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March 2, 2020

The Honorable Susan Sabers
Circuit Court Judge
Minnehaha County Courthouse
425 N. Dakota Ave.
Sioux Falls, SD 57104

RE: State of South Dakota v. Theresa Rose Bentaas, CRI. 19-1657

Dear Judge Sabers:

The State of South Dakota, by and through the undersigned, respectfully submits this letter brief in response to Defendant's Motion to Suppress.

FACTS

On February 28, 1981, police officers with the Sioux Falls Police Department responded to a call of a baby in the ditch in the area of what is now Sycamore Avenue, approximately one-half mile south of 26th Street. The newborn had the placenta still attached and lying next to the baby was a pair of women's panties, a shirt, and Kleenex type material, all with blood on them. Also located on the baby's legs were what appeared to be long dark hairs. The baby was deceased. The baby's body was taken to the morgue for an autopsy, which was performed by Dr. Richard Schultz and Dr. Brad Randall, and it was determined that the baby was born alive and that the cause of death was most likely exposure and failure to assist the baby in maintaining an airway. Detectives followed numerous leads in 1981 but could not find the mother of the baby and the investigation eventually stalled. In the

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Spring of 2009, Sioux Falls Police Detective Mike Webb (Webb) decided to take another look at the case, hoping to obtaining DNA evidence for testing since that technology did not exist in 1981. Webb learned that all of the testable evidence had been destroyed in 1995. Webb, having had experience and training in DNA through basic and advanced homicide schools, as well as cold case investigation, learned that DNA can be extracted from the bones and tissue of the body. Webb arranged for the exhumation of baby Andrew and he was disinterred and sent to the North Texas University Science Center where they took samples and developed a DNA profile for comparison purposes. The DNA profile was forwarded to the South Dakota Forensics Lab and the DNA profile was approved by the South Dakota Attorney General's Office and the South Dakota State Lab for comparison with profiles in the South Dakota DNA database. No matches were ever found from the comparisons with profiles in the DNA database, but since recent technology had been developed through genealogy, and DNA profiles had been successful in solving cold cases across the country, the Sioux Falls Police Department submitted the DNA sample to Parabon NanoLabs Inc.

Parabon completed a Snapshot Genetic Genealogy and a Genetic Genealogy Report and found two possible genetic familial matches using GEDMatch.com, which is an open source website where participants upload genetic profiles that are used for genealogical research by amateur and professional researchers. Donor one matched between sixth to seventh degree relationship and donor two matched between sixth to eighth degree relationship. Parabon advised that donor one was adopted but believed his biological mother was Pamela A Josten (deceased).

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Parabon also advised the baby was a descendant of Mathis Krantz (deceased) and Lucia Brech (deceased), or possibly a descendant of Lucia's parents based on a limited genealogical family tree completed on donor two. Due to the limited genetic information, Parabon could not confirm if donor one or donor two were related to the baby's mother or father.

Detective Mertes (Mertes) then used Ancestry.com, findagrave.com, and numerous other public domain research websites to construct a family tree, which eventually led to the discovery of marriage between Paulette Brech and William Josten, which Mertes believed to be the genetic link between donor one and donor two. Mertes also discovered three living children from Paulette and William, and one of the offspring was identified as the defendant, Theresa R. Josten, who had married Dirk W Bentaas in August of 1987. Mertes then checked Sioux Falls Geographic Information System (GIS) property owner list, which showed they owned the house located at 3308 South Saguaro Avenue, Sioux Falls, Minnehaha County, South Dakota. Mertes drove by residence on February 4, 2019 and observed two sets of tire tracks in the snow indicating two vehicles are at the residence, which he believed to be consistent with two people living at the residence.

Mertes conducted a "trash pull" on February 11, 2019 and seized numerous beer and water containers and used cigarette butts. Mertes also located the wrapping for a package addressed to Theresa Bentaas. Numerous items were sent to the South Dakota Forensic Lab (SDFL) for DNA testing. Mertes also discovered Theresa and Dirk had two living children, one son and one daughter, neither of who still lived with them in the house, but the son did live in Sioux Falls. On February

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15, 2019, Mertes received the SDFL report from the items sent in for testing and the report stated that female DNA was located on a water bottle, Coors Light can and cigarette butts. The report stated the female DNA could not be excluded as being from the biological mother of the baby. The report also stated that male DNA was located on a water bottle and that DNA could not be exclude as being the biological father of the baby. The report further stated a second male DNA was located on a Samuel Adams Cold Snap bottle, which was consistent with being from the same paternal lineage (i.e., a brother to the baby).

On February 27, 2019, Mertes interviewed Dirk and during that interview Dirk admitted the defendant had a bump and then no bump around the time the baby was found. Dirk admitted to hearing about the baby being found but did not believe the defendant was capable of doing such an act. A buccal swab was collected from Dirk. On February 27, 2019, Webb spoke with the defendant at her residence. The defendant agreed to speak about this incident and it was explained to her that they were going to discuss what happened in 1981. The defendant admitted to being pregnant in 1980-1981 and that she hid the pregnancy from family and friends. The defendant also admitted she had the baby in her apartment alone and then drove the baby to the place where he was later discovered. The defendant stated the sheets and blankets must have been from her apartment and the baby was on the passenger seat while she drove to the edge of town. The defendant stated she thought the baby was starting to cry and was moving on the passenger seat but she couldn't remember for sure. When asked what she was thinking when she drove away from the ditch, the defendant said she was sad, scared, and she ran from it

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and it was not smart. The defendant admitted she saw the news after the discovery and was in denial that she was the one responsible. On March 4, 2019 Mertes received the results from the buccal swab samples of the defendant and Dirk Bentaas and the results showed that the defendant and Dirk Bentaas are 18.2 trillion times more likely to have the same genetic results with Baby "Andrew" John Doe than an unrelated person in the general population and that there is an extremely strong evidence to support biological relationship between the defendant, Dirk Bentaas, and Baby "Andrew" John Doe.

ARGUMENT

"The Fourth Amendment to the United States Constitution and Article VI, Section 11 of the South Dakota constitution prohibit unreasonable searches and seizures by government officials." State v. Schwartz, 2004 SD 123, ¶ 11, 689 N.W.2d 430, 434. "Generally, 'police officers must obtain a warrant based on probable cause issued by a judge in order to seize someone's property.'" Id. (quoting *Christensen,* 2003 SD 64, ¶ 11, 663 N.W.2d at 694; *see Terry v. Ohio,* 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889, 905 (1968). But the Fourth Amendment only applies if the person has a "reasonable expectation of privacy in the place searched or the article seized.'" Id. (quoting *Christensen,* supra) (citing *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). Both the United States Supreme Court and the South Dakota Supreme Court have declined to adopt a blanket rule giving trash constitutional protections against unreasonable searches and seizures.

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The United States Supreme Court squarely addressed the question of whether the Fourth Amendment extends to trash in *California v. Greenwood,* 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). In *Greenwood,* a police investigator received information suggesting that the respondent, Greenwood, was involved in drug use and trafficking. The investigator proceeded to conduct a search of Greenwood's trash, and she found items indicative of illegal drug use. After describing in an affidavit the items she found in Greenwood's trash, the investigator obtained a warrant and searched Greenwood's residence. The search yielded large quantities of marijuana and cocaine. A California court dismissed the charges against Greenwood on the grounds that the warrantless search of his trash violated the Fourth Amendment.

The Supreme Court reversed, concluding that the Fourth Amendment did not provide a blanket prohibition against "the warrantless search and seizure of garbage left for collection outside the curtilage of a home." *Id.* at 37, 108 S.Ct. 1625. Specifically, the *Greenwood* Court held such a search would only violate the Fourth Amendment if "respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable." *Id.* at 39, 108 S.Ct. 1625. Finding such an expectation lacking, the Supreme Court noted:

> It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it, respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.

Id. at 40–41, 108 S.Ct. 1625 (internal citations omitted).

Perhaps recognizing the similarity between this case and the facts in *Greenwood,* the Schwartzes do not attempt to argue that the trash pulls conducted by Agent Even were unreasonable according to the Fourth Amendment. Rather, they urge this Court to interpret Article VI, Section 11 of the South Dakota constitution as prohibiting the search of their trash without a warrant. At the outset, we note the language

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> prohibiting unreasonable searches and seizures in our state constitution closely tracks the language of the Fourth Amendment.[1] The similarity in language is not by itself dispositive, however, as this Court may interpret the South Dakota Constitution as providing greater protection to citizens of this state than is provided them under the federal Constitution as interpreted by the United States Supreme Court. *State v. Opperman,* 247 N.W.2d 673, 674 (S.D.1976).
>
> The majority of state courts follow the Supreme Court's decision in *Greenwood* and espouse the rationale that individuals who place their garbage for public collection do not have a reasonable expectation of privacy therein. *See* Kimberly J. Winbush, Annotation, *Searches & Seizures: Reasonable Expectation of Privacy in Contents of Garbage or Trash Receptacle,* 62 A.L.R. 5th 1 (1998); *see also Rikard v. State,* 354 Ark. 345, 123 S.W.3d 114 (2003); *State v. Jones,* 2002 ND 193, 653 N.W.2d 668; *State v. Donato,* 135 Idaho 469, 20 P.3d 5 (2001); *State v. Skola,* 634 N.W.2d 687 (Iowa Ct.App.2001). Those jurisdictions who have decided to part company with the *Greenwood* decision have generally relied upon unique language in their state constitution to extend protection to trash intended for collection. *See State v. Goss,* 150 N.H. 46, 834 A.2d 316 (2003); *State v. Morris,* 165 Vt. 111, 680 A.2d 90 (1996); *State v. Boland,* 115 Wash.2d 571, 800 P.2d 1112 (1990).
>
> We agree with the majority of states and decline to adopt a blanket rule extending the constitutional protection against unreasonable searches and seizures to trash. Rather, we will employ our general two-part test to determine whether an individual has a sufficient privacy interest in the area searched for constitutional protection to apply: "(1) whether the defendant has exhibited an actual subjective expectation of privacy and (2) whether society is willing to honor this expectation as being reasonable." *Cordell v. Weber,* 2003 SD 143, ¶ 12, 673 N.W.2d 49, 53 (quoting *State v. Lowther,* 434 N.W.2d 747, 754 (S.D.1989)). This two-part test is essentially the same as the whether "respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable" analysis utilized by the Supreme Court in *Greenwood. See* 486 U.S. at 39, 108 S.Ct. at 1628.

State v. Schwartz, 2004 S.D. 123, ¶¶ 13-17, 689 N.W.2d 430, 434–36.

The defendant bears the burden of showing the legitimacy of his claimed privacy interest in the trash that he set out for collection. *Id.* at ¶ 18 (citing *State v. Wilson,* 2004 SD 33, ¶ 27, 678 N.W.2d 176, 184) (recognizing that an individual

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asserting privacy interest bore the burden of showing the legitimacy of the claimed interest).

The defendant has admittedly failed to meet that burden here, conceding the defendant had no expectation of privacy in her trash pursuant to *Schwartz*, but rather asks this court to extend the rational of *Schwartz* and find constitutional protection for the warrantless extraction and creation of a DNA profile from the genetic material left on the trash. The South Dakota Supreme Court has not addressed the issue raised by the defendant, but courts in other jurisdictions have addressed the issue and have found a person has no reasonable expectation of privacy in items that are abandoned or discarded or in the discarded genetic material left on the items that have been abandoned or discarded.

> In similar circumstances, courts in other jurisdictions have ordained that abandonment had occurred. *See Piro v. State,* 146 Idaho 86, 190 P.3d 905 (Ct.App.2008) (holding that a suspect did not have a reasonable expectation of privacy in his discarded genetic material left on a water bottle in an interrogation room); *State v. Glynn,* 38 Kan.App.2d 437, 166 P.3d 1075 (2007) (holding there was no constitutional violation or infringement of privacy rights when the police used a lawfully obtained DNA profile from one case to investigate and charge the DNA donor in a subsequent and different case); *Commonwealth v. Perkins,* 450 Mass. 834, 883 N.E.2d 230 (2008) (holding that a defendant did not have a reasonable expectation of privacy in his abandoned cigarette butts or soda can that he left in an interrogation room and were subsequently tested for his DNA); *Commonwealth v. Cabral,* 69 Mass.App.Ct. 68, 866 N.E.2d 429 (2007) (holding a defendant did not maintain an expectation of privacy in spit he expectorated on a public sidewalk, or the DNA retrieved from his saliva; objectively, society would not recognize his expectation of privacy in his spittle as reasonable); *Commonwealth v. Ewing,* 67 Mass.App.Ct. 531, 854 N.E.2d 993 (2006) (holding that a defendant did not have a reasonable expectation of privacy in cigarette butts that he voluntarily abandoned as trash, and the DNA evidence obtained was admissible, absent evidence of coerced abandonment, even if the defendant's trash was obtained under a ruse); *People v. Sterling,* 57 A.D.3d 1110, 869 N.Y.S.2d 288 (2008) (holding that once the

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> police lawfully obtained a discarded milk carton from an imprisoned defendant, he no longer retained any expectation of privacy in his discarded genetic material); *People v. Ayler,* 5 Misc.3d 1020, 799 N.Y.S.2d 162 (N.Y.Sup.Ct.2004) (holding that a defendant did not have any expectation of privacy in his discarded cigarette butts seized from an interrogation room, as well as the DNA results obtained therefrom); *People v. Barker,* 195 Misc.2d 92, 757 N.Y.S.2d 692 (Monroe County Ct.2003) (holding that a jailed defendant had no reasonable expectation of privacy in a plastic spoon discarded in his cell or his DNA profile gleaned from the spoon after it was thrown away); *State v. Athan,* 160 Wash.2d 354, 158 P.3d 27 (2007) (holding that a police ruse to obtain DNA from a suspect's saliva after his licking an envelope was constitutional and the DNA evidence was admissible under both state and federal constitutions, because the defendant could not maintain a reasonable expectation of privacy in his discarded genetic material, there was no recognized privacy interest in voluntarily discarded saliva, and there exists a legitimate government purpose in collecting a suspect's discarded DNA for identification purposes).

Williamson v. State, 413 Md. 521, 537–39, 993 A.2d 626, 636–37 (2010).

Furthermore, the United States Supreme Court has determined that processing a DNA sample's 13 loci "does not intrude on a person's privacy in a way that would make his DNA identification unconstitutional." Maryland v. King, 569 U.S. 435, 464, 133 S. Ct. 1958, 1979, 186 L. Ed. 2d 1 (2013).

> The task of identification necessarily entails searching public and police records based on the identifying information provided by the arrestee to see what is already known about him. The DNA collected from arrestees is an irrefutable identification of the person from whom it was taken. Like a fingerprint, the 13 CODIS loci are not themselves evidence of any particular crime, in the way that a drug test can by itself be evidence of illegal narcotics use. A DNA profile is useful to the police because it gives them a form of identification to search the records already in their valid possession. In this respect the use of DNA for identification is no different than matching an arrestee's face to a wanted poster of a previously unidentified suspect; or matching tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee's fingerprints to those recovered from a crime scene. See Tr. of Oral Arg. 19. DNA is another metric of identification used to connect the arrestee with his or her public persona, as reflected in records of his or her actions that are available to the police. Those records may be linked to the

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> arrestee by a variety of relevant forms of identification, including name, alias, date and time of previous convictions and the name then used, photograph, Social Security number, or CODIS profile. These data, found in official records, are checked as a routine matter to produce a more comprehensive record of the suspect's complete identity. Finding occurrences of the arrestee's CODIS profile in outstanding cases is consistent with this common practice. It uses a different form of identification than a name or fingerprint, but its function is the same.

Maryland v. King, 569 U.S. 435, 451–52, 133 S. Ct. 1958, 1972, 186 L. Ed. 2d 1 (2013).

> And even if non-coding alleles could provide some information, they are not in fact tested for that end. It is undisputed that law enforcement officers analyze DNA for the sole purpose of generating a unique identifying number against which future samples may be matched. This parallels a similar safeguard based on actual practice in the school drug-testing context, where the Court deemed it "significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic." *Vernonia School Dist. 47J,* 515 U.S., at 658, 115 S.Ct. 2386. 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 464–65, 133 S. Ct. at 1979.

Despite *King*, the defendant cites to a Fourth Circuit case, *United States v. Davis*, 690 F.3d 226, 245 (4th Cir.2012), which was decided before *King*, that held the warrantless extraction and testing of the defendant's DNA profile constituted an unreasonable search and seizure under the Fourth Amendment. However, the underlying facts in *Davis* are distinguishable from the facts present here and the decision itself has also been called into question in *Raynor v. State,* 440 Md. 71, 90, 99 A.3d 753, 764 (2014) and *Com. v. Arzola,* 470 Mass. 809, 26 N.E.3d 185 (2015).

In *Raynor*, the victim of an unsolved rape contacted police two years after the offense and told them she suspected the defendant was the perpetrator. The police

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asked the defendant to come to the police station for an interview and he agreed to meet with them. At some point during the interview the police asked for the defendant's consent for a DNA sample for comparison to DNA evidence collected at the scene of the rape and the defendant declined. When the interview was over the defendant left the station and the police, who had noticed the defendant rubbing his bare arms against the armrests of his chair, took swabs of the armrests in an attempt to collect his DNA. The police submitted the swabs to their crime lab for DNA analysis and the analysis revealed that the DNA extracted from the swabs matched DNA samples investigators had collected from the rape. On appeal, the defendant raised the following issues:

> 1. Whether, under the Fourth Amendment ..., a free citizen maintains an objectively reasonable expectation of privacy in the DNA found in genetic material involuntarily and unknowingly deposited through ordinary biological processes?
>
> 2. Whether, under the Fourth Amendment ..., the determination of an individual's expectation of privacy requires consideration of the privacy interest in the information obtained, and not just the privacy interest in the place in which it was found?

Raynor v. State, 440 Md. 71, 80–81, 99 A.3d 753, 758 (2014) (note, when the Court granted certiorari it stayed the appeal pending resolution by the U.S. Supreme Court of Maryland v. King, 569 U.S. 435, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013)).

The *Raynor* court ultimately found the testing of the DNA did not constitute a search for the purposes of the Fourth Amendment and the defendant was not entitled to suppression of the DNA evidence or any fruits derived therefrom. In so finding, the court said:

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> The *Davis* Court's conclusion that the DNA testing at issue in that case constituted a Fourth Amendment search rested on what may now be a faulty premise, given the discussion in *King* that DNA analysis limited to the 13 junk loci within a person's DNA discloses only such information as identifies with near certainty that person as unique.[9]

Raynor v. State, 440 Md. 71, 90, 99 A.3d 753, 764 (2014) (n.9, for the reasons we have discussed so far, the analysis of the junk loci contained within the DNA collected from the chair is not a Fourth Amendment search because no individual has a reasonable expectation of privacy in his or her identifying physical characteristics. It therefore matters not that, at the time of the analysis, Petitioner was, in the words of *Davis,* a "free person.").

> The *Katz* test consists of two parts, "each of which must be satisfied in order for the Fourth Amendment to apply: (1) a defendant must 'demonstrate an actual, subjective expectation of privacy in the item or place searched' and (2) 'prove that the expectation is one that society is prepared to recognize as reasonable.' " *Walker,* 432 Md. at 605, 69 A.3d 1066 (quoting *Corbin v. State,* 428 Md. 488, 499, 52 A.3d 946 (2012)); *see also Williamson v. State,* 413 Md. 521, 534, 993 A.2d 626 (2010). "A person demonstrates a subjective expectation of privacy by showing that he or she sought 'to preserve something as private.' " *Williamson,* 413 Md. at 535, 993 A.2d 626 (quoting *McFarlin v. State,* 409 Md. 391, 404, 975 A.2d 862 (2009)). An objectively reasonable expectation of privacy, by contrast, has " 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society,' and constitutes 'more than a subjective expectation of not being discovered.' " *Id.* (quoting *Rakas v. Illinois,* 439 U.S. 128, 143–44 n. 12, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)). " We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable." *Ortega,* 480 U.S. at 715, 107 S.Ct. 1492. Nonetheless, common experience and social norms bear upon our assessment of whether one has an objectively reasonable expectation of privacy in a particular item or place. *See California v. Greenwood,* 486 U.S. 35, 51 n. 3, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988) ("Expectations of privacy are established by general social norms.") (citation omitted); 1 Wayne R. LaFave, Search and Seizure § 2.1(d), at 587 (5th ed. 2012) ("[I]t is necessary to look to the customs and values of the past and present ....[,]

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the structure of society, the patterns of interaction, [and] the web of norms and values.") (quotations and citations omitted).

Petitioner relies upon the *Katz* test to argue that the analysis of the identifying loci within his DNA implicated the protections of the Fourth Amendment. He first claims that he demonstrated a subjective expectation of privacy in his DNA when, during the course of his interview with Trooper Wenger and Sergeant DeCourcey, he declined to consent to the taking of a DNA sample, thereby asserting a belief that "his genetic markers would not be inspected." The State accepts as much, and so do we.

Petitioner further claims, as he must for his argument to prevail, that his expectation of privacy in his DNA, under these circumstances, was objectively reasonable. In making that argument, he urges us to "focus ... squarely on the 'treasure map' ... of information capable of being culled from" one's DNA. He claims that, contrary to the conclusion of the Court of Special Appeals, individuals have a "much greater" expectation of privacy in their DNA than their fingerprints because DNA contains "a massive amount of deeply personal information," including "medical history, family history, disorders, behavioral characteristics, and ... propensity to ... commit certain behaviors in the future."

The State counters that Petitioner did not possess an objectively reasonable expectation of privacy in the information the police analyzed because they tested only 13 junk loci, which, unlike other regions of the DNA strand, do not disclose the intimate genetic information about which Petitioner expresses concern. Instead, those loci reveal only information related to a person's identity. In this regard, the State argues, law enforcement's testing of the DNA evidence in this case is indistinguishable from its testing of fingerprints left unknowingly upon surfaces in public places, which does not implicate the protections of the Fourth Amendment.

We agree with the State. The Supreme Court has made clear that one's identifying physical characteristics are generally outside the protection of the Fourth Amendment. *See United States v. Dionisio,* 410 U.S. 1, 14, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); *see also State v. Athan,* 160 Wash.2d 354, 158 P.3d 27, 37 (2007) (en banc) ("Physical characteristics [that] are exposed to the public are not subject to Fourth Amendment protection.") (citing *United States v. Mara,* 410 U.S. 19, 21, 93 S.Ct. 774, 35 L.Ed.2d 99 (1973)). The analysis of such physical characteristics by law enforcement "involves none of the probing into an individual's private life and thoughts that marks" a Fourth Amendment search. *See Dionisio,* 410 U.S. at 15, 93 S.Ct. 764 (citation omitted).

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> Consequently, the character of the information specifically sought and obtained from the DNA testing of Petitioner's genetic material—whether it revealed only identifying physical characteristics—is paramount in assessing the objective reasonableness of his asserted privacy interest.
>
> With the advent of DNA testing technology, law enforcement has a highly effective means of identifying an individual as "unique" in the general population and thereby identifying, or excluding, a criminal suspect as the actor in the commission of a crime. *King,* 133 S.Ct. at 1966 (noting the view among "law enforcement, the defense bar, and the courts" of "DNA testing's 'unparalleled ability both to exonerate the wrongly convicted and to identify the guilty'") (quoting *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne,* 557 U.S. 52, 55, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009)). As described in *King,* "[t]he current standard for forensic DNA testing relies on an analysis of the chromosomes located within the nucleus of all human cells. The DNA material in chromosomes is composed of 'coding' and 'non-coding' regions." *Id.* at 1966–67 (quotations and citation omitted). Coding regions—otherwise known as genes—"contain the information necessary for a cell to make proteins." *Id.* at 1967 (citation omitted). Non-coding regions, which do not relate directly to the production of proteins, are generally referred to as junk DNA; it is these regions of junk DNA that are "used with near certainty to identify a person." *Id.* Although highly useful for identification purposes, junk DNA "does not show more far-reaching and complex characteristics like genetic traits." *Id.; accord Williamson,* 413 Md. at 543, 993 A.2d 626 (noting that the 13 junk loci consist of stretches of DNA that "do not presently recognize traits" and "are not associated with any known physical or medical characteristics") (citation omitted); *State v. Belt,* 285 Kan. 949, 179 P.3d 443, 448 (2008) ("In essence, the loci are merely addresses....").

Id. at 83–86, 99 A.3d at 760-61 (footnotes omitted).

> Indeed, it is generally accepted that analysis of a person's DNA, solely for purposes of identification, reveals no more information about that person than does analysis of his or her latent fingerprints. *King,* 133 S.Ct. at 1963–64 ("The only difference between DNA analysis and fingerprint databases is the unparalleled accuracy DNA provides."); *accord Williamson,* 413 Md. at 542, 993 A.2d 626 (noting that DNA tested for identification purposes is "akin to ... a fingerprint") (citation omitted). In her concurring opinion in *State v. Raines,* 383 Md. 1, 857 A.2d 19 (2004), Judge Raker explained the functional similarities between DNA used for identification purposes and fingerprints:

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> DNA type need be no more informative than an ordinary fingerprint. For example, the [13 junk] loci ... are noncoding, nonregulatory loci that are not linked to any genes in a way that would permit one to discern any socially stigmatizing conditions. The "profile" of an individual's DNA molecule ... is a series of numbers. The numbers have no meaning except as a representation of molecular sequences at DNA loci that are not indicative of an individual's personal traits or propensities. In this sense, the [13 loci are] very much like a social security number—though it is longer and is assigned by chance, not by the federal government. In itself, the series of numbers can tell nothing about a person. But because the sequence of numbers is so likely to be unique ..., it can be linked to identifiers such as name, date of birth, or social security number, and used to determine the source of DNA found in the course of criminal investigations....

383 Md. at 45, 857 A.2d 19 (Raker, J., concurring) (quoting D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population–Wide Coverage,* 2003 Wis. L.Rev. 413, 431–32 (2003)).

A number of federal courts and the courts of some of our sister states also recognize the functional similarities between the non-coding regions of DNA and fingerprint evidence. *E.g., Haskell v. Harris,* 669 F.3d 1049, 1063 (9th Cir.2012) (stating that "[t]he collection and use of DNA for identification purposes is substantially identical to a law enforcement officer obtaining an arrestee's fingerprints to determine whether he is implicated in another crime"), *aff'd en banc,* 745 F.3d 1269 (9th Cir.2014); *United States v. Mitchell,* 652 F.3d 387, 412 (3d Cir.2011) (concluding that "DNA profiles ... function as 'genetic fingerprints' used only for identification purposes"); *State v. Surge,* 160 Wash.2d 65, 156 P.3d 208, 212 (2007) (en banc) (observing that the collection of DNA evidence in that case was "limited to the same purposes as fingerprints, photos, or other identifying information"); *see also* Edward J. Imwinkelried & D.H. Kaye, *DNA Typing: Emerging or Neglected Issues,* 76 Wash. L.Rev. 413, 440 (2001) ("[F]or the present the better course is to treat human cells left in public places like fingerprints in deciding what expectation of privacy is reasonable.").

Id. at 88–89, 99 A.3d at 762–63

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> In the end, we hold that DNA testing of the 13 identifying junk loci within genetic material, not obtained by means of a physical intrusion into the person's body, is no more a search for purposes of the Fourth Amendment, than is the testing of fingerprints, or the observation of any other identifying feature revealed to the public—visage, apparent age, body type, skin color. That 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. Because the testing of Petitioner's DNA did not constitute a search for the purposes of the Fourth Amendment, he was not entitled to suppression of the DNA evidence or any fruits derived therefrom. The Court of Special Appeals came to the same conclusion. We therefore affirm the judgment of that Court.

Id. at 96, 99 A.3d at 767–68.

In *Arzola*, which is the second case to call into question the holding in *Davis*, the defendant robbed the victim and assaulted him in the process, stabbing him in the neck and shoulder area. The victim gave a description of the suspect to the officer and another officer said a man fitting that description had been stopped about two blocks away from the scene. The suspect had an outstanding warrant and so he was arrested on the warrant and transported to the police station. During booking the officer saw a stain on the left sleeve of the defendant's gray shirt and, believing the stain to be blood, asked the defendant if he had any injuries that might have caused the stain. The suspect said he was not injured and no wounds were found, so before placing the defendant in a cell the officer seized the shirt as evidence of the armed robbery and assault, but he was not yet under arrest for those crimes. After the case was indicted, the prosecution obtained an order for the defendant's DNA to compare with the DNA from the bloodstain on the defendant's shirt and the chemist determined the DNA found on the shirt matched the victim and not the defendant. The defendant argued on appeal that DNA analysis of a

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bloodstained shirt was itself a search that required a warrant, even where the shirt was lawfully seized in plain view. The Court concluded that, when DNA analysis is limited to the creation of a DNA profile from lawfully seized evidence of a crime, and where the profile is used only to identify its unknown source, the DNA analysis is not a search in the constitutional sense. In coming to that conclusion, the Court said

> The defendant's argument rests heavily on *United States v. Davis,* 690 F.3d 226, 250 (4th Cir.2012), where the court concluded that the police conducted an unreasonable search in violation of the Fourth Amendment when they extracted the defendant's DNA profile from his lawfully seized clothing and tested it as part of a murder investigation.[10] In *Davis,* the defendant's clothing was seized as evidence while he was in the hospital as a gunshot victim, and his DNA profile was later obtained from the bloodstains on his pants in order to compare it with an unknown DNA profile from an unrelated homicide.[11] *Id.* at 230–231. After the defendant was excluded as the source of the evidentiary sample from that murder, the police retained his DNA profile and included it in their local DNA database, where it triggered a "cold hit" with another sample from a different homicide crime scene. *Id.* at 229, 231–232. The court concluded that the defendant's clothing was lawfully seized in plain view. *Id.* at 239. However, the court held that the defendant had an expectation of privacy in his DNA that was implicated once the police extracted the DNA from his clothing and obtained his DNA profile. *Id.* at 246.
>
> In contrast with the instant case, the police in *Davis* treated the DNA sample on the defendant's clothing as the defendant's known sample, and created a DNA profile in order to compare it with other unknown samples obtained from various crime scenes. *Id.* at 231–233. The court's conclusion that the defendant "retained a reasonable expectation of privacy in his DNA profile" was premised on the finding that the sample from his clothing was known to contain the defendant's DNA. *Id.* at 248. Even if we were to accept the *Davis* court's reasoning with regard to a DNA sample *known* to belong to the defendant, a defendant does not have a reasonable expectation of privacy in a DNA profile from an *unknown* sample that was taken from lawfully seized evidence.[12]
>
> Moreover, we doubt that the Fourth Amendment reasoning of the *Davis* court will be adopted by the United States Supreme

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> Court.[13] The *Davis* court never fully addressed the limited scope of the DNA analysis: to develop a DNA profile that would serve as a genetic fingerprint to be compared with unknown DNA profiles. See *id.* at 240 n. 22 (declining further to discuss science of DNA profiling after noting that some courts analogize DNA to fingerprints while others recognize limitations of that analogy). The Supreme Court's subsequent opinion in *King,* 133 S.Ct. at 1979, noted that the loci that comprise a DNA profile "come from noncoding parts of the DNA that do not reveal ... genetic traits," and that the sole purpose of DNA profiling is to generate "a unique identifying number against which future samples may be matched." Although the Court was addressing the suspicionless *collection* of a DNA sample through a buccal swab of certain arrestees, rather than the *analysis* of such a sample, we think it is likely that the limited information provided by a DNA profile and the limited purpose of identification will lead the Supreme Court to reach a conclusion that is different from that of the *Davis* court. See *Raynor,* 440 Md. at 90, petition for cert. filed, U.S. Supreme Ct., No. 14–885 (Jan. 19, 2015) ("The *Davis* Court's conclusion that the DNA testing at issue in that case constituted a Fourth Amendment search rested on what may now be a faulty premise, given the discussion in *King* that DNA analysis limited to the [thirteen Core] loci within a person's DNA discloses only such information as identifies with near certainty that person as unique").
>
> We conclude that where, as here, DNA analysis is limited to the creation of a DNA profile from lawfully seized evidence of a crime, and where the profile is used only to identify its unknown source, the DNA analysis is not a search in the constitutional sense. Therefore, no search warrant was required to conduct the DNA analysis of the bloodstain from the defendant's clothing that revealed that the victim was the source of the blood.

Com. v. Arzola, 470 Mass. 809, 818–20, 26 N.E.3d 185, 193–94 (2015).

In the present case, the DCI Forensic Lab tested the loci from the noncoding parts of the DNA that do not reveal any genetic traits. The limited purpose and scope of the DNA analysis was to develop a DNA profile from the unknown source DNA samples that were collected from the items of trash and use it to compare to the known DNA sample taken from baby Andrew to determine whether or not there was a familial match, not unlike a genetic fingerprint. It was not known whose

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DNA was on the items of trash that were tested at the time the testing was completed. It wasn't until the known DNA sample taken from the defendant was analyzed and compared to the DNA from baby Andrew that a conclusion could be made as to whether the defendant was the biological mother of baby Andrew. The defendant concedes that the collection of the items from the trash was constitutional and the United States Supreme Court has found that processing a DNA sample's 13 loci "does not intrude on a person's privacy in a way that would make his DNA identification unconstitutional." King, 569 U.S. at 464, 133 S. Ct. at 1979. The State would therefore ask this court to reject the defense argument that a logical extension of the rational of *Schwartz* supports constitutional protection for the warrantless extraction and creation of a DNA profile from the genetic material left on the trash and deny the Motion to Suppress.

> Once an individual's fingerprints and/or his blood sample for DNA testing are in lawful police possession, that individual is no more immune from being caught by the DNA sample he leaves on the body of his rape victim than he is from being caught by the fingerprint he leaves on the window of the burglarized house or the steering wheel of the stolen car. The development of such a new and scientifically reliable investigative tool should give rise, in any sane society, not to a cry of alarm but to a sigh of relief. By the same token, photographs, handwriting exemplars, ballistics tests, etc., lawfully obtained in the course of an earlier investigation are freely available to the police in the course of a new and unrelated investigation. No new Fourth Amendment intrusion is involved.

Wilson v. State, 132 Md. App. 510, 550, 752 A.2d 1250, 1272 (2000).

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CONCLUSION

Based on the foregoing, the State respectfully requests that this Honorable Court deny the Defendant's Motion to Suppress.

Sincerely,

/s/ *Randy Sample*
Randy Sample
Deputy State's Attorney

Crystal Johnson
State's Attorney

Cc: Clint Sargent, Attorney for Defendant
Raleigh Hansman, Attorney for Defendant

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