratories that maintain the databases and must only release DNA profile information under certain circumstances); GA. BUREAU OF INVESTIGATIONS – DIV. OF FORENSIC SCIS., *supra* note 12 (listing the DNA collection and analysis responsibilities of the Georgia Bureau of Investigations). For a discussion of “offline” databases, see Joh, *Policing and Genetic Privacy*, *supra* note 5, at 286.

138. See generally *Maryland v. King*, 133 S. Ct. 1958 (2013); see also David Alan Slansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1074 (“[T]echnological and social developments have made or soon will make privacy impossible, whether we like it or not.”).

139. See generally *Maryland v. King*, 133 S. Ct. 1958 (2013).

140. See Joh, *Policing and Genetic Privacy*, *supra* note 5, at 292–93; see also Slansky, *supra* note 138.

141. See Joh, *Artificial Intelligence*, *supra* note 37, at 55 n.131 (suggesting establishment of “a permanent commission to oversee [DNA databanks] . . .”) (quoting Phil Reilly, *Legal and Public Policy Issues in DNA Forensics*, 2 NATURE REVIEWS GENETICS 313, 317 (2001)).

142. *Id.* See also Emma Raviv, *Homing In: Technology's Place in Fourth Amendment Jurisprudence*, 28 HARV. J.L. & TECH. 593, 605 (2015) (explaining how difficult it is to create laws about technological advancements due to the unpredictability of today's ever-evolving technology).

143. See *Rapid DNA or Rapid DNA Analysis*, *supra* note 81.

B. Specific Government Interests

The legitimate government interests should be included in the Georgia statute so that if it is ever under attack, the presiding court can properly balance the government interests with the privacy interests of the individual.¹⁴⁴ Generally, DNA collection from arrestees allows for increased accuracy in the criminal justice system and ensures that justice is served on the correct individual.¹⁴⁵ DNA profile compilation from arrestees will also help keep correctional officers safe while working inside correctional facilities.¹⁴⁶ Knowing the background of the offenders will assist in placing each arrestee in the proper prison facility based on his potential for violent behavior.¹⁴⁷ While the generally applicable government interests are important and highly relevant, the interests specific to Georgia should also be included in the legislation.

Georgia prisons and jails have an exceedingly high rate of inmate deaths.¹⁴⁸ Prison procedures that classify offenders based on level of violence should be implemented in local jails to reduce overall correctional facility violence.¹⁴⁹ For law enforcement to determine the proper classification for arrestee placement, it will be helpful for them to have each arrestee's DNA profile connected to previous arrests and the related documentation of those arrests.¹⁵⁰ Having an accurate list of all previous violent crimes the arrestee committed or for which he was arrested will enable law enforcement to classify

144. W.E. Shipley, Annotation, *Requiring Submission to Physical Examination or Test as Violation of Constitutional Rights*, 25 A.L.R.2d 1407 (2015) (listing multiple situations where a state's actions were valid against personal privacy rights when the statute set forth legitimate government interests that outweighed the individual rights).

145. See generally Garrett, *supra* note 117.

146. Cf. Maryland v. King, 133 S. Ct. 1958, 1971 (2013) ("The interests are [different than interests of searching a physical place] when an individual is formally processed into police custody.").

147. *Id.*

148. Smith, *supra* note 114.

149. See generally GEORGIA DEP'T OF CORRECTIONS, *supra* note 115. See also Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1520 (noting that individuals arrested for minor offenses may turn out to be the most dangerous offenders and giving the example that Timothy McVeigh, the Oklahoma City bomber, was stopped by a state trooper for not having a license plate just after the bombing).

150. *Laboratory Services: CODIS—NDIS Statistics*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics> (last visited July 1, 2015) (listing 295,049 offender profiles in the state of Georgia and 5,677 investigations aided through the use of CODIS as of May 2015).

arrestees according to their violent or non-violent propensities, making the jails safer because violent individuals may be kept separate from the general population.¹⁵¹

C. Maryland Factors Applied To Georgia

In drafting state law regarding DNA collection from arrestees, the Georgia legislature should implement the best features of other states' laws.¹⁵² Georgia should expound on the minimum protections discussed in *Maryland v. King* to better protect the privacy interests of Georgia citizens.¹⁵³

1. Identification Factors Only

DNA collection is necessary to determine the proper identification of an individual but can reveal more personal information.¹⁵⁴ Therefore, law enforcement should be strictly limited to only discovering the identifying factors of an individual through DNA analysis.¹⁵⁵ This limitation protects the medical and genetic privacy of the arrestee, the absence of which would upset the balance of reasonableness.¹⁵⁶ Explicitly limiting DNA analysis to identification will better protect individual privacy without inhibiting any legitimate government interests.¹⁵⁷

151. Matthew R. Durose et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, U.S. DEP'T JUSTICE, NCJ 244205, (Apr. 2014), <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf> (stating that 71.3% of the violent offenders tracked were rearrested for a new crime within five years of release).

152. Stuart, *supra* note 36, at 1158–77 (including an appendix of the positive and negative aspects of each state statute as of January 29, 2014).

153. See *Maryland v. King*, 133 S. Ct. 1958 (2013).

154. *But see Santos*, *supra* note 35, at 596 (explaining that “a forensic DNA profile cannot reveal information about your health status, your propensity to disease, or your physical appearance any more than your Social Security Number can”).

155. MD. CODE ANN., PUB. SAFETY § 2-505(b)(1) (LexisNexis 2011) (“Only DNA records that directly relate to the identification of individuals shall be collected and stored.”); § 2-512(c) (“A person may not willfully test a DNA sample for information that does not relate to the identification of individuals as specified in this subtitle.”); *King*, 133 S. Ct. at 1967.

156. *King*, 133 S. Ct. at 1979 (stating that processing an arrestee’s DNA based on the 13 CODIS loci “did not intrude on [the arrestee’s] privacy in a way that would make his DNA identification unconstitutional”).

157. *Id.* at 1979–80 (noting that when the duty to avoid unwarranted disclosures is included in the statute or regulation, privacy concerns are inherently minimized).

Georgia's proposed arrestee DNA collection statute allows law enforcement to collect an arrestee's DNA "to determine identification characteristics specific to the individual whose DNA sample is being analyzed."¹⁵⁸ The wording of the statute lends itself to an inclusive reason for collecting DNA, but should be amended to exclude all other possible uses for the DNA sample. Georgia should also expressly forbid law enforcement from engaging in familial searches.¹⁵⁹ Imposing limited uses makes the statute more restrictive, and thus, more protective of the individual rights of arrestees.

The major flaw with DNA and its use for identification purposes is speed.¹⁶⁰ For the FBI to process a DNA sample, it takes at least thirty days,¹⁶¹ but the process could be even longer in state laboratories.¹⁶² The disconnect between DNA collection and analysis will be resolved with new technology—Rapid DNA testing—but the technology may cause more of an intrusion into personal privacy by providing law enforcement with an insight into an individual's genetic predispositions or medical history before probable cause is confirmed.¹⁶³ The creation of rapid DNA technology reinforces the need to establish a commission to regulate DNA laws and science to avoid both a reduction in governmental interests and an increased level of intrusion into personal privacy rights.

158. S.B. 77, § 3, 153d Gen. Assemb., Reg. Sess. (Ga. 2015) (Senate Committee Substitute).

159. Jessica D. Gabel, *Indecent Exposure: Genes Are More than a Brand Name Label in the DNA Database Debate*, 42 U. BALT. L. REV. 561, 585 (2013) (stating that, if familial searches are allowed, there should be specific provisions on methods for searching). *Accord* *People v. Buza*, 180 Cal. Rptr. 3d 753, 767 (Cal. Ct. App. 2014), *petition for review granted*, 342 P.3d 415 (Cal. 2015); Natalie Ram, *DNA by the Entirety*, 115 COLUM. L. REV. 873, 873 (2015) (describing how the allowance of familial searching does not recognize that an individual's genetic information is involuntarily shared with family members and since individuals have a cognizable interest in controlling identifiable genetic information, familial searches should not be allowed).

160. *King*, 133 S. Ct. at 1983–86 (2013) (Scalia, J., dissenting).

161. See *DNA Casework Unit (DCU) Case Acceptance*, *supra* note 81.

162. State laboratories suffer, more often than the FBI lab, from financial setbacks and are more susceptible to delay based on a lack of supply or personnel. OFF. OF THE INSPECTOR GEN., DEP'T OF JUSTICE, *AUDIT REPORT: THE COMBINED DNA INDEX SYSTEM 51–54* (2001), <https://oig.justice.gov/reports/FBI/a0126/final.pdf>.

163. See *Rapid DNA or Rapid DNA Analysis*, *supra* note 81 (providing the details of technology that would be able to read and analyze a DNA sample and create an individual profile with no human intervention).

2. Listing Specific Crimes

Maryland v. King also discusses the statute's enumeration of specific crimes for which arrestee DNA may be collected, and multiple states have successfully implemented similar statutory listings.¹⁶⁴ Georgia has proposed legislation that allows DNA collection from "[a]ny individual arrested for a serious offense."¹⁶⁵ The bill also includes the definition of "serious offense" and lists twenty-nine crimes that would qualify for DNA collection in addition to crimes considered a "serious violent felony."¹⁶⁶ Instead, however, the legislature should specify that only violent felonies warrant DNA collection upon arrest to better promote the underlying intent of the law: reducing the worst kind of crimes and protecting the public by preventing those violent criminals from continuing to offend.¹⁶⁷ Including non-violent felonies does not serve legitimate government interests and increases infringement on the rights of a larger number of individuals, tipping the balance of reasonableness towards unconstitutional.¹⁶⁸

3. Automatic Deletion

Many states have DNA collection statutes that include provisions to automatically delete offender profiles and physical samples if the suspect is not convicted or the conviction is overturned.¹⁶⁹ This provision best protects the personal privacy interests of the arrestee and supports the idea that the DNA profile is only for identification purposes during the term of incarceration. With evolving technology, the possibility of creating an automated reporting system that ties the original DNA collection data to the ultimate court disposition is feasible and can be logistically solved and monitored by a commission.

164. See Stuart, *supra* note 36, at 1159–77.

165. S.B. 77, § 2, 153d Gen. Assemb., Reg. Sess. (Ga. 2015) (Senate Committee Substitute).

166. *Id.* at § 1 (even listing drug offenses such as possession or use of marijuana).

167. Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 BROOK. L. REV. 127, 165 (2001).

168. *Maryland v. King*, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting).

169. See statutes cited *supra* note 60.

Consistent DNA profile removal procedures are important nationally, therefore the Georgia legislature should clarify the applicable section in Georgia's statute. Georgia's proposed legislation allows an individual to request removal of his or her DNA profile if the arrest does not culminate in conviction.¹⁷⁰ The legislation also lists the paperwork that will trigger "the bureau" to purge the records, but does not make this process automatic as it should be.¹⁷¹ The bill places the burden on the arrestee to seek expungement, instead of providing for automatic expungement, increasing the privacy invasion on the arrestee and tipping the balance towards unconstitutionality.¹⁷²

4. Disposal of Physical DNA Samples

Advocates of personal privacy dislike the fact that many jurisdictions not only have a "database" of DNA profiles, but also a "data bank" of physical DNA samples.¹⁷³ To protect the personal privacy of arrestees, the Georgia legislature should include a provision in the code to demand disposal of the physical sample after the DNA profile is entered into the database and after a certain amount of time has passed.¹⁷⁴

Georgia's proposed legislation also confuses the definitions of "database" and "data bank," which should be clarified to prevent confusion and potential infringement on personal privacy.¹⁷⁵ A database is a collection of DNA profiles, but a data bank is a collection of physical DNA samples.¹⁷⁶ Georgia's proposed

170. S.B. 77, § 5, 153d Gen. Assemb., Reg. Sess. (Ga. 2015) (Senate Committee Substitute).

171. *Id.*

172. *People v. Buza*, 180 Cal. Rptr. 3d 753, 767 (Cal. Ct. App. 2014), *petition for review granted*, 342 P.3d 415 (2015).

173. Santos, *supra* note 35, at 605 n.117. "Strangely, our discomfort with the idea of someone looking at a tiny portion of our overall genetic profile in a highly regulated and controlled setting is greater than our trepidation about sharing personal information on Facebook or Twitter . . ." *Id.* At 598; *see also* Kaye, *supra* note 35, at 47 (supporting the idea that DNA sampling and profiling is not a bad thing as long as the samples are not retained).

174. Gabel, *supra* note 159; *see also* Ferrell, *supra* note 36, at 257–58.

175. *See generally* Quarterman v. State, 651 S.E.2d 32, 33 n.1 (Ga. 2007); Ga. S.B. 77.

176. Roberto Iraola, *DNA Dragnets – A Constitutional Catch?*, 54 DRAKE L. REV. 15, 20 (2005) ("Databanks store DNA samples consisting of blood, saliva, tissue or fluid. Databases, on the other hand, consist of portions of those samples which have been analyzed. The analysis, which yields a

legislation includes multiple references to a DNA data bank when referring to DNA profiles, which should be amended for clarity.¹⁷⁷

Because of the differences between Maryland's and Georgia's arrestee DNA Collection Acts, Georgia's Act likely will not pass constitutional muster if challenged as it is currently written. Enacting this type of statute will be beneficial to the state as a whole and will positively impact crime victims and their families,¹⁷⁸ but it should only be enacted if it will not be overturned in the future. Therefore, the Georgia legislature should incorporate the above changes before passing the proposed legislation into law.

CONCLUSION

The Supreme Court determined that collecting DNA from arrestees is constitutional if it conforms within certain restrictions to protect personal privacy.¹⁷⁹ In holding that law enforcement's collecting and analyzing arrestee DNA samples were constitutional actions, the Court found that the legitimate government interests outweighed the personal privacy interests of the individual, making the search reasonable within the limits of the Fourth Amendment.¹⁸⁰ The Supreme Court prioritized the specific factors of the Maryland DNA Collection Act that the legislature implemented to safeguard individual liberties, and as long as those rights are protected, the statute is constitutional.¹⁸¹ Other state legislatures—which have not already done so—should mirror the Maryland statute to solidify the underlying policy interest of strengthening the national DNA database and reducing the number of violent felonies.

genotype or 'profile' expressed as a set of numbers, is what is entered into state or local databases.”).

177. Ga. S.B. 77, at §§ 2, 5 (including incorrect phrases such as: “identification characteristics of the profile resulting from the DNA analysis shall be stored . . . in a DNA data bank” and “an individual whose DNA profile has been included in the data bank”).

178. Press Release, Ga. Bureau of Investigation, GBI's DNA Database Has Over 3,500 Confirmed Hits (Sept. 24, 2013), <http://gbi.georgia.gov/press-releases/2013-09-24/gbi's-dna-database-has-over-3500-confirmed-hits> (explaining that 409 cases have been solved through the addition of felony probationers to the DNA database).

179. *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013).

180. *Id.*

181. *See generally King*, 133 S. Ct. 1958.

Since Georgia has a legitimate State interest in collecting DNA from arrestees, the legislature should extend the current DNA collection statute to include arrestee DNA profiles in State and Federal DNA databases. In doing so, however, the legislature should carefully craft the statute so that the legitimate interests of the government outweigh the risks of infringing individual privacy rights. Thus, ensuring that the statute is considered constitutional under both the State and Federal Constitutions. The Georgia legislature should enumerate specific state interests and the reasoning for including each *Maryland v. King* factor to prevent any misapplication of the legislature's intent in the courts.¹⁸² A commission should be established to continually monitor the laws and science of DNA collection, so as not to infringe on an arrestee's personal privacy rights in the future.¹⁸³ These changes must be made before the bill is passed in order to avoid its future abolition.

182. *See supra* Part III.B–C.

183. *See supra* Part III.A.