

No. 07-8538

IN THE
SUPREME COURT OF THE UNITED STATES

Angel M. Anderson,

Petitioner,

v.

Commonwealth of Virginia,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does *Virginia Code* § 19.2-310.2:1, allowing for the search and seizure of DNA from an individual upon arrest, violate the Fourth Amendment's protection against unreasonable searches and seizures?

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Virginia Attorney General Robert F. McDonnell, on behalf of the Commonwealth of Virginia, and pursuant to this Court's request of February 20, 2008, directing that a response be filed,¹ hereby responds to the Petition for Writ of Certiorari. For the reasons set forth below, the Petition should be denied.

INTRODUCTION

In 2002, the Virginia General Assembly enacted *Virginia Code* § 19.2-310.2:1 to require DNA testing for persons charged with certain felonies.² The DNA sample is taken only after a magistrate has determined that probable cause existed for the arrest. *Id.* The purpose of taking the DNA sample is “to determine identification characteristics specific to the individual whose sample is being analyzed.” *Id.* The Division of Forensic Science, or its designated entity, analyzes the sample, which the Division maintains in a DNA data bank. *Id.*

¹ On February 27, 2008, this Court extended the time to file a Response to April 21, 2008.

² These offenses include violent crimes, such as murder and malicious wounding, sexual crimes such as rape, and other very serious felonies, including kidnapping and abduction, arson, robbery and burglary offenses. *Virginia Code* § 19.2-310.2:1.

Virginia Code § 19.2-310.2:1 also requires the clerk of court to notify the Department of Forensic Science of the final disposition of the criminal case. *Virginia Code* § 19.2-310.2:1 provides that, “[i]f the charge for which the sample was taken is dismissed or the defendant is acquitted at trial, the Department shall destroy the sample and all records thereof.” *Virginia Code* § 19.2-310.3:1 requires that the DNA sample be taken prior to the release from custody of the arrestee at a place designated by the magistrate. Samples are to be taken “in accordance with procedures adopted by the Department of Forensic Science,” § 19.2-310.3:1(A).

STATEMENT OF THE CASE

1. An unidentified assailant rapes and robs a woman who was walking to school.

On the morning of July 23, 1991, Laura M. Berry, an instructional assistant at Groveton Elementary School in Fairfax County, Virginia, was walking to school when she heard “running footsteps” behind her. Tr. 11/17/2004 at 224-27. She described how “all of a sudden” she felt a hand on her throat and face. Tr. 11/17/2004 at 227. The assailant told her to “shut up” and “not to move.” Tr. 11/17/2004 at 227. She tried to struggle, but the more she struggled the angrier her attacker became. His grip on her throat became harder. Tr. 11/17/2004 at 227. Berry dropped her purse and her attacker yelled for her to pick it up. Tr. 11/17/2004 at 227-28. Berry was “scared to death, [but she felt if she did what he asked, she] might live through this.” Tr. 11/17/2004 at 231.

Berry's attacker stayed behind her so she could not see his face. Tr. 11/17/2004 at 228. He dragged her to the bottom of a ravine. Tr. 11/17/2004 at 228. He pulled her shirt over her face, and told her to lie on the ground on her back. He ordered her to take off her shoes, pants and underwear. Tr. 11/17/2004 at 229. The man then put his penis in Berry's mouth and forced her to perform "oral sex" on him. He then got on top of her and put his penis in her vagina. Tr. 11/17/2004 at 229-31. Berry's attacker then told her to roll over and he penetrated her anus with his penis. Tr. 11/17/2004 at 231-32.

After raping and sodomizing Berry, the attacker ordered Berry to sit up. He made sure her shirt was still over her head, and then asked if she had any money. Tr. 11/17/2004 at 232. Berry removed \$63 from her wallet and handed it to the man. Tr. 11/17/2004 at 232.

After Berry handed her assailant the money, he told her to lie down and not move for 45 minutes or he would "come back and hurt [her]." Tr. 11/17/2004 at 233. After her attacker left, Berry started sobbing "pretty hysterically." Tr. 11/17/2004 at 330. She then prayed, and "sort of got [her]self together," dressed, walked to work, and called the police. Tr. 11/17/2004 at 233-34.

Berry was transported to Mount Vernon Hospital where she was examined by Emergency Room physician Dr. Val Chapman and interviewed by Fairfax County Police Investigator Steven G. Milefsky. Tr. 11/17/2004 at 242-43. She gave a general description of her assailant, providing his approximate height, weight, race and age. Tr. 11/17/2004 at 234-36.

Dr. Chapman treated Laura Berry for injuries and he used a Physical Evidence Recovery Kit (“PERK”) to collect specimens for evidence.³ He explained the purpose and use of the swabs, slides and tubes contained in the kit. Tr. 11/18/2004 at 112-22. Dr. Chapman personally “collect[ed] the specimens [from Berry], placing them in the [envelope], sealed [the envelope] while in the examination room and giving that to [Investigator] Milefsky.” Tr. 11/18/2004 at 123.

The police received the completed PERK on Laura Berry taken by Dr. Chapman on July 23, 1991, and it was stored and analyzed according to standard police procedures. Tr. 11/17/2004 at 244, 248-52, 257-59. For more than a decade, police were unable to solve the crime.

2. A “cold hit” links Anderson to the crime.

In early 2003, the Petitioner Angel Anderson was arrested for a rape in Stafford County, Virginia. As authorized by *Virginia Code* § 19.2-310.2:1, police took a sample of his DNA. *Anderson v. Virginia*, 650 S.E.2d 702, 704 (Va. 2007). After this sample was entered into the DNA databank and analyzed, it produced a “cold hit” with the DNA found in Berry’s PERK.⁴ Based on the cold hit, Police

³ Milefsky explained that the PERK was a self-contained kit provided by the State to doctors and that it was approved and used by the state forensic laboratory. Tr. 11/17/2004 at 243-44.

⁴ Anderson was previously convicted of rape. *See Anderson v. Warden*, 222 Va. 511, 281 S.E.2d 885 (1981).

obtained a further search warrant and obtained two buccal swabs that matched the DNA on Berry's PERK with Anderson's DNA.⁵ *Id.* Tr. 09/24/2004 at 37. This confirmed the initial match between the DNA recovered from Anderson's buccal swabs and the spermatozoa recovered from Berry's PERK. Tr. 11/18/2004 at 165-70, 178-79, 183-95. At trial, the forensic analysis report detailed that "[t]he probability of selecting an unrelated individual with a DNA profile matching that detected in the sperm fraction of the vaginal swabs from Laura M. Berry . . . is 1 in greater than 6.0 billion . . . in the Caucasian, Black and Hispanic populations." Prosecution Exh. 6 (certificate of analysis).

3. The petitioner is tried and convicted.

Anderson was then charged with rape, sodomy, and robbery. Before trial, he moved to suppress the DNA evidence, contending that it was the fruit of an illegal search under the Fourth Amendment. Tr. 09/24/2004 at 1-15. The trial court denied the motion. Tr. at 09/24/2004 at 18. Following a jury trial, Anderson was convicted of all three offenses. He was sentenced to serve life in prison for the rape, another life sentence for sodomy and ten years for robbery. In affirming the jury's sentencing recommendation, the trial court noted the petitioner's extensive criminal history, including a prior rape, a conviction for assault with a deadly weapon and carnal knowledge of a female under the age of sixteen. Tr. 02/18/2005 at 24-25.

⁵ The buccal swabs are obtained by swabbing a Q-tip on the inside of the suspect's cheek. Tr. 1/17/04 at 254.

On appeal, the Court of Appeals of Virginia affirmed his convictions. *Anderson v. Virginia*, 634 S.E.2d 372 (Va. Ct. App. 2006). The Supreme Court of Virginia likewise affirmed. *Anderson*, 650 S.E.2d at 708. In addressing Anderson's challenge to the DNA sample, the Court analogized the taking of a DNA sample on arrest to long-accepted booking procedures, such as the taking of fingerprints. *Id.* at 704-06. This Petition followed.

REASONS FOR DENYING THE WRIT

This Petition should be denied for several reasons. First, Anderson's challenge to the statute that allows the taking of a DNA sample upon arrest is premature. Challenges to such statutes have been few. Therefore, the issue should be allowed to percolate in the lower courts. Second, even if this Court were inclined to take the case on an "error correction" basis, it should decline to do so because no error occurred. Taking a DNA sample on arrest is no different from taking fingerprints upon arrest – a practice that is universally accepted. Moreover, the minimal nature of the intrusion, when weighed against the indisputable societal interests at stake, renders the taking of DNA samples reasonable under the Fourth Amendment. Finally, because the officers who took the petitioner's DNA acted upon a presumptively valid statute, Anderson is not entitled to suppression of the evidence.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS OR THE STATE COURTS OF LAST RESORT.

While this Court may find it appropriate at some point to address the Constitutional propriety of taking DNA samples upon arrest, granting review at this stage would be premature. Virginia's statute is clearly in the vanguard of a legislative trend.⁶ A number of States have enacted legislation similar to *Virginia Code* § 19.2-310.2:1.⁷ Other States are currently considering such legislation.⁸ Similarly at the federal level, in 2006, the DNA Fingerprint Act of 2005, S. 1606, 109th Cong. § 1004(A)(1)(A) was signed into law. *See* 42 U.S.C. § 14135a(a)(1)

⁶ The United Kingdom and most European countries already collect and store DNA from persons arrested for a wide range of offenses. D.H. Kaye, *THE CONSTITUTIONALITY OF DNA SAMPLING ON ARREST*, 10 CORNELL J. L. & PUB. POL'Y 455, 457 (2001).

⁷ *See Alaska Stat.* § 44.41.035(b)(6); *Arizona Rev. Stat. Ann.* § 13-610(K); *California Penal Code* § 296(a) (provision effective in 2009); *Kansas Stat. Ann.* § 21-2511(e); 15 *Louisiana Rev. Stat.* § 609(A); *Minnesota Stat.* § 299C.105(1) (3); *New Mexico Stat.* § 23-3-10; *North Dakota Cent. Code* § 31-13-03(1) (effective after July 31, 2009); *Tennessee Code Ann.* § 40-35-321(e); *Texas Code Ann.* § 411.1471(a)(2).

⁸ A number of other states are presently considering such legislation. *See* <http://www.ilga.gov/legislation> (Illinois: House Bill 1901, providing for DNA testing in felony arrests); <http://mlis.state.md.us/2008rs/billfile/hb0107.htm> (Maryland: House Bill 107, which would require police to collect DNA for persons arrested for certain offenses); <http://www.legislature.mi.gov> (Michigan: House Bill 4092); <http://www.ncga.state.nc.us> (North Carolina: House Bill 1697, providing for DNA tests for certain felonies); <http://www.scstatehouse.net> (South Carolina: Senate Bill 0142, requiring DNA sample for all lawful felony arrests); <http://www.legis.state.pa.us> (Pennsylvania: Senate Bill 1265, providing for DNA tests in certain sex crime arrests and other specified felonies). *See also* Kaye, 10 CORNELL J. L. & PUB. POL'Y at 458 n.11 (detailing proposed legislation in Connecticut, North Carolina and New York).

(authorizing the collection of DNA samples from persons in federal custody). Finally, some law enforcement agencies have begun to take DNA samples upon arrest, independently of any specific legislative authorization.⁹

At this stage, given the relative novelty of these statutes and procedures, court challenges to their constitutionality have been few. Other than the decision below, only one other appellate court has addressed the legality of obtaining a DNA sample from an arrestee. Minnesota's intermediate appellate court concluded that the compulsory profiling of defendants prior to conviction violated the Minnesota Constitution as well as the Fourth Amendment. *In the Matter of the Welfare of: C.T.L., Juvenile*, 722 N.W.2d 484, 492 (Minn. Ct. App. 2006). The outcome in Minnesota, therefore, would have been the same even without a challenge under the Fourth Amendment. Given the legislative trend, more challenges and decisions can be expected.

Moreover, even if there is a conflict, the decisions that are of gravest importance for purposes of this Court's review involve conflicts among United States Court of Appeals and/or state courts of last resort. *See* Sup. Ct. R. 10. A decision from Minnesota's intermediate appellate court does not qualify under the Rule, particularly when the Supreme Court of Minnesota has not addressed the

⁹ For example, in August, 1999, Salt Lake County Sheriff Aaron Kennard announced his office's intention to sample all arrestees' DNA and to seek federal funds for an expansion of forensic laboratory capacity to match the increase in demand for DNA analysis that would ensue. *See* Jennifer Dobner, *DNA Test Sought on All Booked at New Jail*, DESERT NEWS, Aug. 4, 1999, at A1.

issue, and when the decision also rests on an adequate and independent state ground. Thus, this Court should deny certiorari.

II. THE LOWER COURT CORRECTLY UPHELD THE SWAB OF THE PETITIONER'S MOUTH FOLLOWING A LAWFUL ARREST.

A. Swabbing the Mouth of Someone Arrested for a Violent Felony Is No Different Than Longstanding Routine Booking Procedures Such as Fingerprinting.

The Fourth Amendment of the Constitution protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” U.S. CONST. amend. IV. The respondent does not contest that obtaining DNA from a criminal suspect is a search for purposes of the Fourth Amendment. *See Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 616 (1989). The key question in this case is whether the search is reasonable. *See United States v. Knights*, 534 U.S. 112, 118 (2001) (“the touchstone of the Fourth Amendment is reasonableness”).

While DNA evidence is a relatively modern phenomenon, booking procedures, such as photographs and fingerprinting, have so long been a part of our justice system that they do not operate under any cloud of constitutional suspicion – even if this Court has not directly passed on their propriety. Fingerprints have been

widely used by law enforcement as part of the booking process for over 100 years.¹⁰

Photographing arrestees was also in widespread use at the turn of the century.¹¹

That the State has an interest in ascertaining the identity of an arrestee is beyond serious argument. As the Fourth Circuit aptly explained:

[w]hen a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it. We accept this proposition because the identification of suspects is relevant not only to solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes. This becomes readily apparent when we consider the universal approbation of “booking” procedures that are followed for every suspect arrested for a felony, whether or not the proof of a particular suspect’s crime will involve the use of fingerprint identification.

Jones v. Murray, 962 F.2d 302, 306 (4th Cir. 1992).¹²

DNA swabs are minimally invasive procedures analogous to fingerprints and photographs taken during booking. Lower courts have recognized the obvious

¹⁰ See, e.g., Andre A. Moenssens, FINGERPRINT TECHNIQUES 23 (1975).

¹¹ *Indiana ex rel. Bruns v. Clausmeier*, 57 N.E. 541, 542 (Ind. 1900) (rejecting challenge to Sheriff’s practice of photographing suspects).

¹² See also *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963) (noting that it is “elementary” that arrestees can be fingerprinted and photographed “as part of routine identification processes.”); *United States v. Kelly*, 55 F.2d 67, 70 (2nd Cir. 1932) (upholding fingerprinting of arrestees); 3 Wayne R. LaFave, *SEARCH AND SEIZURE*, § 5.3(c), at 168 (4th ed. 2004) (noting “the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution.”).

similarity between taking fingerprints and taking a DNA sample.¹³ The longstanding use of fingerprinting and other booking procedures demonstrates that DNA searches made during booking are “reasonable” searches under the Fourth Amendment.

Anderson unconvincingly attempts to distinguish the taking of a DNA sample from routine booking procedures such as fingerprinting. At the outset, he cannot contest the fact that DNA is a highly reliable means of determining the identity of an individual, nor can he contest that the police have an interest in determining that identity. For example, if a suspect flees and begins to live elsewhere under an assumed name, the DNA obtained under *Virginia Code* § 19.2-310.2:1 would conclusively establish his true identity.

Anderson maintains that “the taking of a DNA sample is more intrusive than obtaining fingerprints.” Pet. at 23. In fact, swabbing a person’s mouth is quicker and less troublesome than fingerprinting. Among other things, it does not require a suspect to wash any byproducts away, as required with fingerprint ink. Furthermore, fingerprinting “may constitute a much less serious intrusion upon personal security than other types of police searches and detentions.

¹³ See *Jones*, 962 F.2d at 306; *Nicholas v. Goord*, 430 F.3d 652, 671 (2nd Cir. 2005) (noting that a DNA sample “plays the same role as fingerprinting”); *United States v. Sczubelek*, 402 F.3d 175, 185-86 (3rd Cir. 2005), *cert. denied*, 126 S. Ct. 2930 (2006) (“[t]he governmental justification for [DNA] identification . . . relies on no argument different in kind from that traditionally advanced for taking fingerprints and photographs, but with additional force because of the potentially greater precision of DNA sampling and matching methods.”).

Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Davis v. Mississippi*, 394 U.S. 721, 727 (1969).¹⁴

Anderson also complains that a DNA search "can be used to determine if someone is predisposed to a certain type of disease, their sex, or familial lineage." Pet. at 24. Even if this is theoretically correct, the petitioner does not allege that this is actually being done. Nor does he explain why the government would have any particular interest in a suspect's "lineage" or "disease predisposition." His concern in this regard is purely abstract.

Furthermore, fingerprinting is not infallible. The defendant may suffer from blisters or cuts that prevent fingerprinting, the prints may be improperly taken or lost, or the electronic fingerprinting equipment may fail. See Federal Bureau of Investigation, *THE SCIENCE OF FINGERPRINTS: CLASSIFICATION AND USES* 120-30 (1976) (detailing problems that may arise with fingerprinting). Following this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), fingerprinting has been attacked in various courts. See, e.g., *United States v. Crisp*, 324 F.3d 261, 265-71 (4th Cir. 2003) (citing cases and upholding admissibility of fingerprint evidence). While these challenges universally have been rejected, their existence, combined with possible problems with a particular set of

¹⁴ See also *Jones*, 962 F.2d at 307 (finding that even the DNA blood test sampling procedure involves "virtually no risk, trauma, or pain").

fingerprints, warrants an “insurance policy” to endure proper identification of those charged with the most serious crimes under Virginia law.

Anderson stresses that the Fourth Amendment, subject to certain exceptions, requires a warrant. *See Skinner*, 489 U.S. at 619. While the Court has never explicitly labeled booking procedures as an exception to the general requirement of a warrant, that is in effect what they are and have been for more than a century. *See Illinois v. LaFayette*, 462 U.S. 640, 648 (1983) (upholding inventory searches of personal belongings of an arrestee “as part of the routine procedure incident to incarcerating an arrested person”). Because obtaining a DNA sample is analogous to fingerprinting and photographing, and because the state unquestionably has an interest in determining a suspect’s identification, the search was reasonable under the Fourth Amendment.

B. A Balancing of Interests Justifies the Minimal Intrusion of DNA Sampling.

In addition to longstanding practice, another mode of assessing the reasonableness of a search is to assess, on the one hand, the degree to which a search intrudes on an individual’s privacy and, on the other hand, the degree to which it advances legitimate governmental interests.¹⁵

¹⁵ *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999); *Vernonia Sch. District 47J v. Acton*, 515 U.S. 646, 652-53 (1995). *See also Terry v. Ohio*, 392 U.S. 1, 19 (1968) (describing the “central inquiry under the Fourth Amendment” as “the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.”).

A lawful arrest results in a diminished expectation of privacy. As noted above, under settled law, the arrestee can be subjected to searches incident to the arrest and to booking procedures. A lawful arrest justifies certain impositions that could not be visited upon citizens who are not under arrest. For example, upon “a lawful custodial arrest, a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.” *United States v. Robinson*, 414 U.S. 218, 235 (1973). As the Fourth Circuit noted, “[w]ith the person’s loss of liberty upon arrest comes the loss of at least some, if not all, rights to personal privacy otherwise protected by the Fourth Amendment.” *Jones*, 962 F.2d at 306.

Against this diminished expectation of privacy, the government’s interests are compelling. First, the government has an obvious interest in ensuring the identity of the arrestee, in determining whether he may be wanted in another jurisdiction, and in preserving identifiers if the suspect flees. Second, the government has a compelling interest in solving past crimes, particularly “cold cases” such as the case at bar. It is also quite clearly in the interest of the government to exonerate innocent persons who may be suspected of a crime, or even persons who have been wrongfully convicted of a crime they did not commit. The government has a concomitant interest in devoting its scarce resources towards the most productive investigative leads rather than squandering them to investigate an innocent person.

The balancing is all the more reasonable because of the limitations found in the statute. DNA samples are taken only for the most serious crimes under Virginia law, and, if the suspect is acquitted, the sample must be destroyed. *Virginia Code* § 19.2-310.2:1. Moreover, the statute does not permit DNA sampling merely because an officer has found probable cause to arrest. Rather, the DNA sample can be obtained only after a magistrate or a grand jury have found probable cause. *Id.* Finally, Virginia has enacted procedural protections to guard against the unauthorized use of DNA. *Virginia Code* § 19.2-310.6 (providing criminal penalties for the unauthorized use or dissemination of DNA). Balancing the arrestee's diminished expectation of privacy against these compelling governmental interests, the search that occurred here is reasonable under the Fourth Amendment.

C. The Authority Offered by the Petitioner is Inapposite.

This Court's jurisprudence recognizes that a person who is properly arrested does not stand on the same constitutional footing as a person who is going about his or her business, free of any suspicion of criminal activity. Thus, a person who is arrested can be handcuffed, and can be searched incident to arrest. *Robinson*, 414 U.S. at 235. The person's belongings or automobile can properly be subjected to an

inventory search.¹⁶ Police would not be free to engage in such practices for persons who are not under arrest. “It is the fact of the lawful arrest which establishes the authority to search.” *Robinson*, 414 U.S. at 235.

The petitioner seeks to marshal “special needs” cases in support of his argument that the DNA swab was unreasonable. Pet. at 14-20. Those cases are inapposite because they ignore the distinction between the searches that flow from a proper arrest and random, suspicionless searches of the citizenry at large. First, the petitioner relies on *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). In *Edmond*, this Court invalidated a police checkpoint conducted to interdict illegal drugs. *Id.* at 34, 48. No individualized suspicion was necessary to stop the motor vehicles. This Court noted that searches and seizures are “ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.” *Id.* at 37. The Court detailed certain exceptions to this settled principle but ultimately “decline[d] to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control.” *Id.* at 40-44. Anderson was not plucked from the street and ordered to provide a sample of his DNA. His DNA was obtained following a valid arrest. In *Edmond*, had the police conducted a vehicle search

¹⁶ *Lafayette*, 462 U.S. at 646 (“At the stationhouse, it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed.”); *Florida v. Wells*, 495 U.S. 1, 4 (1990) (discussing propriety of inventory search for contents of automobile).

following a lawful arrest, of course, the search would have posed no Fourth Amendment problem. *See, e.g., Wells*, 495 U.S. at 4.

Similarly in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), this Court invalidated a scheme that tested pregnant women's urine, without the women's consent, for the presence of drugs. *Id.* at 70. The evidence was turned over to the police. *Id.* at 77. This Court concluded that this scheme was invalid. *Ferguson* is also irrelevant, because unlike the petitioner here, the women had not been arrested. For example, if the police in *Ferguson* had fingerprinted hospital patients without any suspicion of wrongdoing, that measure would be invalid under the Fourth Amendment. However, fingerprinting and photographing suspects who are properly arrested – as well as sampling their DNA – implicates different concerns than the suspicionless searches at issue in *Ferguson* and *Edmond*. The petitioner here was properly arrested for rape and the search that flowed from his arrest was reasonable under the Fourth Amendment.

Skinner, 489 U.S. at 616, is irrelevant for the same reason that *Edmond* and *Ferguson* are irrelevant. In *Skinner*, the Court upheld suspicionless searches of blood and urine samples for railroad employees. *Id.* at 633-34. The persons tested in *Skinner* were ordinary railroad employees, not criminal suspects under a proper arrest like the petitioner.

Finally, the petitioner complains that his DNA sample, once obtained, may be made available to law-enforcement in furtherance of an unrelated criminal

investigation. Pet. at 19. While that is correct, it is not constitutionally problematic. Just as a fingerprint card, properly generated based on a lawful custodial arrest, need not be destroyed at any particular time, neither must a suspect's DNA swab. For that matter, law enforcement can later make use of a "mug shot" of an arrestee. The storage and use of the DNA sample – or of fingerprints and "mug shots" – impose no additional intrusion upon a criminal suspect. Under the petitioner's logic, the police would be required to artificially segregate an arrestee's fingerprint card and photograph to a particular offense and to a particular jurisdiction. Such a restriction defies common sense and long-settled practices.

III. REVIEW BY THIS COURT WILL NOT AFFORD THE PETITIONER ANY RELIEF.

As noted above, the Supreme Court of Virginia correctly applied this Court's precedent and upheld the Virginia statute. Nevertheless, even if one assumes that the Virginia statute at issue is constitutionally problematic, it would still not warrant the drastic remedy of suppression.

Like the petitioner here, the defendant in *Illinois v. Krull*, 480 U.S. 340 (1987), sought the suppression of evidence obtained against him. Pursuant to an Illinois statute that authorized the warrantless search of the defendant's business records, detectives examined the records of a wrecking yard and found evidence that some of the cars on the lot were stolen. *Id.* at 343. On appeal, state courts held that the statute was unconstitutional and, therefore, the fruits of the search had to

be suppressed. *Id.* at 344-46. This Court concluded that suppression of the evidence was not appropriate based on the officer's good faith reliance on the presumptively valid statute that authorized the search. The Court observed that

The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant. Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written.

Id. at 349-50.

The Court in *Krull* noted that the officers could not in good faith rely on a statute if "the legislature wholly abandoned its responsibility to enact constitutional laws" or if a "reasonable officer should have known that the statute was unconstitutional." *Id.* at 341, 355. The reasoning in *Krull* is consistent with this Court's earlier decision in *Michigan v. DeFillippo*, 443 U.S. 31 (1979), where the Court noted that

Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality — with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.

Id. at 38.

The officers here were reasonable in relying on the statute at issue. In addressing the petitioner's constitutional challenge to this statute, the Supreme Court of Virginia *unanimously* upheld its validity. It is hard to see how police officers should be expected to have greater legal acumen than possessed by the combined state supreme court – along with a unanimous panel decision from the state intermediate appellate court. Furthermore, in the context of challenges to statutes requiring *post-conviction* DNA sampling, the courts have overwhelmingly upheld such laws. *See United States v. Kincade*, 379 F.3d 813, 830-31 & n.24 (9th Cir. 2004) (en banc) (listing over 30 such cases). While the Virginia statute at issue differs from such statutes in that it requires a DNA sample on arrest for certain offenses, rather than after conviction, this authority strongly supports the reasonableness of the officer's reliance on a presumptively valid statute.

Even if one assumes that the statute suffers from some constitutional defect, the officers could objectively rely on its constitutionality. Because the officers relied in good faith on a presumptively valid statute, suppression of the DNA evidence would not be appropriate.

CONCLUSION

The Petition for a Writ of Certiorari should be **DENIED**.

Respectfully submitted:

COMMONWEALTH OF VIRGINIA

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PROOF OF SERVICE

On April 16, 2008, I served one copy of the RESPONDENT'S BRIEF IN OPPOSITION upon all parties required to be served, by United States Postal Service in accordance with Rule 29(3), as follows:

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