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Brief for Professor Albert E. Scherr as Amicus Curiae in Support of Petitioner

Albert E. Scherr
University of New Hampshire School of Law

No. 14-885

In The

Supreme Court of the United States

GLENN JOSEPH RAYNOR,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF FOR PROFESSOR ALBERT E. SCHERR AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST AND IDENTITY OF AMICUS CURIAE[1]

Counsel is a law professor at the University of New Hampshire School of Law and a member of the U.S. Supreme Court bar. He has spent the last twenty years focused on policy and law development in the area of genetic privacy, through litigation, scholarship and teaching. He has lectured, taught and written in the area of genetic privacy, particularly with regard to the Fourth Amendment. That background gives him a deep interest in a thoughtful resolution of the petition.

Professor Scherr received a two-year NIH ELSI (Ethical, Legal and Social Implications) grant to study the Constitution and genetic privacy, one result of which was a 2013 article: Albert E. Scherr, *Genetic Privacy & The Fourth Amendment: Unregulated Surreptitious DNA Harvesting*, 47 Ga. L. Rev. 445 (2013), the very subject of the above-captioned petition.

He was also the co-founder and co-investigator with a moral philosopher and geneticist on a sequence of three three-year NIH ELSI grants at Dartmouth College to train domestic and international undergraduate

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to its preparation or submission.

faculty on the substance and technique of teaching ELSI issues at the graduate and undergraduate levels. He continues to lecture at undergraduate institutions around the country on genetic privacy issues. He has also taught the foundational course in Criminal Procedure for many years at the University of New Hampshire School of Law.

Professor Scherr also litigated a number of forensic DNA admissibility issues in state and federal courts. *See, e.g.*, *State v. Vandebogart*, 139 N.H. 145, 652 A.2d 671 (1995); *United States v. Shea*, 957 F. Supp. 331 (D. N.H. 1997), *affirmed,* 211 F.3d 658 (1st Cir. 2000). He was on the board of the national ACLU for six years and during that time chaired its Patents & Civil Liberties Committee.

By virtue of his litigation, scholarship and policy work, Professor Scherr is uniquely situated to offer a rich and well-developed perspective on the issues raised in petitioner's case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Professor Scherr agrees with petitioner that review is warranted because the Maryland Court of Appeals decision is erroneous. The Fourth Amendment does not sanction police harvesting of DNA without probable cause and a warrant and without the subject's knowledge or consent, to be used however the authorities deem appropriate and without restriction.

The Maryland Court of Appeals' decision is contrary to the Supreme Court's jurisprudence as articulated in the *Riley v. California – Maryland v. King – United States v. Jones* trilogy. This case fits squarely in the center of the triangle formed by that trilogy. The petition should be accepted to remedy this conflict at the intersection of this Court's jurisprudence on the newest forensic technology and the Fourth Amendment.

Professor Scherr also agrees with the petitioner that this Court should accept this petition to resolve a conflict between a Federal Court of Appeals and a state court of appeals. In *United States v. Davis*, 690 F.3d 226 (4th Cir. 2012), the Fourth Circuit found that the police implicated the suspect's Fourth Amendment privacy interest when it sought to obtain a DNA profile from his blood found on clothing it held legally. In this case the Maryland Court of Appeals found the opposite. As surreptitious harvesting cases continue to enter the criminal justice system, it is an opportune time for this Court to resolve this conflict and offer guidance to state and federal courts.

ARGUMENT

I. The Maryland Court Of Appeals' Rule Is Contrary To This Court's Fourth Amendment Jurisprudence As Articulated In The *Riley-King-Jones* Trilogy

This Court's recent jurisprudence in cases involving new and sophisticated technology elucidates a set of Fourth Amendment principles as to information that (A) has varying degrees of accessibility within an item; (B) is publicly available in some fashion; or (C) involves the potential for either controlled or uncontrolled data collection. The Maryland Court of Appeals decision in petitioner's case conflicts with that jurisprudence.

A. *Riley v. California* and Information Accessibility

In *Riley v. California*, 134 S. Ct. 2473 (2014), this Court found that, though the police had possession of an individual's cellphone legally under the search-incident-to-arrest doctrine, a search of the contents of that cellphone constituted an additional search which required either a warrant supported by probable cause or by a warrant exception to justify it constitutionally.

In petitioner's case, petitioner's sweat replaces the *Riley* cellphone and petitioner's DNA replaces the contents of the cellphone. Otherwise, the circumstance is identical. Contrary to the Maryland Court of Appeals' holding that the DNA testing of the 13

identifying "junk" loci within one's genetic material, not obtained by means of a physical intrusion into the person's body, does not constitute a Fourth Amendment search, *Raynor v. Maryland,* 99 A.3d 753, 767 (Md. 2014), a search of the contents of one's sweat for DNA constitutes a search worthy of Fourth Amendment protection.

In *Riley*, this Court identified (1) the "immense storage capacity" of a cellphone, *id.* at 2489; (2) the collection in one place of "many distinct types of information – an address, a note, a prescription, a bank statement, a video – that reveal much more in combination than any isolated record," *id.*; (3) that "the data on a phone can date back to the purchase of the phone, or even earlier," *id.*; (4) the "element of pervasiveness that characterizes cellphones," *id.* at 2490; and the "qualitatively different" nature of cellphone data, *id.*, among the several factors that distinguished cellphone contents from other physical records.

The storage capacity of biological material for DNA is immense. Every cell has DNA and it contains all of an individual's DNA, not just the DNA of that "body part." In that DNA exists information that is intimate, personal, shared, predictive and powerful. Scherr, *supra*, at 493-504. It contains a kaleidoscope of one's identity that interacts passively and actively with the environment. And, it is not easily accessible; taken as a whole, it is unique; it is permanent and it exists at the core of one's physical being. *Id.* at 501.

To paraphrase this Court's language in *Riley*: DNA is not just another technological convenience. With all it contains and all it may reveal, it holds for many Americans "the privacies of life." The fact that technology now allows an individual to access such information does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching for DNA in biological material seized legally is accordingly simple – get a warrant. *Riley,* 134 S. Ct. at 2494-95.

B. *United States v. Jones* and Publicly Available Information

In *Jones,* this Court concluded that the attachment of a Global Positioning System (GPS) tracking device to a vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, was a search within the meaning of the Fourth Amendment. Though the Court split on the justification for this conclusion, the result for the entire Court was premised on the principle that obtaining publicly available information – the suspect's whereabouts while in public – may constitute a search in spite of its public nature.

Members of the Court took differing approaches to the public surveillance question. Justice Sotomayor and Justice Alito (joined by Justices Kagan, Kennedy and Breyer) in separate opinions expressed the view that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy"

while short-term monitoring did not. 132 S. Ct. at 955 (Sotomayor, J., concurring); *id.* at 964 (Alito, J., concurring). Justice Scalia, joined by Justices Roberts and Thomas, expressed the view that the public surveillance of the suspect combined with the trespassory intrusion on the suspect's jeep constituted a search. *Id.* at 954. He postponed the "vexing question" of what extent such monitoring merited Fourth Amendment protection.

Even in light of the differing approaches, *Jones* effectively holds that the existence in public of that which is being searched does not disqualify it from Fourth Amendment protection. This is a notable addition of nuance to the Court's perspective in the iconic Fourth Amendment search case, *Katz v. United States,* 389 U.S. 347 (1967) where the Court said: "For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Id.* at 352.

By contrast, the Maryland Court of Appeals found that " . . . [p]etitioner exposed to the public, albeit not to the naked eye, the identifying content of the genetic material he left on the armrests of the chair." *Raynor*, 99 A.3d at 94. This conclusion is in direct conflict with *Jones* (measurement of publicly available and very accessible "whereabouts") and with *Kyllo v. United States*, 533 U.S. 27 (2001) (measurement of publicly available, but less accessible "heat") where the police conduct constituted a search for Fourth Amendment purposes. By that standard,

the measurement of publicly available, though very much inaccessible, DNA in petitioner's case constitutes a constitutionally protected search.

C. *Maryland v. King* and Controlled/ Uncontrolled Data Collection

In *Maryland v. King,* 133 S. Ct. 1958 (2013), this Court directly confronted a DNA search case for the first time. It concluded that the police may acquire biological material via a buccal swab from one arrested for a crime in certain circumstances. The acquisition of the biological material and the mining for DNA constituted a search for Fourth Amendment purposes and was reasonable under the circumstances of that case.

Those circumstances included a state statutory structure that regulated the DNA collection and use closely. The DNA could only be used for identification purposes and the analysis only looked at 13 standard STR loci. Familial and other types of searches were explicitly prohibited and the collection was part of the highly regulated CODIS system.

In particular, this Court in *King* noted with approval its statements in prior cases as to how a statutory or regulatory scheme can allay privacy concerns related to data collection and chose not to speculate about its conclusions if such a scheme did not exist. It then described the next sequence of cases:

> If in the future police analyze samples to determine, for instance, an arrestee's predisposition for a particular disease or other hereditary factors not relevant to identity, that case would present additional privacy concerns not present here.

Id. at 1979.

Petitioner's case is the first in that next sequence. Here, the police used the DNA to identify the petitioner as a possible contributor of the crime scene sample, a kind of identification purpose. But, unlike in *King,* no regulatory or statutory structure limited their use of petitioner's DNA. Like in *Kyllo*, the potential knowledge available from the DNA was broad and intrusive. In *King*, the search was limited to identifying information by a strict statutory scheme. In *Kyllo*, though the government contended that the search was constitutional because it was only searching for evidence of high-intensity lamps, 533 U.S. at 38, the Court expressed concern for the potential of the search to reveal intimate details of one's personal life within a protected space. *Id.* at 38-39.

Further, unlike in *King,* where significant prohibitions existed on the storage and future use of the DNA, no prohibitions exist on the use of the DNA in this case or in future such cases. In fact, the city of Baltimore, Maryland has a database with the DNA of more than 3,000 homicide victims in it. Other local and county law enforcement authorities have also collected a variety of individuals' DNA in databases.

"Police Agencies Are Assembling Records of DNA," *The New York Times,* June 12, 2013. And, this practice is not new. Scherr, *supra*, at 447.

It is particularly noteworthy that the petitioner expressed that very concern to the police when they asked him for a sample of his DNA. *Certiorari Petition of Petitioner* at 3. Yet, without his knowledge and with his explicit refusal to consent, the police collected and searched his biological sample. No evidence exists in this case or other such cases as to the fate of the biological samples from the petitioner or others whose samples have been collected and searched.

The Maryland Court of Appeals concluded "[t]hat Petitioner's DNA could have disclosed more intimate information is of no moment in the present case because there is no allegation that the police tested his DNA sample for that purpose." *Raynor*, 99 A.3d at 768. That conclusion conflicts with this Court's approach to the Fourth Amendment and data collection in *King* – controlled data collection and in *Kyllo* – the potential for uncontrolled data collection. *See also*, *Whalen v. Roe,* 429 U.S. 589 (1977) (strict statutory data protections obviate need for constitutional privacy analysis).

II. The Maryland Court Of Appeals And The United States Court Of Appeals For The Fourth Circuit Decisions In Unregulated Surreptitious DNA Harvesting Cases Conflict And That Conflict Merits Resolution By This Court

In 2012, the Fourth Circuit Court of Appeals found that the extraction of Mr. Davis's DNA from clothing and the creation of a genetic profile constituted a search for Fourth Amendment purposes. In 2014, the Maryland Court of Appeals found that the extraction of Mr. Raynor's DNA from his sweat and the creation of a genetic profile did not constitute a search for Fourth Amendment purposes. The *Davis* and *Raynor* holdings represent an irreconcilable division between a federal appellate court and a state court of last resort. This Court should accept this petition to resolve this division in the interests of the administration of justice.

The practice of surreptitious DNA harvesting is not new. It has been occurring at the least since the early 2000's. Scherr, *supra*, at 454-56. Almost without exception, courts have been deciding the issue using an abandonment theory (a question not at issue in this case), finding that no Fourth Amendment-protected search occurred., *Id.* at 454-59 though the use of that theory has been questioned. *Id.* at 465-68.

But, other than *Raynor,* the large majority of these cases preceded the *Riley-King-Jones* trilogy which together bring a fresh perspective to the practice as noted above. *Id.* at 454-59. A resolution of the

Davis/Raynor conflict would bring much needed definition to a developing area.

In addition, the practice of surreptitious harvesting is one of a number of practices that appear to be resulting in the development of the rogue DNA databases noted above. Other techniques have included acquiring and uploading DNA taken for the limited purpose of eliminating the donor as a suspect into a DNA database. Such databases of DNA samples – both biological and numerical – are not part of federal or state CODIS-regulated databases. They are completely unregulated and allow for whatever use law enforcement desires. *See, e.g.*, Stephen Mercer & Jessica Gabel, Shadow Dwellers: *The Underregulated World of State and Local DNA Databases*, 69 N.Y.U. Ann. Surv. Am. L. 639 (forthcoming 2014).

Because surreptitious DNA harvesting occurs without probable cause or a warrant, no regulatory, statutory or constitutional check exists on such samples entering these unregulated databases. Acceptance of this petition provides the Court with an opportunity to evaluate one of the practices leading to constitutionally suspect rogue databases now growing around the country.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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