



Critics: In DNA case, court opened 'gaping new exception' to privacy rights

By: Ned Resnikoff – June 3, 2013

Law enforcement officials can take routine DNA samples from those they arrest, the Supreme Court ruled on Monday. A 5-4 majority held that doing so is little different from taking fingerprints, and therefore does not intrude on a suspect's Fourth Amendment rights.

But civil liberties groups, as well as the dissenting justices, stridently disagreed with the ruling, authored by Justice Anthony Kennedy.

"Justice Kennedy says you've got to get somebody's identification for booking purposes, but that's not what's happening here," Jim Harper, director of information policy studies at the libertarian Cato Institute, told MSNBC. "They're collecting DNA to investigate a person for other crimes that happened elsewhere, for which they have no suspicion."

Police "have to have some reason to believe that you committed a crime" before they search you for evidence of your guilt, said ACLU legal director Steven Shapiro. Echoing Harper, Shapiro argued that the majority opinion in the case, *Maryland v. King*, created a "gaping new exception" to that rule by allowing police to collect DNA evidence which they would then use to investigate old, unsolved crimes.

Justice Kennedy and the other members of the majority argued that DNA collection was more a process of identification than a search of the suspect. "[T]he need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody" is "well established," wrote Kennedy. He pointed out that DNA collection is a simple, non-invasive procedure.

But Harper said the ease of the procedure was irrelevant, because it still constituted a search.

"Is it also within the sphere of things you can do to examine the contents of [the suspect's] cell phone to see if he's planning an extortion plot?" Harper asked.

In his dissenting opinion, Justice Antonin Scalia also compared routine DNA collection to an indiscriminate search.

"Searching every lawfully stopped car...might turn up information about unsolved crimes the driver had committed, but no one would say that such a search was aimed at 'identifying' him, and no court would hold such a search lawful," wrote Scalia, a conservative, who was joined in his dissent by three more liberal justices, Elena Kagan, Sonia Sotomayor, and Ruth Bader Ginsburg.

Justice Stephen Breyer, who normally sides with the liberal wing, joined the four conservative justices, minus Scalia, in the majority.

Shapiro predicted that the court may soon hear further cases regarding DNA collection, and that the impact of the ruling could be narrowed. He pointed out that the Maryland law under consideration has “some crucial safeguards” which similar state laws lack: In particular, Shapiro said, it bans the police from using DNA evidence to determine whether an arrestee’s family members should be investigated for unrelated crimes.

“I think it’s premature to say that this decision upholds all DNA testing laws for all arrestees,” said Shapiro.