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Fourth Amendment "Cheeks" and Balances: The Supreme Court's Inconsistent Conclusions and Deference to Law Enforcement Officials in *Maryland v. King* and *Florence v. Board of Chosen Freeholders of the County of Burlington*

Diana R. Donahoe

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Fourth Amendment "Cheeks" and Balances: The Supreme Court's Inconsistent Conclusions and Deference to Law Enforcement Officials in *Maryland v. King* and *Florence v. Board of Chosen Freeholders of the County of Burlington*

Cover Page Footnote

Professor, Legal Research & Writing, Georgetown University Law Center. The author began teaching at Georgetown in 1993, where she was the Director and Chair of Legal Research & Writing from 2004 until 2008. She won the Frank Flegal Teaching Award in 2008. Before teaching at Georgetown, the author was a criminal defense attorney, representing the indigent in the Superior Court of the District of Columbia and supervising students in Georgetown's Criminal Justice Clinic. The author would like to thank the following people for their support in writing this article: Professor Jeffrey Shulman and research assistants Corey Strauss and Danielle Tepper.

FOURTH AMENDMENT “CHEEKS” AND
BALANCES: THE SUPREME COURT’S
INCONSISTENT CONCLUSIONS AND DEFERENCE
TO LAW ENFORCEMENT OFFICIALS IN *MARYLAND
V. KING* AND *FLORENCE V. BOARD OF CHOSEN
FREEHOLDERS OF THE COUNTY OF BURLINGTON*

Diana R. Donahoe⁺

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If you are arrested for speeding, do you know which “cheek” the police are justified in searching? In June 2013, the U.S. Supreme Court held that the Fourth Amendment permits officials to swab the inside cheek of an arrestee’s mouth for a deoxyribonucleic acid (DNA) sample if he is arrested for a serious crime.¹ In April 2012, the Court held that a person detained for any reason, even for a minor traffic offense, can be subjected to a strip search and visual inspection of his anus or genitals if he will subsequently enter the general jail population.² Consequently, if you are arrested today for a minor offense, such as a violation of a leash law or a traffic infraction, the Fourth Amendment likely prohibits the police from swabbing the inside of your mouth, but permits officials to force you to strip, bend over, and cough to inspect your body cavities if you could later join the general prison population.

The Court justified each holding with a different exception to the Fourth Amendment, contradicted its own reasoning, and refused to recognize important precedent. In *Maryland v. King*, the Court upheld a Maryland statute that allows law enforcement officers to swab the cheek of an individual arrested for a serious offense for a DNA sample, even before a neutral magistrate determines that there is probable cause for the offense.³ In *Florence v. Board of Chosen Freeholders of the County of Burlington*, the Court upheld a jail procedure that permits law enforcement officers to perform a strip search and visual body cavity inspection of an arrestee who will be held in the general prison population, even without

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

2. *See Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1523 (2012).

3. *King*, 133 S. Ct. at 1967, 1980. However, the statute does not allow law enforcement to process or test the DNA sample until after the arrestee appears before a magistrate. *Id.* at 1967.

any reasonable suspicion that he was carrying contraband and before a neutral magistrate determines if the offense is indictable.⁴

These decisions will have an enormous impact on Fourth Amendment searches. Experts estimate that nearly one-third of Americans are arrested at least one time by age twenty-three.⁵ Collection of DNA from arrestees, like the swab of the defendant's cheek in *King*, is increasingly common as DNA technology improves.⁶ Currently, "cells can be collected from an individual through a blood draw or a cheek swab," as well as "from bodily fluids, flakes of skin, or items such as a toothbrush, a coffee cup, or a cigarette butt."⁷ Similarly, it is not uncommon for a misdemeanor offender to be strip searched, like the plaintiff in *Florence*. Law enforcement officers have strip searched individuals after stopping them for leash law violations,⁸ traffic infringements,⁹ and automobile inspection expirations.¹⁰ In more outrageous cases, officers strip searched a nun for trespassing during an anti-war demonstration,¹¹ a bicycle rider for failing to have an audible bell,¹² and a driver with an inoperable headlight.¹³

This Article considers *King* and *Florence* in the context of relevant Fourth Amendment jurisprudence. Part I of this Article explains the Fourth Amendment, including relevant exceptions to the probable cause and warrant requirements and the reasonableness balancing test. Part II discusses the Court's opinions in *King* and *Florence*. Part III exposes the Court's inconsistent

4. *Florence*, 132 S. Ct. at 1514–15, 1523.

5. See, e.g., Robert Brame, Michael G. Turner, Raymond Paternoster & Shawn D. Bushway, *Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25 (2012).

6. See Dist. Att'y's Office for Third Judicial Dist. v. Osbourne, 557 U.S. 52, 62 (2009) (describing the advances in DNA technology and the resulting benefits to the criminal justice system).

7. Brief for the Respondent at 3, *Maryland v King*, 133 S. Ct 1958 (2013) (No. 12-207).

8. See, e.g., *Jones v. Edwards*, 770 F.2d 739, 740 (8th Cir. 1985) (discussing the strip search of a man who failed to sign a summons for a leash law violation).

9. See, e.g., *Masters v. Crouch*, 872 F.2d 1248, 1249–50 (6th Cir. 1989) (describing the strip search of a woman who was arrested for failing to appear in court to address two traffic tickets); *Tinetti v. Wittke*, 479 F. Supp. 486, 488 (E.D. Wis. 1979) (involving a non-misdemeanor traffic violator who was detained because she was unable to post the required cash bail), *aff'd* 620 F.2d 150 (7th Cir. 1980).

10. See, e.g., *Hill v. Bogans*, 735 F.2d 391, 392–93 (10th Cir. 1984) (considering the constitutionality of the strip search of a man arrested on an open warrant after he was pulled over for an expired automobile registration sticker).

11. See, e.g., *Bull v. City & Cnty. of S.F.*, 595 F.3d 964, 989 (9th Cir. 2010) (en banc) (Thomas, J., dissenting).

12. Brief for the Petitioner at 25, *Florence*, 132 S. Ct. 1510 (No. 10-945) (noting that a plaintiff in the certified class was strip searched as a consequence of riding a bicycle without an audible bell).

13. *Id.* (noting that a plaintiff in the certified class was strip searched as a consequence of driving with an inoperable headlight).

application of the Fourth Amendment balancing test in *King* and *Florence*, and Part IV argues that the Court should have applied the balancing test in both cases to protect citizens from unfettered police discretion and unreasonable searches. Part V of the Article illustrates that this inconsistency gives law enforcement officers greater discretion in conducting Fourth Amendment searches that is ripe for abuse and proposes remedies by which to limit this potential for abuse. The Article concludes that had the Court applied the appropriate balancing test consistently, both searches would have been permissible, but only in limited circumstances after the arrestees had appeared before a neutral magistrate.

I. THE FOURTH AMENDMENT WARRANT REQUIREMENT AND ITS EXCEPTIONS

Both *King* and *Florence* involved searches and, therefore, were appropriately analyzed under the Fourth Amendment jurisprudence that protects individuals from unreasonable searches and seizures. When drafting the Constitution, the Founding Fathers were concerned with the use of “general warrants,” which allowed any law enforcement officer to search places or people without any evidence.¹⁴ The Fourth Amendment was written to address this concern, and it provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁵

Compliance with the Fourth Amendment usually requires a neutral magistrate to issue a warrant individualized to the place to be searched or the persons or things to be seized.¹⁶ The warrant requirement provides a mechanism by which a neutral party can evaluate the basis of the search or seizure as well as a

14. See 3 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 588 (2d ed. 1994) (“[G]eneral warrants, by which an officer may search suspected places, without evidence of the commission of a fact, or seize any person without evidence of his crime, ought to be prohibited. As these are admitted, any man may be taken, in the most arbitrary manner, without any evidence or reason.”). See generally WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 603–67 (2009) (discussing the development of American search and seizure law from the Revolutionary War). Many states prohibited general warrants in their own constitutions before the Fourth Amendment was added to the U.S. Constitution. See, e.g., MD. CONST. Declaration of Rights, art. XXVI; VA. CONST. art. I, § 10.

15. U.S. CONST. amend. IV.

16. See *United States v. Chadwick*, 433 U.S. 1, 15–16 (1977) (holding that, in the absence of some kind of exigency, seizure of the petitioners’ belongings entitled them “to the protection of the Warrant Clause with the evaluation of a neutral magistrate”).

limitation on police discretion.¹⁷ In *Katz v. United States*, the Court established the general rule “that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment.”¹⁸ However, neither a warrant nor individualized suspicion of wrongdoing is always a prerequisite to a constitutional search; rather, the constitutionality of government action ultimately depends on whether it was reasonable.¹⁹ Indeed, the Court has carved out several “closely guarded”²⁰ exceptions to the Fourth Amendment probable cause and warrant requirements by balancing the government’s legitimate interest in the search or seizure against the individual’s privacy interest.²¹ The two exceptions relevant to this Article are the search incident to a valid arrest exception and the special needs doctrine.

The search incident to a valid arrest exception applies at various stages of the arrest.²² At the time of the arrest, searching the arrestee is reasonable to protect the government’s interest in preventing of destruction of evidence and ensuring the safety of the arresting officers.²³ Accordingly, the police may search the arrestee’s person as well as anything within his lunging area at the time of arrest, without any reason to believe that he may be carrying evidence or a weapon.²⁴ Once the arrestee is detained, he may be further searched incident to the arrest.²⁵ For example, the police may search the arrestee’s clothing or in his wallet,²⁶ and any clothing seized during the search is subject to laboratory analysis.²⁷ Additionally, the arrestee must provide handwriting samples, voice samples, or

17. *Id.* at 9. See generally 2 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.2, at 611–38 (5th ed. 2012) (discussing review of search warrants by a detached and neutral magistrate).

18. 389 U.S. 347, 357 (1967).

19. See *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968).

20. *Chandler v. Miller*, 520 U.S. 305, 308–09 (1997).

21. *Pennsylvania v. Mimms*, 434 U.S. 106, 109–11 (1977) (per curiam) (evaluating the constitutionality of asking the respondent to exit his car during a traffic stop by balancing the government’s interest in the police officer’s safety and the curtailment of the respondent’s liberty); *Chimel v. California*, 395 U.S. 752, 762–63 (1969) (discussing the constitutionality of the search incident to arrest exception to the warrant requirement by considering the reasonableness of the search and the intrusiveness of the size of the search area).

22. See generally, 3 LAFAYE, *supra* note 17, at § 5.2(b) (overviewing the search incident to valid arrest exception).

23. *Chimel*, 395 U.S. at 762–63 (1969).

24. *Chimel*, 395 U.S. at 763; *United States v. Robinson*, 414 U.S. 218, 235 (1973) (holding that a search incident to a valid arrest requires “no additional justification” than the probable cause underlying the arrest).

25. *United States v. Edwards*, 415 U.S. 800, 803 (1974) (“[S]earches and seizure that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention.”).

26. See, e.g., *United States v. Smith*, 549 F.3d 355, 358, 360 (6th Cir. 2008) (clothing); *United States v. Rodriguez*, 995 F.2d 776 (7th Cir. 1993) (wallet).

27. *Edwards*, 415 U.S. 800, 804–05 (explaining that, during a search incident to valid arrest, law enforcement officials are entitled to search, seize, and test the suspect’s clothing).

fingerprints if he is requested to do so.²⁸ These searches are considered to be part of the routine administrative process of booking and detention of an arrestee and are justified by the government's interest in protecting the arrestee's property while he is detained, protecting prisoners in the jail, and verifying the arrestee's identity.²⁹

The Court has also identified a "special needs" exception to justify warrantless, suspicion-less searches in situations in which "special needs beyond the normal need for law enforcement make the warrant and probable cause requirement impractical."³⁰ For example, the Court has upheld blanket urine drug testing of railroad employees to address the "special need" of railroad safety.³¹ The Court has also held that the "special need" of school safety justifies searches of students based on a reasonable suspicion rather than probable cause,³² as well as blanket urine drug testing of student athletes³³ and all students who participate in extracurricular activities.³⁴ The Court has also permitted searches of probationers' homes to protect the special needs associated with monitoring offenders released from prison.³⁵

Regardless of the exception applied, the "touchstone" of the Fourth Amendment is the reasonableness of the government's conduct,³⁶ which is evaluated by balancing the legitimate government interest protected by the conduct against the individual's privacy interest.³⁷ In considering the

28. *United States v. Dionisio*, 410 U.S. 1, 14 (1973) (voice); *United States v. Mara*, 410 U.S. 19, 21 (1973) (handwriting); *United States v. Kelly*, 55 F.2d 67, 70 (2d Cir. 1932) (fingerprints); *Downs v. Swann*, 73 A. 653, 654–55 (Md. 1909) (photographs).

29. *See Abel v. United States*, 362 U.S. 217, 239 (1960) ("We do not think it significantly different . . . for the search of [the arrestee and his property] to occur instead at the first place of detention when the accused arrives there, especially as the search of property carried by an accused to the place of detention had additional justifications, similar to those which justify a search of the person of one who is arrested.")

30. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

31. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 620, 634 (1989). The Court also noted that the railroad employees chose to participate in an industry "that is regulated pervasively to ensure safety." *Id.* at 627.

32. *See T.L.O.*, 469 U.S. at 341.

33. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 650, 664–65 (1995).

34. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 825, 838 (2002).

35. *See Griffin v. Wisconsin*, 483 U.S. 868, 875–76, 880 (1987) (concluding that the special needs of the probation department justify replacing the probable cause requirement with a standard of reasonable suspicion); *United States v. Knights*, 534 U.S. 112, 121 (2001) (emphasizing the government's special need in preventing recidivism in upholding the search based only on reasonable suspicion).

36. *Pennsylvania v. Mimms*, 424 U.S. 106, 108–09 (1977) (per curiam) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)); *see also Vernonia*, 515 U.S. at 652.

37. *See Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (explaining that the permissibility of a search "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests"); *see also Bell v. Wolfish*, 441 U.S. 520, 559 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *Schmerber v. California*, 384

government's interest, courts examine factors such as the legitimacy of the interest, the efficacy of the search in meeting that interest, and whether the government used the least intrusive search methods available.³⁸ In weighing the individual's privacy interest, courts look to both the individual's expectation of privacy and the invasiveness of the search.³⁹ As the intrusion becomes more invasive, the government interest must be more compelling in order to justify the search or seizure.⁴⁰

II. MARYLAND V. KING AND FLORENCE V. BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON

Both *King* and *Florence* involved searches conducted without a warrant or reasonable suspicion. Therefore, to be constitutional, the searches must have been conducted pursuant to an exception to the Fourth Amendment. In *King*, the Court relied on the search incident to valid arrest exception, specifically the procedural booking exception, to justify swabbing the defendant's cheek for a DNA sample.⁴¹ In *Florence*, the Court did not identify a specific Fourth Amendment exception, but it seemed to rely on the special needs doctrine, based on law enforcement's special need to thoroughly inspect each detainee to provide proper jail security.⁴²

In both cases, the Court attempted to limit its holding. In *King*, the Court limited its holding to individuals arrested for serious offenses, but it left the determination of which arrestees will be charged with serious crimes to law enforcement officials.⁴³ In *Florence*, the Court limited its holding to detainees who will enter the general population of a facility, but it left the determination of which detainees will be placed in the general population to law enforcement officials.⁴⁴

A. *The Cheek Swab Case: Maryland v. King*

On June 3, 2013, in an opinion written by Justice Kennedy and joined by Chief Justice Roberts and Justices Thomas, Breyer, and Alito, the Court held that law

U.S. 757, 769–70 (1966). However, an important government interest does not permit indiscriminate police behavior; the search must be reasonable in its scope and manner. *Maryland v. King*, 133 S. Ct. 1958, 1978 (2013).

38. See, e.g., *Vernonia*, 515 U.S. at 664–65; *Prouse*, 440 U.S. at 658, 660–61.

39. See, e.g., *Bd. of Educ. of Indep. Sch. Dist. v. Earls*, 536 U.S. at 822, 830 (2002); *Vernonia*, 515 U.S. at 654, 657–58.

40. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375–77 (2009).

41. See 133 S. Ct. at 1980 (holding that DNA collection after a valid arrest is “a legitimate police booking procedure” and therefore is reasonable).

42. See *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1515–23 (2012) (considering the special need of prison safety).

43. *King*, 133 S. Ct. at 1980.

44. *Florence*, 132 S. Ct. at 1522–23.

enforcement officials are permitted to swab the cheek of a person arrested for a serious offense in order to collect a DNA sample.⁴⁵ Petitioner Alonzo King was arrested in April 2009 for first- and second-degree assault as a result of menacing others with a shotgun.⁴⁶ Pursuant to Maryland's DNA Collection Act, when King was booked, the police used a buccal cheek swab to take a sample of his DNA.⁴⁷ In July 2009, the police uploaded King's DNA record into a state DNA database, where it was matched to DNA evidence collected from an unsolved 2003 rape.⁴⁸ This evidence supported King's conviction for the 2003 rape.⁴⁹ King moved to suppress the DNA evidence, arguing that the DNA Collection Act permitted unreasonable searches in violation of the Fourth Amendment.⁵⁰

The Court held that a buccal swab of the inner tissues of the cheek is a Fourth Amendment search, but it determined that the search was reasonable by balancing the minimal intrusiveness of a cheek swab against the government's substantial interest in identifying the arrestee and obtaining his criminal record.⁵¹ The Court relied on the routine booking exception to justify the search, comparing the DNA cheek swab to fingerprinting and arguing that the additional intrusion of the swab is insignificant.⁵² The Court analogized to *United States v. Kelly*, the seminal fingerprinting case, in which the Second Circuit held that fingerprinting is a minimal physical invasion that is "no more humiliating than other means of identification."⁵³ The Court reasoned that DNA collection is simply a better method of identification that, like fingerprinting, is part of the routine processing of an arrestee.⁵⁴ The Court made sure to note that the special needs doctrine did not apply because a special needs search involves a law-abiding citizen, whereas King was arrested and therefore had a reduced expectation of privacy.⁵⁵

Justice Scalia, joined by Justices Ginsburg, Sotomayor, and Kagan, wrote a scathing dissent that accused the Court of concocting a government interest to conceal Maryland's obvious motive, in this case, of discovering evidence of

45. *King*, 133 S. Ct. at 1965, 1980.

46. *Id.* at 1965.

47. *Id.* at 1965–66. A buccal swab collects cells containing DNA from the inside of the cheek with a sterile cotton swab, similar to a Q-tip. *Id.* at 1967–68.

48. *Id.* at 1966.

49. *Id.*

50. *Id.*

51. *Id.* at 1968–69, 1977.

52. *Id.* at 1976. The Court also emphasized that DNA testing is a much more accurate method of identification. *Id.*

53. 55 F.2d 67, 70 (2d Cir. 1932).

54. *King*, 133 S. Ct. at 1976–77 (quoting *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 58 (1991)) (explaining that "courts had no trouble determining that fingerprinting was a natural part of 'the administrative steps incident to arrest'").

55. *Id.* at 1978.

criminal wrongdoing.⁵⁶ The dissent insisted that the government's interest in DNA collection "had nothing to do with establishing King's identity."⁵⁷ Justice Scalia distinguished fingerprinting and photographing arrestees, which are actual means of identification and may not even be Fourth Amendment searches, from DNA collection, which is used to solve crimes.⁵⁸ Furthermore, Justice Scalia challenged the constitutionality of fingerprinting, noting that "'the great expansion in fingerprinting came before the modern era of Fourth Amendment jurisprudence,' and so [the Court was] never asked to decide the legitimacy of the practice."⁵⁹ Justice Scalia cautioned that, although the Court attempted to limit its holding to individuals arrested for serious offenses, the majority's reasoning would eventually lead to the collection of DNA from an arrestee who violated a traffic rule.⁶⁰ Horrified by this "predictable consequence," Justice Scalia warned that the Court's decision would lead to cheek swabs for DNA collection "if you are ever arrested, rightly or wrongly, and for whatever reason."⁶¹

B. The Strip Search Case: Florence v. Board of Chosen Freeholders of the County of Burlington

One year before *King*, in an opinion also penned by Justice Kennedy and joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, the Court held that any person arrested, rightly or wrongly, for any offense can be subjected to a strip search and visual body cavity inspection as a condition of his detention in the general population of a detention facility.⁶² Petitioner Albert Florence was riding in the passenger seat of his car, traveling to a family dinner, when the driver was pulled over for a minor traffic infraction.⁶³ After a records search, the officer discovered an outstanding bench warrant for Florence for his apparent failure to pay a fine for an earlier criminal charge.⁶⁴ Despite Florence's documentation that he had paid the fine, the officer arrested Florence and transported him to the Burlington County Jail in New Jersey, where correctional officers required him to strip naked so they could examine his backside, under his genitals, and in his mouth.⁶⁵ After six days in the Burlington County Jail, Florence was transported to the Essex County Correctional Facility, where he

56. *Id.* at 1980–82 (Scalia, J., dissenting).

57. *Id.* at 1984.

58. *Id.* at 1986–87.

59. *Id.* at 1988 (quoting *United States v. Kincade*, 379 F.3d 813, 874 (9th Cir. 2004) (Kozinski, J., dissenting)).

60. *Id.* at 1989.

61. *Id.*

62. *See Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1514, 1523 (2012).

63. Petition for a Writ of Certiorari at 3, *Florence*, 132 S. Ct. 1510 (No. 10-945).

64. *Florence*, 132 S. Ct. at 1514.

65. Petition for a Writ of Certiorari, *supra* note 63, at 3–5.

was again strip searched.⁶⁶ The Essex County officers required him to shower with four other detainees and then to open his mouth, lift his genitals, squat, and cough.⁶⁷ In New Jersey, Florence's alleged offense—failure to pay a fine—is a civil offense, not a crime.⁶⁸ When Florence finally appeared in front of a magistrate six days after his arrest, the judge was “appalled” that an arrest warrant even existed and immediately released Florence from jail.⁶⁹

The *Florence* majority emphasized the government's special need to provide safe prisons and recognized the challenges of operating a prison facility.⁷⁰ The Court began its analysis by considering the application of the Fourth Amendment balancing test to prison searches discussed in *Bell v. Wolfish*.⁷¹ The *Bell* Court explained that, to evaluate the reasonableness of search policies in correctional facilities, “[t]he need for a particular search must be balanced against the resulting invasion of [the inmate's] personal rights.”⁷² However, instead of applying this balancing test, the *Florence* Court focused solely on the search policy's ability to advance the government's interest in prison safety,⁷³ an evaluation that “is ‘peculiarly within the province and professional expertise of correctional officials.’”⁷⁴ Accordingly, the Court held that, “unless there is ‘substantial evidence’” that the search in question is an “exaggerated” response to safety concerns, “deference must be given to the officials in charge of the jail.”⁷⁵ Because even those arrested for minor offenses can raise safety concerns, the Court concluded that the government has a substantial interest in stripping and visually inspecting a detainee in the general prison population to determine if he has a disease, is affiliated with a gang, or is attempting to smuggle contraband.⁷⁶ However, the Court explicitly declined to limit which detainees may be placed in the general prison population, and therefore which detainees may be subjected to a strip search.⁷⁷

Justice Thomas declined to join Part IV of the opinion, in which the Court refrained from limiting the prison administration's discretion in choosing which detainees will join the general population of the facility.⁷⁸ Chief Justice Roberts

66. *Florence*, 132 S. Ct. at 1514.

67. Petition for a Writ of Certiorari, *supra* note 63, at 6.

68. *Id.* at 4.

69. *Id.* at 7.

70. *Florence*, 132 S. Ct. at 1515.

71. *Id.* at 1516 (citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

72. *Id.*

73. See *id.* at 1515 (quoting *Turner v. Safely*, 482 U.S. 78, 89 (1987)) (explaining “that a regulation impinging on an inmate's constitutional rights must be upheld ‘if it is reasonably related to legitimate penological interests.’”).

74. *Id.* at 1517 (quoting *Block v. Rutherford*, 468 U.S. 576, 584–85 (1984)).

75. *Id.* at 1518 (citing *Block*, 468 U.S. at 584–85).

76. *Id.* at 1520.

77. *Id.* at 1522–23.

78. *Id.* at 1513.

wrote a concurring opinion that emphasized that there was no alternative to holding Florence in the general population, other than releasing him altogether.⁷⁹ Additionally, in a separate concurrence, Justice Alito suggested that, in some instances, a strip search may not be reasonable, particularly if it is possible for law enforcement officials to segregate temporary detainees from the general jail population.⁸⁰

Justice Breyer, in a dissent joined by Justices Ginsburg, Sotomayor, and Kagan, applied the Fourth Amendment balancing test and concluded that invasive strip searches of detainees arrested for minor offenses are unconstitutional in the absence of a reasonable suspicion that the detainees were carrying drugs or other contraband.⁸¹ Justice Breyer admonished the majority for failing to define “any clear example of an instance in which contraband was smuggled into the general jail population during intake that could not have been discovered if the jail was employing a reasonable suspicion standard.”⁸² He further accused the Court of relying too heavily on the prison officials’ representations, which he considered insufficient to justify the searches.⁸³

79. *Id.* at 1523 (Roberts, C.J., concurring).

80. *Id.* at 1524–25 (Alito, J., concurring).

81. *Id.* at 1524–25 (Breyer, J., dissenting). Justice Breyer supported his conclusion by noting that several circuit courts of appeals applied the balancing test in prison search cases and reached the same result. *Id.* at 1530 (“[A]t least seven Courts of Appeals . . . have required reasonable suspicion that an arrestee is concealing weapons or contraband before a strip search of one arrested for a minor offense can take place.”). For example, the Fifth Circuit held that a search policy that permitted strip searches of all individuals arrested for misdemeanors—punishable only by fine—without a reasonable suspicion was unconstitutional. *Steward v. Lubbock Cnty.*, 767 F.2d 153, 156–57 (5th Cir. 1985) (involving an arrest for public intoxication and for issuing a bad check after a routine traffic stop). Similarly, the First Circuit concluded that a strip search policy was unconstitutional under *Bell*, holding that “[a]n indiscriminate strip search policy routinely applied to detainees . . . cannot be constitutionally justified simply on the basis of administrative ease in attending to security considerations.” *Logan v. Shealy*, 660 F.2d 1007, 1013 (1st Cir. 1981). Additionally, the Ninth Circuit held that an individual arrested for a minor offense could only be strip searched if officials have a “reasonable suspicion that the arrestee is carrying or concealing contraband or suffering from a communicable disease.” *Giles v. Ackerman*, 746 F.2d 614, 615 (9th Cir. 1984) (identifying the “nature of the offense, the arrestee’s appearance and conduct, and [his] prior arrest record” as factors to consider in whether there is reasonable suspicion to search a detainee). However, other circuit courts have agreed with the *Florence* majority and have deferred to prison officials in determining whether to strip search detainees. *See, e.g., Bull v. City & Cnty. of S.F.*, 595 F.3d 964, 975 (9th Cir. 2010) (deferring to the correctional facility and upholding the strip search policy in question); *Powell v. Barrett*, 541 F.3d 1298, 1307 (11th Cir. 2008) (holding that *Bell* does not require reasonable suspicion to conduct a strip search), *cert. denied sub nom. Matkin v. Barrett*, 134 S. Ct. 513 (2013).

82. *Florence*, 132 S. Ct. at 1530 (Breyer, J., dissenting).

83. *Id.* at 1531.

III. THE SUPREME COURT'S INCONSISTENT APPLICATION OF THE FOURTH AMENDMENT

In *King*, the Court justified the warrantless collection of the petitioner's DNA with the search incident to valid arrest exception—specifically the administrative booking exception—to the Fourth Amendment's warrant requirement.⁸⁴ The Court specifically declined to consider the special needs doctrine because a special needs search involves a law-abiding citizen, not an arrestee suspected of wrongdoing.⁸⁵ However, in *Florence*, the Court upheld the strip searches with the special needs doctrine, even though the petitioner in *Florence* had been arrested, just like the petitioner in *King*.⁸⁶

Both opinions relied on the Fourth Amendment balancing test to uphold the searches. In *King*, the Court balanced the government's interest in identifying arrestees and the effectiveness of the DNA analysis against the minimal intrusion of a cheek swab and the limited use of the DNA information. However, in *Florence*, although the Court considered the application of the balancing test in *Bell*, it ultimately deferred to the judgment of the prison officials, failing to evaluate the effectiveness of the search policy and refusing to recognize the intrusiveness of a strip search.

A. *The Government's Interest*

The Fourth Amendment required the *King* and *Florence* Courts to balance the petitioners' privacy interests against the government's interest in each search. In evaluating the government's interests, the Court considers whether (1) the interest is legitimate; (2) the search was effective in meeting that interest; and (3) the police used the least intrusive search means available.⁸⁷

1. *Legitimate Interest*

Both *King* and *Florence* relied on the safety of the prison and detainee population to justify their respective searches.⁸⁸ In *King*, the Court identified “the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody” as a legitimate government interest.⁸⁹ The *King* opinion proffered two purposes for identifying the arrestee: (1) to determine his identity, including his name and social security number; and (2) to determine whether he had previously been charged with or

84. *King*, 133 S. Ct. at 1970–71.

85. *Id.* at 1978.

86. *Florence*, 132 S. Ct. at 1515–23.

87. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 650, 664–65 (1995); *Delaware v. Prouse*, 440 U.S. 648, 658, 660–61 (1979).

88. *Maryland v. King*, 133 S. Ct. 1958, 1970; *Florence*, 566 U.S. at 1518, 1520.

89. *King*, 133 S. Ct. at 1970–72. Justice Scalia dismissed the majority's justification, arguing that the actual purpose of collecting the DNA sample was to solve crimes. *Id.* at 1980, 1982 (Scalia, J., dissenting).

convicted of other crimes.⁹⁰ The Court explained that, by collecting DNA, the police can determine the “type of person whom they are detaining,” which assists them in making critical decisions regarding arrest and detainment.⁹¹ The Court highlighted the specific safety benefits of identifying gang membership, explaining that the ability to review an arrestee’s criminal record achieves the same result as examining the arrestee himself for evidence of gang membership.⁹² This type of identification allows law enforcement officials to later protect other prisoners and prison staff who may come into contact with the arrestee, without creating inordinate “risks for facility staff, for the existing detainee population, and for a new detainee.”⁹³

The *Florence* Court also justified the search at issue with the government’s substantial interest in prison safety. The Court placed significant weight on the prison officials’ need to conduct “a thorough search as a standard part of the intake process,” citing the numerous risks that the intake of arrestees creates for staff, the detainee population, and the new detainee himself.⁹⁴ However, unlike in *King*, the Court did not rely on the administrative booking exception to justify the government’s interest. Instead, the Court identified the special need of prison safety as a legitimate government interest and determined that the strip searches were necessary to detect injuries, lice, and contagious diseases to identify gang membership through tattoos and other markings in order to isolate and prevent potential gang violence, and to discover contraband.⁹⁵

Additionally, both opinions relied on *Bell*, which permitted cavity searches of inmates who had contact visits, to emphasize the importance of the government’s interests in the searches.⁹⁶ In *King*, the Court cited *Bell* for the proposition that the government has a substantial interest in bringing those accused of crimes to trial.⁹⁷ In *Florence*, the Court cited *Bell* for the proposition that search policies designed to prevent contraband from entering prisons serve the legitimate government interest of ensuring prison safety and that courts should defer to law enforcement in promulgating these policies.⁹⁸

Finally, the *King* Court also recognized that the DNA identification of arrestees also advances the government’s substantial interest in protecting the general public. The Court explained that the ability to examine the arrestee’s

90. *Id.* at 1971.

91. *Id.* at 1972.

92. *Id.* at 1972–73. The Court explained that DNA identification is no different than “matching tattoos to known gang symbols to reveal a criminal affiliation.” *Id.*

93. *Id.* at 9172 (quoting *Florence*, 132 S. Ct. at 1518).

94. *Florence*, 132 S. Ct. at 1518.

95. *See id.* at 1518–19, 1523.

96. *Bell v. Wolfish*, 441 U.S. 520, 558–59 (1979).

97. *King*, 133 S. Ct. at 1972–73 (quoting *Bell*, 441 U.S. at 534, 557).

98. *Florence*, 132 S. Ct. at 1516–17 (citing *Bell*, 441 U.S. at 546, 559).

criminal record assists a court in determining whether the arrestee should be released on bail or whether his bail should be revoked.⁹⁹

Thus, both opinions reflected a legitimate government interest in the searches in question. In *King*, the Court upheld the search to advance the government's substantial interest in identifying the arrestee and his past conduct, which serves to both ensure prison safety and protect the general public. *Florence* similarly rested on safety concerns, validating the government's interest in regulating prison safety.

2. Efficacy

To satisfy the reasonableness test, the search must also be effective in advancing the government's interest.¹⁰⁰ While *King* successfully met this requirement by substantiating the effectiveness of DNA testing, the *Florence* Court deferred to the judgment of the prison officials, failing to reach a conclusion about the effectiveness of strip searches in ensuring prison safety.

The *King* Court explicitly discussed the effectiveness and accuracy of DNA testing.¹⁰¹ DNA testing is a much more advanced identification technique. It is more accurate than both fingerprints and photographs at identifying arrestees, as it is capable of identifying an arrestee even if he has attempted to change his physical characteristics to avoid identification.¹⁰² DNA also has the ability to discern guilt or innocence, helping to both convict the guilty and exonerate the wrongfully convicted.¹⁰³ Although the Court acknowledged that the amount of time the testing of a DNA sample takes may cause considerable delay, the majority presumed that the speed of DNA testing will improve—mirroring advancements in fingerprinting—to the extent that it will be even more effective in the future.¹⁰⁴ Additionally, DNA testing provides information that is essential in determining whether an arrestee should be released on bail.¹⁰⁵ The Court cited several studies of cases in which DNA identification would have uncovered the arrestees' criminal records and prevented their release and subsequent

99. *King*, 133 S. Ct. at 1973 (quoting Md. R. § 4-216(f)(1)(G) (2013)) (“Knowing that the defendant is wanted for a previous violent crime based on DNA identification is especially probative of the court’s consideration of ‘the danger of the defendant to the alleged victim, another person, or the community.’”).

100. See, e.g., *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 837 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 660 (1995).

101. *King*, 133 S. Ct. at 1975–76.

102. *Id.* at 1976.

103. *Id.* at 1966, 1974 (quoting *Dist. Att’y’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 55 (2009)) (noting that “courts have acknowledged DNA testing’s ‘unparalleled ability both to exonerate the wrongly convicted and to identify the guilty’” and that the identification of one arrestee as the perpetrator of a previous violent crime could also have the “salutary effect of freeing a person wrongfully imprisoned for the same offense”).

104. *Id.* at 1976–77.

105. *Id.* at 1973–74.

commission of additional crimes.¹⁰⁶ Similarly, DNA identification provides information necessary to revoke bail for offenders released without knowledge of their violent criminal history.¹⁰⁷

Conversely, rather than engage in an analysis of the efficacy of strip searches in protecting prisoners and prison staff, the *Florence* Court deferred to the correctional officials' determination that such searches are necessary. The Court concluded that, absent "substantial evidence" that the search policy is unwarranted, the policy is justified by the "expert judgment" of its creators.¹⁰⁸ The Court attempted to justify the strip searching of those arrested for minor offenses by speculating that those individuals "can turn out to be the most devious and dangerous criminals" and are equally as likely as serious offenders to attempt to smuggle contraband into jail.¹⁰⁹

Thus, the *King* Court established that DNA testing effectively advances the government's safety interest by citing its ability to identify the arrestee and his past criminal behavior, while the *Florence* Court concluded that strip searches keep prisons safe because prison officials argued that they do.

3. Least Intrusive Means

In assessing the government's conduct, courts also consider whether there was a less intrusive way to administer the search to accomplish the government's goal.¹¹⁰ The Court did not address whether the government used the least intrusive means in either *King* or *Florence*.

B. The Individual's Privacy Interest

To determine the extent of an individual's privacy interest, the Court considers both (1) the individual's legitimate expectation of privacy, and (2) the

106. *King*, 133 S. Ct. at 1973 (citing City of Chicago, *Chicago's Study on Preventable Crimes*, DNA SAVES, <http://www.dnasaves.org/files/ChicagoPreventableCrimes.pdf> (last visited Apr. 9, 2014); Denver Dist. Att'y's Office, *Denver's Study on Preventable Crimes*, DENVER DA, http://www.denverda.org/DNA_Documents/Denver%27s%20Preventable%20Crimes%20Study.pdf (last visited Apr. 9, 2014); Md. Criminal Justice Info. Sys., *Maryland Study on Preventable Crimes*, http://www.denverda.org/DNA_Documents/MarylandDNAarresteestudy.pdf (last visited Apr. 9, 2014)).

107. *King*, 133 S. Ct. at 1974 (providing examples of bail and diversion determinations that courts reversed after DNA evidence identified the arrestee's violent history).

108. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1517–18 (quoting *Block v. Rutherford*, 468 U.S. 576, 584–85 (1984)) ("The task of determining whether a policy is reasonably related to legitimate security interests is 'peculiarly within the province and professional expertise of corrections officials' . . . [and] 'in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations courts should ordinarily defer to their expert judgment in such matters.'").

109. *Id.* at 1520–21.

110. See, e.g., *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 837 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658–60 (1995); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 626 (1989).

invasiveness of the search.¹¹¹ The Court considered both factors in *King*, but did not discuss the petitioner's privacy interest in *Florence*.

1. *Legitimate Expectation of Privacy*

For the Fourth Amendment to protect King and Florence, each must "have exhibited an actual (subjective) expectation of privacy . . . that society is prepared to recognize as reasonable."¹¹² This expectation is not static; there is a "continuum" of privacy expectations.¹¹³ An individual has the greatest expectation of privacy in his home¹¹⁴ and in his body.¹¹⁵ That expectation diminishes on a public street¹¹⁶ and in an automobile.¹¹⁷

A lawful arrest "changes the nature of [an individual's] physical relationship to the State, and correspondingly diminishes the individual's reasonable expectation of privacy."¹¹⁸ Accordingly, King's and Florence's expectations of privacy were reduced when they were arrested, and further diminished when they were detained at the police station. However, King's and Florence's expectations of privacy differed because of the seriousness of their alleged offenses. King, arrested for a serious offense involving a weapon, arguably had a lesser expectation of privacy than Florence, who was arrested for a minor violation that did not required jail time.

The Fourth Amendment also describes a judicial finding of probable cause a "watershed event" that officially distinguishes a detainee from a member of the general public.¹¹⁹ After a probable cause hearing, the court may curtail a defendant's liberty by placing him in jail or ordering strict conditions of pre-trial release, such as electronic monitoring, mandatory drug testing, curfew

111. See *King*, 133 S. Ct. at 1979 (citing *Illinois v. McArthur*, 531 U.S. 326, 330 (2001)).

112. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

113. See *Samson v. California*, 547 U.S. 843, 850 (2006).

114. See *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)) (stating that a person's right to be free from unreasonable searches of his home is at the "core" of the Fourth Amendment).

115. *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013) (explaining that physical intrusions into the human body "implicate[] an individual's 'most personal and deep-rooted expectation of privacy'" (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985))).

116. *Terry v. Ohio*, 392 U.S. 1, 22–24, 27 (1968) (balancing the government's interests in crime detection and officer safety against the individual's privacy interest and holding that a search for weapons in an individual's outer garments need only be based on a reasonable suspicion that the individual is armed and dangerous).

117. See *California v. Carney*, 471 U.S. 386, 392–93 (1985) (recognizing that there is a lesser expectation of privacy in an automobile).

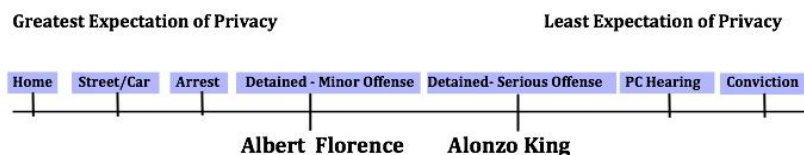
118. Brief of Petitioner at 17, *Maryland v. King*, 133 S. Ct. 1958 (2013) (No. 12-207) (citing *United States v. Robinson*, 414 U.S. 218, 235 (1973)); see also *Bell v. Wolfish*, 441 U.S. 520, 557 (1979) (indicating that a detainee's right to privacy is "of a diminished scope").

119. *United States v. Pool*, 621 F.3d 1213, 1219 (9th Cir. 2010).

requirements, and travel restrictions.¹²⁰ Neither King nor Florence appeared in front of a magistrate before being searched.

A criminal conviction further reduces an individual's expectation of privacy. A conviction is a "transformative" event.¹²¹ Although "there is no iron curtain drawn between the Constitution and the prisons of this country,"¹²² incarcerated individuals "have a severely reduced expectation of privacy."¹²³ Similarly, parolees and probationers are considered convicted felons who remain under the supervision of the state and therefore continue to have a very reduced expectation of privacy.¹²⁴ However, even individuals who have been convicted and incarcerated "retain the essence of human dignity inherent in all persons."¹²⁵ Neither King nor Florence had been convicted before being searched. Accordingly, the presumption of innocence to which all arrestees are entitled afforded King and Florence greater expectations of privacy than convicted felons.¹²⁶

LEGITIMATE EXPECTATION OF PRIVACY SPECTRUM



Alonzo King and Albert Florence retained similar expectations of privacy; both were arrested, detained, and searched before a neutral magistrate found probable cause. However, Florence had a greater expectation of privacy because his alleged offense was a mere civil infraction, whereas King was charged with

120. *See id.* at 1216–17.

121. *See United States v. Kincade*, 379 F.3d 813, 834 (9th Cir. 2004) (en banc).

122. *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

123. *Maryland v. Raines*, 857 A.2d 19, 33 (Md. 2004) (plurality opinion); *see also Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (“[P]risoners have no legitimate expectation of privacy.”); Brief of Petitioner, *supra* note 118, at 16–17 (citing *Samson v. California*, 574 U.S. 843, 850 (2006)) (noting that incarceration “implicitly mark[s] the nadir of privacy expectations”). However, a prisoner does not shed his Constitutional rights. *Turner v. Safely*, 482 U.S. 78, 84 (1987); *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

124. *See United States v. Knights*, 534 U.S. 112, 120–21 (2001) (holding that reducing recidivism is a legitimate government interest justifying the search of a probationer’s home based on only a reasonable suspicion of wrongdoing); *Griffin v. Wisconsin*, 483 U.S. 868, 874–75 (1987) (explaining that probation falls on a continuum of punishments between incarceration and full freedom).

125. *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

126. *King v. State*, 42 A.3d 549, 577 (Md. 2012) (“Although arrestees do not have all the expectations of privacy enjoyed by the general public, the presumption of innocence bestows on them greater protections than convicted felons, parolees, or probationers.”), *rev’d*, 133 S. Ct. 1958 (2013).

a first-degree assault, a serious crime that carries a sentence of up to twenty-five years in prison.¹²⁷

The *King* Court recognized this privacy spectrum. The Court based its ruling, in part, on the fact that King was arrested for a serious crime.¹²⁸ The Court recognized that, while not every search is acceptable simply because a person is in custody, once a person has been lawfully arrested for a serious offense that could require pretrial detention, “his or her expectations of privacy and freedom from police scrutiny are reduced.”¹²⁹

Conversely, in *Florence*, the Court refused to acknowledge any distinction between the expectation of privacy of an individual arrested for a serious crime and an individual arrested for a minor crime. Because the government has the authority to arrest individuals suspected of minor crimes that do not mandate jail time, suspects of minor crimes can be detained alongside serious offenders.¹³⁰ Consequently, the Court rejected *Florence*’s argument that strip searches should only be performed on detainees arrested for serious crimes because correctional officers cannot easily determine which detainees qualify as serious offenders.¹³¹ The Court explained that law enforcement officers cannot predict which offenders may pose safety concerns based only on the seriousness of the offenses for which they were arrested.¹³² Additionally, a detainee may lie about his identity or his criminal history may be unavailable, inaccurate, or incomplete.¹³³ In these circumstances, law enforcement officials are ill equipped to evaluate the seriousness of the detainee’s offense, which requires a case-by-case determination.¹³⁴ Accordingly, the Court declined to place any restrictions on who can be held in the general population of a detainment facility—and therefore who can be strip searched—essentially granting the officials the power to determine the amount of privacy to which an arrestee is entitled.

127. See MD. CODE ANN., CRIM. LAW § 3-202(b) (LexisNexis 2012).

128. See *King*, 133 S. Ct. at 1977–78 (“The necessary predicate of a valid arrest for a serious offense is fundamental.”). The Maryland statute at issue authorized law enforcement officials to collect DNA from an individual “charged with: 1. a crime of violence or an attempt to commit a crime of violence; or 2. burglary or an attempt to commit burglary.” MD. CODE ANN., PUB. SAF., § 2-504(a)(3)(i) (LexisNexis 2011 & Supp. 2013).

129. *King*, 133 S. Ct. at 1978.

130. *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (permitting the arrest of a woman for failing to wear seat belt, even though the offense did not carry jail time).

131. *Florence*, 132 S. Ct. at 1520. The Court reasoned that it would be “difficult in practice to determine whether individual detainees” fall into the category of being arrested for serious crimes. *Id.*

132. *Id.*

133. *Id.* at 1521.

134. *Id.* at 1522 (citing *Welsh v. Wisconsin*, 466 U.S. 740, 761-62 (1984) (White, J., dissenting)); *Bull v. City & Cnty. of S.F.*, 595 F.3d 964, 985–87 (9th Cir. 2010) (Kozinski, C.J., concurring)).

2. Intrusiveness of the Search

Both *King* and *Florence* involved Fourth Amendment searches. However, the difference in the intrusiveness of each search is stark; *King* merely had to open his mouth, while *Florence* was forced to expose his mouth, anus, and genitals. These searches fall on a continuum of intrusiveness that is similar to the legitimate expectation of privacy spectrum. Some searches are not invasive enough to even implicate the Fourth Amendment because they do not involve physical intrusions.¹³⁵ For example, taking an individual's photograph does not implicate the Fourth Amendment because it does not invade a legitimate expectation of privacy.¹³⁶ At the other end of the spectrum, searches are most intrusive if they pose a threat to the health or safety of the arrestee.¹³⁷

The pat down of an individual's outer garments, although considered a Fourth Amendment search, is minimally intrusive.¹³⁸ Outer body searches, such as the collection of fingernail scrapings¹³⁹ and hair samples¹⁴⁰ and breathalyzer tests,¹⁴¹ are somewhat more intrusive than a pat down search. Blood and urine samples and cheek swabs are even more intrusive, but the Court has concluded that these intrusions are not significant.¹⁴² However, a strip search is a serious invasion of privacy that is "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive, signifying

135. See *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quoting *United States v. Jones*, 132 S. Ct. 945, 950 n.3 (2012)) (noting that the "baseline" for determining whether a Fourth Amendment search occurred is whether there was a physical intrusion into a constitutionally protected area).

136. *Maryland v. King*, 133 S. Ct. 1958, 1986 (2013) (Scalia, J., dissenting).

137. See *Winston v. Lee*, 470 U.S. 753, 761 (1985) ("A crucial factor in analyzing the magnitude of the intrusion . . . is the extent to which the procedure may threaten the safety or health of the individual.").

138. See *Terry v. Ohio*, 392 U.S. 1, 29–30 (1968).

139. *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (quoting *id.* at 24–25) ("[T]he search of the respondent's fingernails . . . constituted the type of 'severe, though brief, intrusion upon cherished personal security' that is subject to constitutional scrutiny.").

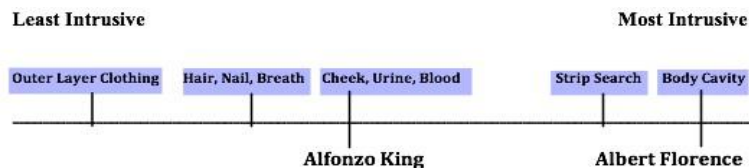
140. See *id.*

141. See *Skinner v. Ry. Labor Excs.' Ass'n.*, 489 U.S. 602, 616–17 (1989) (comparing a breathalyzer test to a blood test).

142. See *Maryland v. King*, 133 S. Ct. 1958, 1979 (2013) (buccal swabs); *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013) (blood draws); *Schmerber v. California*, 384 U.S. 757, 771–72 (1966) (same); *Skinner*, 489 U.S. at 626–27 (urine samples).

degradation and submission.”¹⁴³ A body cavity inspection is a further intrusion and is the type of search that gives the Court the “most pause.”¹⁴⁴

INTRUSIVENESS SPECTRUM



A cheek swab is one of the lesser intrusive searches on the spectrum. The rub against the inside part of the cheek does not break the skin and “involves virtually no risk, trauma, or pain.”¹⁴⁵ The *King* Court found that a “crucial” factor in evaluating the level of intrusion was that the swab posed no threat to the safety or health of the detainee and “did not increase the indignity already attendant to normal incidents of arrest.”¹⁴⁶ Additionally, the Maryland statute limits the use of the DNA that the swab collects. The statute lists only five purposes for which the DNA can be tested, and it explicitly states that only DNA samples related to identification may be collected and tested.¹⁴⁷ The swab in *King* was reasonable because it was only collected and tested for the purposes of identifying the petitioner.¹⁴⁸

143. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1526 (2012) (Breyer, J., dissenting) (quoting *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1984)); see also *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375–76 (2009) (holding that a strip search of a student—forcing her to undress down to her underwear and bra—was not justified, despite the school’s valid interest in eliminating drugs from the school, because of the “extreme intrusiveness of a search down to the body,” especially in a situation in which there was no reason to suspect that the student had hidden contraband in her underwear).

144. *Bell v. Wolfish* at 558, 560 (“We do not underestimate the degree to which these searches may invade the personal privacy of inmates.”); see also *Byrd v. Maricopa Cnty. Sheriff’s Dep’t*, 629 F.3d 1135, 1136 n.1 (9th Cir. 2011) (en banc) (quoting *Way v. Cnty. of Ventura*, 445 F.3d 1157, 1160 (9th Cir. 2006)) (acknowledging the “humiliation and degradation associated with forcibly exposing one’s nude body to strangers”); *Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir. 1996) (quoting *Conchrane v. Quattrocchi*, 949 F.2d 11, 13 (1st Cir. 1991)) (“[A] strip search, by its very nature, constitutes an extreme intrusion upon personal privacy, as well as an offense to the dignity of the individual”); *Blackburn v. Snow*, 771 F.2d 556, 564 (1st Cir. 1985) (recognizing “the severe if not gross interference with a person’s privacy’ that accompanies a visual body cavity search”) (quoting *Arruda v. Fair*, 710 F.2d 886, 887 (1st Cir. 1983)).

145. See *King*, 133 S. Ct. at 1979 (quoting *Schmerber*, 384 U.S. at 771).

146. *Id.* at 1963 (quoting *Winston v. Lee* 470 U.S. 753, 761 (1985)).

147. MD. CODE ANN., PUB. SAF. § 2-505 (LexisNexis 2011).

148. *King*, 133 S. Ct. 1979. The Court supported its opinion by citing similar limitations on student drug testing in cases in which urine samples could only be used to test for drugs, not for epilepsy, pregnancy, or diabetes. *Vernonia School District 47J v. Acton*, 515 U.S. 644, 658 (1995).

In *Florence*, the Court failed to address the intrusiveness of the search at all, and it even refused to label the search as a “strip search.”¹⁴⁹ Although the Court conceded that Florence was forced to remove his clothes and “allege[dly]” lift his genitals and cough in a squatting position, it emphasized that Florence was never physically touched.¹⁵⁰

IV. WHAT THE SUPREME COURT SHOULD HAVE DONE

In performing the balancing test, the Court should have applied a sliding scale: as the search becomes more intrusive, the government needs to have a more compelling legitimate interest.¹⁵¹ Because a strip search and visual body cavity inspection is more intrusive than a cheek swab, the *Florence* search should have required greater justification by the government than the cheek swab in *King*. However, the Court limited the less intrusive cheek swab search to those charged with serious crimes, but permitted the more intrusive strip and visual body cavity search of anyone who will be detained in the general jail population, including those arrested for minor offenses. Had the Court performed the balancing test in both cases, both holdings would have been limited and the result in *Florence* would have been different.

Additionally, both *King* and *Florence* were pretrial detainees who were searched prior to appearing before a magistrate. Therefore, both cases should have been examined under the administrative booking exception to the Fourth Amendment warrant and probable cause requirements. However, regardless of the exception used to justify the search, the Court should have performed the balancing test in *Florence* in the same way it did in *King*.

Although the *King* Court was “reluctant to circumscribe the authority of the police,” it still applied the balancing test as required by the Fourth Amendment.¹⁵² The Court concluded that *King* had a minimal privacy interest because he was arrested for a serious crime involving a weapon and the cheek swab was minimally intrusive.¹⁵³ On the other hand, the government had a legitimate interest in identifying *King* to protect both the other prisoners and the general public and the swab was an effective means by which to advance that interest.¹⁵⁴

In *Florence*, the Court did not apply the reasonableness balancing test. Instead of discussing the twenty-five years of circuit cases that applied the balancing test to find that some sort of suspicion was required before permitting strip and body

149. See *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1513, 1515 (2012) (referring to the search as “a close visual inspection while undressed” and describing the term “strip search” as imprecise).

150. *Id.* at 1514–15.

151. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375–77 (2009).

152. *King*, 133 S. Ct. at 1970, 1970, 1974.

153. See *id.* at 1977–79.

154. See *id.* at 1970–73, 1976–77.

cavity searches,¹⁵⁵ the Court only referenced the Third Circuit Court of Appeals decision below, which found the search to be constitutional, and the other circuits that came to the same conclusion.¹⁵⁶

Had the Court performed the balancing test, it would have found that, although the government's need to ensure prison security is legitimate, the strip searching of minor offenders is not the most effective or least intrusive means by which to achieve that goal. In his dissent, Justice Breyer discussed the circuit court cases that applied the balancing test and subsequently concluded that the government failed to prove that requiring a reasonable suspicion of wrongdoing resulted in an increase in detainees smuggling contraband into prisons.¹⁵⁷ Justice Breyer recognized that "managing a jail or prison is an 'inordinately difficult undertaking'" and that regulations that infringe on constitutional interests are typically upheld "as long as they are 'reasonably related to legitimate penological interests.'"¹⁵⁸ However, he cautioned that "the need must not be 'exaggerated'" and accused the Court of relying too heavily on the representations of the prison officials.¹⁵⁹ In both cases, the Court should have balanced the government's interest in the search against the petitioners' privacy interests.

155. See, e.g., *Masters v. Crouch*, 872 F.2d 1248, 1257 (6th Cir. 1989) (requiring reasonable grounds to believe that a detainee arrested for a traffic or non-violent offense is carrying contraband before he can be strip searched); *Weber v. Dell*, 804 F.2d 796, 804 (2d Cir. 1986) (requiring reasonable suspicion to strip search a minor offender); *Jones v. Edwards*, 770 F.2d 739, 741–42 (8th Cir. 1985) (concluding that the strip search of an individual arrested for violating a leash law was unreasonable under the Fourth Amendment); *Stewart v. Lubbock Cnty.*, 767 F.2d 153, 154 (5th Cir. 1985) (holding that strip searching of minor offenders is unconstitutional without reasonable suspicion); *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984) (finding no justification for the strip search of an individual for an overdue speeding ticket and violation of a license restriction); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1274 (7th Cir. 1983) (holding that the strip search of a minor offender awaiting a bail determination was unconstitutional); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981) (holding that a blanket strip search policy is unconstitutional). *But see* *Bull v. City & Cnty. of S.F.*, 595 F.3d 964, 982 (9th Cir. 2010) (en banc) (permitting strip searches that satisfy the Fourth Amendment balancing test); *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc) (upholding a strip search policy that did not require reasonable suspicion), *aff'd sub nom. Powell v. Sheriff*, 511 F. App'x 957 (11th Cir. 2013), *cert. denied sub nom. Matkin v. Barrett*, 134 S. Ct. 513 (2013).

156. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1518 (2012) (citing *Bame v. Dillard*, 637 F.3d 380, 382 (D.C. Cir. 2011); *Florence v. Board of Chosen Freeholders*, 621 F.3d 296, 311 (3d Cir. 2010); *Bull v. City & Cnty. of S.F.*, 595 F.3d 964, 966 (9th Cir. 2010); *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008), *cert. denied sub nom. Matkin v. Barrett*, 134 S. Ct. 513 (2013)).

157. *Florence*, 132 S. Ct. at 1530 (Breyer, J., dissenting).

158. *Id.* at 1527–28 (Breyer, J., dissenting) (quoting *Turner v. Safely*, 482 U.S. 78, 85, 89 (1987)).

159. *Id.* at 1531 (Breyer, J., dissenting).

A. Government Interest

Both opinions identified a legitimate government interest. However, although the Court sufficiently addressed the efficacy of the search in *King*, it did not require the government to prove the efficacy of strip searching minor offenders in *Florence*. In both cases, the Court should have evaluated the efficacy of the government's conduct and whether that conduct was the least intrusive as possible.

1. Legitimate Interest

Both *King* and *Florence* relied on a similar legitimate government interest: prison safety. In *King*, the Court held that the government has a legitimate interest in identifying both the detainee and his criminal history. A detainee's criminal record serves to promote safety, even if it also implicates the detainee in another crime. In his dissent, Justice Scalia accused the majority of concocting a government interest and argued that the true purpose of the DNA swab was to discover evidence of criminal wrongdoing.¹⁶⁰ However, the Court was correct to conclude that identification is a legitimate government interest. Although the search incident to valid arrest exception was carved out to protect individuals around the arrestee, this type of search often leads to additional inculpatory evidence as well. Furthermore, several state courts have already used the government interest in identification to justify DNA collection from arrestees and convicted felons.¹⁶¹ Similarly, the *Florence* Court correctly concluded that the government has a legitimate interest in prison safety; even the dissent agreed that the government's interest is legitimate.¹⁶²

2. Efficacy

The *King* Court adequately discussed the efficacy of the cheek swab in advancing the government's interest. The Court concluded that, based on studies, statistics, and information about the DNA technology, the government's interest in identification "is not speculative;" indeed, DNA offers "irrefutable evidence" of identity that helps to isolate violent offenders.¹⁶³ On the other hand,

160. See *Maryland v. King*, 133 S. Ct. 1958, 1982–85 (Scalia, J., dissenting) ("The truth, known to Maryland and increasingly to the reader: this search had nothing to do with establishing King's identity.").

161. See, e.g., *Mario v. Kaipio*, 265 P.3d 389, 392 (Ariz. Ct. App. 2011) (requiring a DNA sample as a condition of release), *vacated*, 281 P.2d 476 (Ariz. 2012), *abrogated by King*, 133 S. Ct. 1958; *Poston v. State*, 201 S.W.3d 406, 413 (Ark. 2005) (noting that collecting a DNA sample from a convicted felon was a reasonable search under the Fourth Amendment); *State v. Hutchinson*, 969 A.2d 923, 931–32 (Me. 2009) (noting the government's interest in identifying monitoring convicted felons through DNA samples); *State v. Sanders*, 163 P.3d 607 (Ore. 2007) (comparing DNA samples to fingerprints and photographs).

162. *Florence*, 132 S. Ct. at 1527–28 (Breyer, J., dissenting).

163. *King*, 133 S. Ct. at 1972–74.

the efficacy of strip searching detainees arrested for minor offenses in *Florence* remains speculative, and the Court deferred to the prison officials' argument that such searches are effective in maintaining prison safety.¹⁶⁴

Although the Court distinguished minor offenders from serious offenders in *King*, it was unwilling to do so in *Florence*. However, this distinction is important in determining efficacy. First, minor offenders, typically stopped unexpectedly, do not have the time or wherewithal to surreptitiously and spontaneously store contraband in their body cavities.¹⁶⁵ In *Florence*, in order for the efficacy argument to be logical, the Court would have to assume that Florence strapped contraband under his genitals or secreted them in his anal cavity before attending a family celebration, in anticipation that the police would stop his wife for a traffic violation and then arrest and detain him for failing to pay a fine. The Court rejected this flawed logic in an earlier case, in which it concluded that a full car search for evidence or contraband following a traffic citation would not be effective because the likelihood that an officer would "stumble onto evidence wholly unrelated to the speeding offense seems remote."¹⁶⁶

Second, the government provided limited support for the argument that minor offenders were at risk for smuggling contraband.¹⁶⁷ Justice Breyer found no convincing evidence that mandatory strip searches of minor offenders without reasonable suspicion furthered the government's safety goals.¹⁶⁸ Additionally, he admonished the Court for failing to provide any examples of cases in which detainees smuggled contraband into a jail that would not have been discovered if the jail employed a reasonable suspicion standard for searches.¹⁶⁹ Justice Breyer instead relied on two studies suggesting that requiring reasonable suspicion for strip searches would not result in contraband passing into jails undetected.¹⁷⁰ He noted that many correction facilities, including the United States Marshals Service and the Federal Bureau of Prisons, require reasonable suspicion before strip searching detainees that will be held in the general jail

164. See *Florence*, 132 S. Ct. at 1517–21.

165. *Florence*, 132 S. Ct. at 1531 (Breyer, J., dissenting).

166. Knowles v. Iowa, 525 U.S. 113, 118 (1998); see also Robin Lee Fenton, Comment, *The Constitutionality of Policies Requiring Strip Searches of All Misdemeanants and Minor Traffic Offenders*, 54 U. CIN. L. REV. 175, 185–86 (1985) (“[O]ne who is arrested for an outstanding parking ticket is much less likely to be carrying a dangerous weapon than is one who is arrested for an armed robbery.”).

167. See *Florence*, 132 S. Ct. at 1520–21. Instead, the Petitioner provided evidence that most smuggling is facilitated by jail employees, not detainees. See Brief for the Petitioner, *supra* note 12, at 31 n.10.

168. *Florence*, 132 S. Ct. at 1528 (Breyer, J., dissenting).

169. *Id.* at 1529–30 (Breyer, J., dissenting).

170. *Id.* at 1528–29 (Breyer, J., dissenting).

population.¹⁷¹ Justice Breyer also listed several states that prohibit suspicionless searches of minor—or, in some cases, all—offenders.¹⁷²

Third, for twenty-five years before *Florence*, federal courts of appeals had consistently held that strip searching minor offenders without reasonable suspicion that they were carrying contraband was unreasonable.¹⁷³ Although jail officials worried that these rulings “would result in major security problems because of the dramatic increase in contraband entering the jail,” a study commissioned by the United States Department of Justice indicated that the jurisdictions that required reasonable suspicion before strip searching detainees did not see an increase in the smuggling of contraband into prisons once blanket suspicionless searches were prohibited.¹⁷⁴

For example, the United States District Court for the Southern District of New York reported that, of 23,000 arrestees processed in the Orange County Correctional Facility, only one would have been able to smuggle in contraband past a reasonable suspicion standard.¹⁷⁵ Another New York study reported that, of the 75,000 new prisoners strip searched at the Nassau County Correctional Center from 1993 to 1998, not one case required a strip search “without colorable suspicion . . . to uncover a weapon or other contraband from a body or body cavity.”¹⁷⁶ Similarly, in 2009, a federal district court judge in northern Illinois found that jail officials could not show that minor offenders entering the Cook County, Illinois jail “routinely possessed contraband.”¹⁷⁷

The *Florence* Court should not have accepted the conjecture of prison officials who presumed, without adequate evidence, that blanket strip searching would increase prison security. Instead, the Court should have relied on studies and statistics as it did to demonstrate the efficacy of the cheek swab in *King*.

171. *Id.* at 1529 (Breyer, J., dissenting).

172. *Id.* at 1529-30 (Breyer, J., dissenting) (citing COLO. REV. STAT. § 16-3-405(1) (2012); FLA. STAT. ANN. § 901.211(2) (West 2001); 725 ILL. COMP. STAT. ANN. 5/103-1(c) (West 2006); IOWA CODE ANN. § 804.30 (West 2003); KAN. STAT. ANN. § 22-2521(a) (2007); MICH. COMP. LAWS ANN. § 764.25a(2) (West 2000); MO. ANN. STAT. § 544.193.2 (West 2002); WAS. REV. CODE ANN. § 10.79.130(1) (West 2010); 501 KY. ADMIN. REGS. 120 (2014)).

173. *See supra* note 155 (discussing circuit courts of appeals opinions that applied the Fourth Amendment balancing test to evaluate the constitutionality of strip searches in prisons).

174. WILLIAM C. COLLINS, U.S. DEP'T OF JUSTICE, JAILS AND THE CONSTITUTION 28–29 (2d ed. 2007), available at <https://s3.amazonaws.com/static.nicic.gov/Library/022570.pdf> (noting that jail officials tended to exaggerate the security threat). Ultimately, jail administrators' assumptions that suspicionless strip searches would reduce contraband were unfounded; as a former jail administrator explained: “We really have not seen an increase in the entry of contraband in those facilities that use a constitutionally valid strip search policy.” Don Leach, *Arrestee Strip Searches: An Administrator's View*, CORRECTIONAL L. REP., June-July 2010, at 13, 13.

175. *See Dodge v. Cnty. of Orange*, 282 F. Supp. 2d 41, 70 (S.D.N.Y. 2003).

176. *See Respondent's Brief in Opposition at 7–8, Nassau Cnty. v. Shain*, 537 U.S. 1083 (2002) (No. 02-541).

177. *Young v. Cnty. of Cook*, 616 F. Supp. 2d 834, 847 (N.D. Ill. 2009).

3. Least Intrusive Means

Neither the *King* Court nor the *Florence* Court discussed whether the government used the least intrusive search means. Had the Court conducted this analysis in *King*, it would have determined that a buccal swab was a less intrusive means of collecting DNA than other available methods. Other reliable methods of obtaining DNA include blood testing, semen samples, or the surgical removal of tissue.¹⁷⁸ Swabbing a Q-tip in the arrestee's mouth is less intrusive than any of these alternatives.

Had the Court considered less intrusive means in *Florence*, it would have found that alternative means exist to search for contraband, address health risks, and identify gang membership. First, a pat-down search will uncover the vast majority of contraband and is "the least intrusive type of search [that] may be conducted on a routine and random basis to maintain security and control."¹⁷⁹ Additionally, once an arrestee is detained, officials can conduct random "shakedown" search of his cell to find any contraband smuggled into the facility.¹⁸⁰ Furthermore, in this technological age, a plethora of advanced technological tools are available to search for contraband, such as metal detectors.¹⁸¹ For example, the Body Orifice Scanning System—known as a "BOSS chair"—is designed to detect metal objects concealed in body cavities.¹⁸² The Canon RadPro SecurPass, used in Illinois and Florida, is so accurate and detailed it can display "something as minute as a filling in someone's tooth."¹⁸³

Another justification for the strip search in *Florence* was the health of the detainees; the search allowed the prison officials to screen arrestees for lice or illness.¹⁸⁴ However, these problems are a consequence of *living* in a correctional facility,¹⁸⁵ not of entering one. Moreover, only medical professionals are

178. See Rana Saad, *Discovery, Development, and Current Applications of DNA Identity Testing*, 18 BAYLOR UNIV. MED. CTR. PROCEEDINGS 131, 132–33 (2005), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1200713/pdf/bumc0018-0130.pdf>.

179. MARK D. MARTIN & THOMAS A. ROSAZZA, U.S. DEP'T OF JUSTICE, RESOURCE GUIDE FOR JAIL ADMINISTRATORS 113 (2004), available at <http://static.nicic.gov/Library/020030.pdf>.

180. See *Block v. Rutherford*, 468 U.S. 576, 589, 591 (1984) (upholding random "shakedown" searches of detainees' cells for contraband while they are away from them).

181. Brief of Former Attorneys General of New Jersey Robert J. Del Tufo et al. as Amici Curiae in Support of Petitioner at 21, *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012) (No. 10-945) [hereinafter Brief of Former Attorneys General] (citing *Kelsey v. City of Schoharie*, 567 F.3d 54, 70 (2d Cir. 2009) (Sotomayor, J., dissenting)) ("[M]etal detectors may provide a less intrusive means of identifying contraband.").

182. *Florence*, 132 S. Ct. at 1528 (Breyer, J., dissenting).

183. Elaine Pittman, *County Jails Deploy Whole-Body Scanners to Detect Hidden Weapons or Contraband*, GOV'T TECH (Apr. 27, 2011), <http://www.govtech.com/public-safety/County-Jails-Deploy-Whole-Body-Scanners.html> (explaining that the scanning system takes only seven seconds, compared to a fifteen-minute strip search).

184. *Florence*, 132 S. Ct. at 1518.

185. See Grant E. Deger & David W. Quick, *The Enduring Menace of MRSA: Incidence, Treatment, and Prevention in a County Jail*, 15 J. CORRECTIONAL HEALTH CARE 174, 177 (2009)

qualified to evaluate an arrestee's medical condition.¹⁸⁶ Jails require medical examinations after intake, so an earlier strip search to evaluate the detainee's health is redundant and unnecessary.¹⁸⁷

The *Florence* Court also relied on the need to identify gang members to justify the strip search.¹⁸⁸ However, male gang members do not tattoo their genitals or body cavities, and women members, who may tattoo private areas, choose tattoos representing sexual relationships, not gang affiliation.¹⁸⁹ Instead, gang members display their tattoos prominently as a form of communication to identify their affiliation with a certain gang.¹⁹⁰ Thus, the best method for searching for gang tattoos would not be to strip search an individual, but to examine already exposed body parts such as the face, hands, neck, arms, and legs.

B. Individual's Privacy Interest

The *King* Court explicitly addressed the privacy interest of the serious offender who had his cheek swabbed for DNA evidence. However, it did not discuss the privacy interest of the minor offender in *Florence*, who was forced to strip, bend over, and have his body cavities inspected.

1. Legitimate Expectation of Privacy

Both *King* and *Florence* were pretrial detainees who had not yet appeared before a neutral magistrate. Despite the similarities in their cases, the Court treated *King* and *Florence* differently. In *King*, the Court correctly noted that not every search is acceptable simply because a person is in custody.¹⁹¹ Additionally, once a person has been arrested for a dangerous offense that may require pretrial detention, "his expectations of privacy and freedom from police scrutiny are reduced."¹⁹² Therefore, *King* had a reduced expectation of privacy after being arrested for a serious offense. However, the Court refused to recognize that *Florence* retained a much greater expectation of privacy because he was only arrested for failing to pay a fine. Instead, the Court incorrectly

(noting that methicillin-resistant *Staphylococcus aureus* (MRSA) is prevalent in jails because of overcrowding, poor health care, and other factors); see also Brief Amici Curiae of Medical Society of New Jersey the Center for Prisoner Health and Human Rights, and Medical Experts in Support of Petitioner at 5, *Florence*, 132 S. Ct. 1510 (No. 10-945) (explaining that skin infections, such as MRSA, are widespread in prisons but that strip searches are not effective at detecting them).

186. Reply Brief for the Petitioner at 15, *Florence*, 132 S. Ct. 1510 (No. 10-945).

187. See *id.*

188. *Florence*, 132 S. Ct. at 1518–19.

189. See Brief of Academics on Gang Behavior as Amici Curiae on Behalf of Petitioner at 6, *Florence*, 132 S. Ct. 1510 (No. 10-945); see also Shawn Booth, *Gang Symbols*, in *ENCYCLOPEDIA OF GANGS* 74, 75 (Louis Kontos & David C. Brotherton eds., 2008).

190. Brief of Academics on Gang Behavior, *supra* note 189, at 9.

191. *Maryland v. King*, 133 S. Ct. 1958, 1979 (2013).

192. *Id.* at 1978.

treated Florence like a prisoner with a significantly reduced expectation of privacy, despite his minor offender status. By placing the search within the discretion of prison officials, the Court transformed the search from an administrative booking procedure to a special needs prison regulation procedure. This reduced Florence's expectation of privacy from that of a minor offender, who was unlikely to serve any jail time, to a prisoner at the mercy of unfettered law enforcement discretion.

Because neither King nor Florence appeared before a magistrate before being searched, the police were free to detain King for a serious offense and to place Florence in the general prison population. However, the Court should have required an official finding of probable cause before allowing the police to conduct either search.¹⁹³ By requiring a probable cause hearing, Florence would have been released because he was suspected of an offense that does not carry jail time. In King's case, the police would have been required to show that there was probable cause that King had committed first-degree assault before swabbing his cheek.

2. Intrusiveness of the Search

Only *King* addressed the invasiveness of the search at issue, concluding that the buccal swab procedure was not intrusive and likening the swab to DNA fingerprinting. Conversely, the *Florence* Court refused to even label the search a "strip search." However, the labeling of the searches is less important than where each falls on the intrusiveness scale. A cheek swab, although an intrusion into the body, is not degrading, humiliating, or even very invasive. It takes no more than a few seconds and only exposes the cheek, a single body part that is typically visible when talking, eating, singing, or yawning. Therefore, the Court was correct to conclude that the cheek swab was minimally invasive.

On the other hand, the *Florence* Court failed to place the search in question on the invasiveness spectrum and refused to label the search a "strip search" because no touching occurred.¹⁹⁴ However, strip searches do not require touching to be labeled as strip searches. For example, in *Safford United School District No. 1 v. Redding*, the Court described a search of a student's clothes as a "strip search" even though she remained in her bra and underwear and no

193. Lower courts have required a probable cause hearing before allowing law enforcement to take a DNA sample. See, e.g., *Mario v. Kaipio*, 265 P.3d 389, 392 (Ariz. Ct. App. 2011), *vacated*, 281 P.2d 476 (Ariz. 2012), *abrogated by King*, 133 S. Ct. 1958. This hearing is not held to determine probable cause for a warrant, but rather is held to determine if there is probable cause to detain the arrestee, based on the charges filed against him. See *id.* In *King*, the DNA collection statute prohibited the police from testing King's DNA sample until after his first appearance in court. See MD. CODE ANN., PUB. SAFETY § 2-504(d)(1) (LexisNexis 2011 & Supp. 2013). However, the police were permitted to take the swab before King's initial court appearance. See *id.* at § 2-504(a)(3)(i).

194. See *Florence*, 132 S. Ct. at 1513–15 (describing the search instead as "a close visual inspection while undressed").

touching was involved.¹⁹⁵ In addition, several states have defined the term “strip search” to include visual inspections without touching.¹⁹⁶ In his *Florence* dissent, Justice Breyer specifically labeled these searches as “strip searches” and correctly found them to be serious invasions of privacy.¹⁹⁷

Individuals have an intense cultural and personal sense of privacy in their bodies.¹⁹⁸ Indeed, “[i]n a civilized society, one’s anatomy is draped with constitutional protections,”¹⁹⁹ and forced undressing without consent in almost any other context results in criminal charges.²⁰⁰ People forced to expose themselves often “experience a severe and sometimes debilitating humiliation and loss of self-esteem.”²⁰¹ Individuals subjected to strip searches have described them as humiliating and shameful, with both short term effects, such as weeping on the floor, and long term effects, such as severe psychological trauma.²⁰² Detainees who are strip searched after being arrested for minor offenses are even more traumatized because they are taken by surprise, which “exacerbate[es] the terrifying quality of the event.”²⁰³ Accordingly, the Court

195. 129 S. Ct. 2633, 2638 (2009) (noting that the student was forced to pull her underwear away from her body and shake it out).

196. See, e.g., CAL. EDUC. CODE § 49050 (West 2006) (permitting specifically *visual* inspection of underclothing, breast, buttocks, or genitalia); COLO. REV. STAT. § 16-3-405 (2012 & Supp.) (defining a strip search as the removal of some or all clothing so as to allow a visual inspection); WIS. STAT. ANN. § 948.50(2)(b) (West 2005 & Supp. 2012) (defining a strip search to include both exposure or touching of the genitals or pubic areas).

197. *Florence*, 132 S. Ct. at 1525 (Breyer, J., dissenting).

198. See Trina J. Magi, *Fourteen Reasons Privacy Matters: A Multidisciplinary Review of Scholarly Literature*, 81 LIBR. Q. 187, 191–92 (2011) (noting that, according to the privacy norms of various cultures, most prohibit nudity); Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2092–93 (2001) (explaining that ideas of privacy help to inform social norms that respect individual dignity and autonomy); David C. James, Note, *Constitutional Limitations on Body Searches in Prisons*, 82 COLUM. L. REV. 1033, 1049–50 (1982) (“Nowhere are privacy and dignity interests implicated more acutely than with respect to the body.”).

199. *United States v. Afanador*, 567 F.2d 1325, 1331 (5th Cir. 1978).

200. Brief for Psychiatrists as Amici Curiae in Support of Petitioner at 4, *Florence*, 132 S. Ct. 1510 (No. 10-945).

201. Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 537 (2006). For example, the student searched in *Safford* was so humiliated that she transferred to a different high school. Adam Liptak, *Strip-Search of Young Girl Tests Limit of School Policy*, N.Y. TIMES, Mar. 24, 2009, at A19.

202. See *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982) (“[A] strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience.”); *Lucero v. Donovan*, 354 F.2d 16, 19 (9th Cir. 1965) (describing a search during which law enforcement officials “made deprecating remarks” about the plaintiff’s body and the plaintiff wept on the floor); see also McKeown, *Strip Searches are Alive and Well in America*, HUM. RTS., Spring 1985, 36, 37 (characterizing strip searches as “paralyzing”); Daphne Ha, Note, *Blanket Policies for Strip Searching Pretrial Detainees*, 79 FORDHAM L. REV. 2721, 2740 (2011) (describing the emotional and physical consequences of strip searching).

203. Brief for the Petitioner, *supra* note 12, at 23 (quoting *Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir. 1993)). For example, *Florence* was humiliated after being strip searched because he

has recognized that forced disrobement is humiliating, degrading, and dehumanizing.²⁰⁴ Consequently, the *Florence* Court should have recognized that the search at issue was deeply invasive and therefore should have labeled it a strip search.

In addition to the minimal invasiveness of the cheek swab itself, the *King* Court also noted the statutory limitations on the use of the DNA sample; DNA may only be tested for identification, not to reveal genetic traits.²⁰⁵ However, the Court should have been more explicit in defining the constitutional implications of both potential searches. The first search, the buccal swab of King's cheek, was minimally invasive because King simply had to open his mouth for a few seconds for a Q-tip swab. However, had the police used the DNA evidence beyond identifying King by, for example, testing for other genetic traits, they would have conducted a much more intrusive search.²⁰⁶ In that situation, King would have done more than simply open his mouth; he would have exposed personal genetic information that he is entitled to keep private. Although the Court based its argument, in part, on the fact that the use of the DNA sample was limited to identification, it did not clearly distinguish the two searches for constitutional purposes.

V. THE RESULTING EFFECTS, ABUSES, AND PROPOSED REMEDIES

The consequence of *King* and *Florence* is that all citizens should be concerned about their Fourth Amendment rights. Law enforcement officials now have the ability to strip search you, visually inspect your body cavities, and swab your cheek for DNA, even if they have no suspicion that these searches will uncover evidence or contraband. The Founding Fathers sought to prohibit exactly this sort of unfettered discretion and its potential for abuse with the Fourth Amendment.

“had ‘never been . . . seen naked in front of a man’ other than his father.” *Id.* When the officer conducting the search looked at him, *Florence* “just wanted to get away from [the officer] as quickly as [he] could.” *Id.*

204. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374–75 (2009). The Court also noted that some communities find strip searches to be so degrading that they have forbidden them. *Id.* at 375.

205. *Maryland v. King*, 133 S. Ct. 1958, 1967 (2013) (explaining that the Maryland statute only permits police officers to test noncoding parts of DNA, which do not reveal any of the arrestee's genetic traits).

206. Other courts have distinguished these two searches. *See, e.g.*, *Friedman v. Boucher*, 580 F.3d 847, 858 (9th Cir. 2009) (holding that the search was unconstitutional because the DNA was collected from the defendant for the purpose of adding to a law enforcement databank); *United States v. Kriesel*, 508 F.3d 941, 947–48 (9th Cir. 2007) (“The concerns about DNA samples being used beyond identification purposes are real and legitimate.”); *United States v. Kincade*, 379 F.3d 813, 837–38 (9th Cir. 2004) (en banc) (plurality opinion) (acknowledging the constitutional distinction between DNA testing for identity and DNA testing for genetic information).

A. *The Resulting Effects and Abuses*

The decisions in *King* and *Florence* have several important consequences: (1) the traumatic and disproportionate effects of suspicionless searches of arrestees charged with minor offenses; (2) the potential for abuse of the expansive holdings, which do not require a probable cause hearing before the searches may be performed; (3) the unnecessary entry of minor offenders into the general jail population; and (4) the inappropriate use of DNA testing, especially with expanding new technologies.

1. *Effects of Suspicionless Searches of Minor Offenders*

The suspicionless strip search and visual body cavity inspection of *Florence* was not an isolated incident. These types of searches occur more often than one may believe because police have the ability to arrest and detain individuals for minor offenses such as moving, parking, and bicycle violations.²⁰⁷ Occasionally, police also strip search these individuals. For example, police have strip searched a nun for trespassing during an anti-war protest,²⁰⁸ a woman for speeding,²⁰⁹ a group of teachers for disorderly conduct during a strike,²¹⁰ and other individuals who committed minor, non-violent crimes.²¹¹

Blanket strip search policies desensitize law enforcement officers to the dehumanizing and traumatic effects of the searches and cause officers to view detainees as “booking-numbered objects to be processed.”²¹² In addition, the most inexperienced officers are often assigned to perform strip searches, creating the potential for mistake or abuse, especially with searches of women and children.²¹³

Women are especially susceptible to pretextual arrests as a vehicle for strip searches. Women are generally subjected to more invasive searches than men

207. See Brief for the Petitioner, *supra* note at 12, at 25.

208. See *Bull v. City & Cnty. of S.F.*, 595 F.3d 964, 989 (9th Cir. 2010) (en banc) (Thomas, J., dissenting).

209. See *Tinetti v. Witke*, 479 F. Supp. 486, 488 (E.D. Wis. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980).

210. Paul R. Shuldiner, *Visual Rape: A Look at the Dubious Legality of Strip Searches*, 13 J. MARSHALL L. REV. 273, 274 (1980).

211. See, e.g., *Chapman v. Nichols*, 989 F.3d 393, 394 (10th Cir. 1993) (presenting a strip search resulting from driving with a suspended license); *Masters v. Crouch*, 872 F.2d 1248, 1250 (6th Cir. 1989) (recounting a strip search resulting from a failure to appear in traffic court, even though the judge provided wrong date); *Jones v. Edwards*, 770 F.2d 739, 740 (8th Cir. 1985) (considering a strip search resulting from violating a leash law); *Doe v. Calument City*, 754 F. Supp. 1211, 1213–14 (N.D. Ill. 1990) (analyzing a strip search resulting from a young woman’s underage drinking).

212. *Bull*, 595 F.3d at 1000 (Thomas, J., dissenting).

213. See Brief of Current and Former Jail and Corrections Professionals as Amici Curiae in Support of Petitioner at 15, *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012) (No. 10-945) [hereinafter Brief of Current and Former Jail and Corrections Professionals].

because, according to law enforcement and correctional officials, vaginal smuggling is easier and therefore more prevalent than anal smuggling.²¹⁴ These searches can be particularly traumatic for women who have been victims of domestic abuse or sexual assaults,²¹⁵ which is problematic because women are physically and sexually abused at a higher rate than men. Indeed, more than fifty percent of detained women report that they have been victims of physical or sexual abuse.²¹⁶

Children also experience trauma as a result of strip searches at a higher rate than others.²¹⁷ Students who are strip searched typically have problems concentrating in school, drop out of school at higher rates than other students, and experience difficulties with personal relationships.²¹⁸ These students may also suffer from anxiety, phobias, depression, and occasionally even suicidal behavior.²¹⁹ Strip searches can be as traumatic as rape or sexual abuse to adolescents, whose self-conscious body images are directly related to their self-esteem and well being.²²⁰

Strip and visual cavity searches of individuals arrested for minor offenses also stifle constitutional rights. For example, a protestor may think twice before

214. See Margo Schlanger, *Jail Strip-Search Cases: Patterns and Participants*, 71 LAW & CONTEMP. PROBS. 65, 75 (2008).

One commentator has described strip searches as “visual rape.” Shuldiner, *supra* note 211, at 303.

215. See Brief for the Petitioner, *supra* note 12, at 24; ANTI-DISCRIMINATION COMM’N QUEENSLAND, WOMEN IN PRISON 72 (2006), available at https://www.adcq.qld.gov.au/_data/assets/pdf_file/0018/5148/WIP_report.pdf; see also RUSSEL P. DOBASH ET AL., THE IMPRISONMENT OF WOMEN 204–05 (1986); Lori B. Girshick, *Abused Women and Incarceration*, in WOMEN IN PRISON 95–96 (Barbara H. Zaitzow & Jim Thomas eds. 2003); Jan Heney & Connie M. Kristiansen, *An Analysis of the Impact of Prison on Women Survivors of Childhood Sexual Abuse*, in BREAKING THE RULES: WOMEN IN PRISON AND FEMINIST THERAPY 29, 30–31 (Judy Harden & Marcia Hill eds., 1998); Jude McCulloch & Amanda George, *Naked Poker: Strip Searching in Women’s Prisons*, in THE VIOLENCE OF INCARCERATION 107, 116 (Phil Scraton & Jude McCulloch eds., 2009); Louise Bill, *The Victimization and Revictimization of Female Offenders: Prison Administrators Should Be Aware of Ways in Which Security Procedures Perpetuate Feelings of Powerlessness Among Incarcerated Women*, CORRECTIONS TODAY, Dec. 1998, at 106, 108–10.

216. Brief of Former Attorneys General, *supra* note 181, at 30 (citing DORIS J. JAMES, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 10 (2004), available at <http://www.bjs.gov/content/pub/pdf/pji02.pdf>).

217. See Laura L. Finley, *Examining School Searches as Systemic Violence*, 14 CRITICAL CRIMINOLOGY 117, 125–26 (2006).

218. See Irwin A. Human & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. SCH. PSYCHOL. 7, 13 (1998); Stephen F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 13–14 (1991). Courts have taken the same view that “[c]hildren are especially susceptible to trauma from strip searches.” See, e.g., *Flores v. Meese*, 681 F. Supp. 665, 667 (C.D. Cal. 1988), *rev’d sub nom. Renov v. Flores*, 507 U.S. 292 (1993).

219. See Shatz, et al., *supra* note 218, at 12.

220. See David C. Blickenstaff, *Strip Searches of Public School Students: Can New Jersey v. T.L.O. Solve the Problem?*, 99 DICK. L. REV. 1, 45 (1994).

asserting his First Amendment rights if his arrest for a minor offense could result in an invasive strip search.²²¹

Many law and policy makers understand the traumatic effects of strip searching and have spoken out against suspicionless searches of individuals arrested for minor offenses. For example, former Governor of New Jersey Tom Kean stated: “It is an outrageous abuse of authority to subject a person detained for a motor vehicle violation, for instance, to a strip search [I]t is a violation of a person’s privacy and dignity and cannot be tolerated or condoned.”²²² Similarly, the American Bar Association’s Standards for Criminal Justice provide that “a strip search should not be permitted without individualized reasonable suspicion when the prisoner is an arrestee charged with a minor offense not involving drugs or violence.”²²³ Additionally, federal agencies such as the Bureau of Prisons, the Immigration and Customs Service, the Bureau of Indian Affairs, and the United States Marshals Service forbid strip searches unless the officers have a reasonable suspicion that the arrestee is concealing contraband on his person.²²⁴

2. Potential Abuse as the Result of a Search Conducted Without a Probable Cause Hearing

Law enforcement officials are responsible for determining what offense will predicate an arrest and whether the arrestee will be housed in the general prison population. Therefore, unless a neutral magistrate intervenes, the determination of which detainees to search, either through a cheek swab or visual cavity search, is left to the police. The Court’s ruling in *King* allows police to arrest a person for a serious crime as a pretext to acquire DNA material to enter into a database for criminal record identification. Police could therefore charge a serious offense alongside a minor offense as a pretext to authorize a DNA swab. For example, *King* was originally charged with first-degree assault and second-degree assault, but the first-degree assault—the charge that permitted the cheek swab—was subsequently dropped.²²⁵ Moreover, after *Florence*, police may arrest a citizen for any reason, decide to intermingle him with the general population of a prison, and force him to strip and expose his genitals and anal cavity. Without a magistrate to intervene before the decision to intermingle is made, all citizens are at risk for strip and visual body cavity searches.

221. See Schalnger, *supra* note 214, at 67 (describing the case of Judith Haney, who was arrested at a 2003 political demonstration in Miami, Florida and forced to bend over, expose her anus and genitals, squat, and then “hop like a bunny”).

222. Brief for the Petitioner, *supra* note 12, at 17.

223. AM. BAR ASS’N., ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS § 23-7.9(d)(ii) (3d ed. 2011).

224. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1529 (2012) (Breyer, J., dissenting).

225. Brief for the Respondent, *supra* note 7, at 43.

3. *Intermingling of Minor Offenders in the General Jail Population*

Together, *Florence* and *Atwater* give police the authority to decide who will undergo a strip search.²²⁶ However, in their *Florence* concurrences, Chief Justice Roberts and Justice Alito both expressed concern about the potential to abuse *Florence*'s broad holding. Justice Alito admitted that most individuals arrested for minor offenses are not typically dangerous and, consequently, that strip searching these offenders is particularly humiliating.²²⁷ Justice Alito also cautioned that admitting minor offenders into the general jail population may be unreasonable if alternative detention options are available.²²⁸ Chief Justice Roberts clarified that, in *Florence*'s specific case, there was no alternative to holding him in the general jail population.²²⁹ In fact, alternative facilities are often not an option, especially in small communities that can only afford one general holding facility.²³⁰

4. *Inappropriate Use of DNA Testing*

The *King* majority failed to draw the important distinction between DNA searches. First, the cheek swab itself was a search for Fourth Amendment purposes. However, the subsequent testing of that sample, for a purpose other than identification, is a discrete, more invasive search. This distinction is important. For example, if a suspect is questioned at the police station, he may inadvertently leave hair or skin cells behind. According to *King*, police are permitted to test these samples to identify the suspect. Such a search is permissible because the suspect has technically abandoned the skin cells, and he therefore has no expectation of privacy in them. Any additional testing of the sample is unconstitutional because the suspect has a legitimate expectation of privacy in the genetic information gathered from additional tests.²³¹

Additionally, law enforcement and courts will struggle in applying this vague jurisprudence to new technology. For example, facial-recognition technology and other biometric tools, which can identify variations in an individual's irises,

226. See *Florence*, 132 S. Ct. at 1513, 1523 (permitting strip searches of any arrestee who will enter the general prison population); *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (recognizing law enforcement's discretion to determine who may be arrested).

227. *Florence*, 132 S. Ct. at 1524 (Alito, J., concurring).

228. *Id.* (Alito, J., concurring).

229. *Id.* at 1523 (Roberts, C.J., concurring).

230. *Id.* at 1524 (Alito, J., concurring).

231. See *Raynor v. State*, 29 A.3d 617, 621, 625 (Md. Ct. Spec. App. 2011) (holding that defendant's skin cells, left on arm rest when he repeatedly rubbed his hands on chair in police station, were abandoned and could therefore be used for identification purposes only), *cert. granted*, 52 A.3d 978 (Md. 2012); *Williamson v. State*, 993 A.2d 626, 635, 642 (Md. 2010) (finding that DNA left on a cup used at police station was abandoned and therefore did not violate Fourth Amendment).

vein patterns, walking gait, and skin textures, are now available.²³² This technology could be compared to photographs and therefore may not even implicate the Fourth Amendment. Advanced identification technology could also be compared to collection and testing DNA for genetic material and therefore extremely intrusive. Because *King* failed to address most of these technology questions, future courts will need to consider these technologies without the benefit of Supreme Court jurisprudence.

B. Proposed Remedies

To balance the problematic rules set forth in *King* and *Florence*, states and agencies can employ their own safeguards to protect individual Fourth Amendment rights. States could (1) limit strip searches to arrestees about whom law enforcement has reasonable suspicion; (2) require a ruling on probable cause before officers are permitted to conduct a cheek swab and strip searches occur; (3) limit the placement of detainees arrested for minor offenses into the general jail population; and (4) explicitly limit the purpose of DNA testing to only identification.

1. Requirement of Reasonable Suspicion

State courts and legislatures can help to prevent potential abuse of *Florence* by requiring reasonable suspicion that detainees are carrying contraband before they may be strip searched and inspected. Reasonable suspicion should be based, in part, on the seriousness or violence of the crime for which the individual was arrested. At least eighteen state legislatures have already enacted statutes that prohibit suspicionless strip searches of individuals arrested for minor offenses.²³³

232. Craig Timberg & Ellen Nakashima, *Photo-ID Databases Become Troves for Police*, WASH. POST, June 17, 2013, at A1.

233. See CAL. PENAL CODE § 4030(f) (West 2011) (requiring reasonable suspicion); COLO. REV. STAT. § 16-3-405(1) (2012) (requiring reasonable belief); CONN. GEN. STAT. ANN. § 54-33L(a) (West 2009) (requiring reasonable belief); FLA. STAT. ANN. § 901.211(2) (West 2001) (requiring probable cause); 725 ILL. COMP. STAT. ANN. § 5/103-1(c) (West 2006) (requiring reasonable belief); IOWA CODE ANN. 804.30 (West 2003) (requiring probable cause); KAN. STAT. ANN. § 22-2521(a)(2007) (requiring probable cause); MICH. COMP. LAWS ANN. § 764.25a(2) (West 2000) (requiring reasonable cause); MO. ANN. STAT. § 544.193.2 (West 2002) (requiring probable cause); N.J. STAT. ANN. § 2A.161A-1(b) (West 2011) (requiring probable cause); OHIO REV. CODE ANN. § 2933.32(B)(2) (LexisNexis 2010) (requiring probable cause); TENN. CODE ANN. § 40-7-119(b) (2012) (requiring reasonable belief); VA. CODE ANN. § 19.2-59.1(A) (2008) (requiring reasonable cause); WAS. REV. CODE ANN. § 10.79.130(1) (West 2012) (requiring reasonable suspicion or probable cause); 501 KY. ADMIN. REGS. 119 (2014) (requiring reasonable suspicion); 03-201 ME. CODE R. § II(1)(B) (2006) (requiring reasonable suspicion); 81 NEB. ADMIN. CODE § 006.03A2, .03D4 (1987) (requiring reasonable suspicion or probable cause); VT. AGENCY OF HUMAN SERVS., DEP'T OF CORRECTIONS, Directive 315.01, § II.A.2. (1997) (requiring reasonable suspicion).

Law enforcement agencies can easily implement these stricter policies. The United States Marshals Service, the Immigration and Customs Service, and the Bureau of Indian Affairs all apply a reasonable suspicion standard before strip searching detainees who will be held in the general jail population.²³⁴ Additionally, the American Correctional Association, which sets nationwide standards for correctional facilities, requires reasonable suspicion before an arrestee may be strip searched at intake.²³⁵ Similarly, the Department of Justice's National Institute of Corrections has published a comprehensive handbook for jail administrators, which requires reasonable suspicion for strip searches, limits the type of offenses for which strip searches may be performed, and prohibits blanket strip search policies.²³⁶

The reasonable suspicion standard encourages officers to apply their training and experience to assess whether a strip search is necessary. Many jurisdictions have implemented checklists to assist officers in determining whether reasonable suspicion exists.²³⁷ Jail personnel are encouraged to consider a range of factors, such as: "(1) the crime charged, (2) the particular characteristics of the arrestee . . . (3) the circumstances of the arrest,"²³⁸ (4) the arrestee's criminal record, (5) the effect of placing the detainee in the general prison population, and (6) the safety concerns raised by the detainee.²³⁹ Other jurisdictions should implement similar guidelines.

Finally, the reasonable suspicion standard will not cause an increase in contraband in prisons, as evidence by the data reported by jurisdictions that have already implemented this standard.²⁴⁰ Pat down searches, advanced metal detectors, and random searches of cells are sufficient to ensure safe prisons.²⁴¹ In fact, requiring reasonable suspicion will allow correctional officers to focus their limited resources on offenders who are likely to have concealed contraband.

234. *Florence*, 132 S. Ct. at 1529 (Breyer, J., dissenting).

235. AM. CORR. ASS'N, CORE JAIL STANDARDS Standard 1- CORE-2C-02 (2010); AM. CORR. ASS'N, PERFORMANCE-BASED STANDARDS FOR ADULT LOCAL DETENTION FACILITIES Standard 4-ALDF-2C-03 (4th ed. 2004); *Standards and Accreditation*, AM. CORRECTIONAL ASS'N, <https://www.aca.org/standards/faq.asp> (last visited Apr. 10, 2014).

236. *Florence*, 132 S. Ct. at 1529 (Breyer, J., dissenting) (citing MARTIN & ROSAZZA, *supra* note 189, at 4).

237. Brief of Current and Former Jail and Corrections Professionals, *supra* note 213, at 17–18 (discussing a checklist provided to new sheriffs in Indiana).

238. *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (listing factors to consider in determining whether reasonable suspicion exists for a minor crime).

239. See Gabriel M. Helmer, Note, *Strip Searches and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L. REV. 239, 283 (2001).

240. See *supra* notes 155, 174–77 and accompanying text.

241. See Brief of Former Attorneys General, *supra* note 181, at 20–21.

2. Requirement of Probable Cause Hearings Before the Search

Before allowing police to take a DNA sample or to strip search, states should require a hearing to determine if the pending charges are supported by probable cause. This requirement would deter police from charging a person with a serious crime for the sole purpose of collecting his DNA. Requiring a probable cause hearing would help to ensure that police do not target specific citizens and arrest them for a minor offense as a pretext to strip search them.

Finally, a finding of probable cause before the search would prevent the humiliation detainees experience from undergoing invasive searches based on invalid charges. For example, after being arrested, Florence should have promptly appeared before a judge, who could have quashed the warrant and released him or set appropriate bond.

3. Limit the Offenders Who May be Placed in the General Prison Population

Although the *Florence* Court limited strip searches to only those arrestees detained in the general prison population, it placed no limitations on who may be placed in the general population.²⁴² Currently, a wide range of minor violations, such as failure to wear a seatbelt,²⁴³ failure to stop at a stop sign,²⁴⁴ and improperly using a car horn²⁴⁵ can result in arrest and detention. States have the authority to arrest and detain even those individuals accused of minor offenses that do not impose jail time as part of its penalty.²⁴⁶ States should therefore impose their own limits on the types of detainees who can be intermingled in the general jail population. There are a number of available means by which this can be accomplished. First, state legislatures could forbid warrantless arrests for minor offenses to ensure that these offenders are never detained.²⁴⁷ Instead, the police officer could simply write a citation.

Second, jails can classify and separate detainees based on offense and criminal background. Indeed, many correctional systems already classify detainees based on objective factors such as the severity of their alleged offense.²⁴⁸ In fact, New Jersey, the state in which Florence was arrested, authorizes offenders to be detained based on offense, previous incarceration, behavior, addiction, and status as a detainee or sentenced prisoner, among other factors.²⁴⁹ Such

242. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1518, 1520–23 (Alito, J., concurring).

243. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

244. *See Revelly v. City of Huntington*, No. 3:07-0648, 2009 WL 1097972, at *1–2 (S.D. W. Va. Apr. 23, 2009), *aff'd*, 379 F. App'x 297 (4th Cir. 2010) (per curiam).

245. *See Lee v. Ferraro*, 284 F.3d 1188, 1190, 1195–96 (11th Cir. 2002).

246. *Atwater*, 532 U.S. at 323, 359 (permitting the custodial arrest of a woman for failing to wear seat belt, even though the offense did not carry any jail time).

247. *See id.* at 352.

248. *See Brief for the Petitioner*, *supra* note 12, at App. 53a.

249. N.J. ADMIN. CODE § 10A:31-22.2(a) (2013).

classification systems allow jails to focus resources on the riskiest inmates, which improves both safety and jail administration.²⁵⁰ In many cases, arrestees are temporarily detained but never processed into the general jail population,²⁵¹ as it is illogical and economically inefficient to introduce the arrestee into the general jail population before he is released.

Third, some states may *require* that detainees charged with minor offenses be housed separately from those detained in the general population. For example, the Federal Bureau of Prisons separates minor offenders who will only be temporarily detained from the general population of the facility.²⁵² Similarly, the San Francisco County Jail System distinguishes between arrestees eligible for release, who are kept in a temporary intake and release facility, and those who are not eligible for release and detained in the general jail population.²⁵³ Although it may be difficult for some smaller jurisdictions to achieve, states should attempt to house minor offenders separately if it is economically feasible to do so.

4. *Limit the Purpose of DNA Testing*

To remedy the *King* Court's failure to identify the two discrete searches stemming from the collection of King's DNA, states can specifically limit the testing of DNA material solely for the purpose of identification. The statute at issue in *King* imposed this limitation.²⁵⁴ Other states should limit their own DNA collection statutes accordingly. Statutes permitting this type of DNA testing should only allow testing for identification, not for any other genetic markers. In situations in which law enforcement wishes to use the DNA sample for purposes beyond identification, the State must recognize additional testing as a second, more intrusive search that requires both probable cause and a warrant before it can be performed. As new Fourth Amendment questions arise as a consequence of constantly improving technology, courts must balance the government's interest and the individuals' privacy concerns in order to ensure that DNA evidence is collected and tested in a constitutionally reasonable manner.

250. See JAMES AUSTIN, NAT'L INST. OF CORRS., U.S. DEP'T OF JUSTICE, OBJECTIVE JAIL CLASSIFICATION SYSTEMS 8 (Feb. 1998), available at <http://www.nicic.gov/Library/Files/014373.pdf> (advising that objective classification systems have several benefits, including "[i]mproved security and control of inmates by identifying and providing appropriate surveillance for each group by assisting the corrections staff in knowing what 'kind' of inmates are where").

251. Brief for Amicus Curiae National Police Accountability Project in Support of Petitioner at 12, *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012) (No. 10-945).

252. See *Florence*, 132 S. Ct. at 1524. (Alito, J., concurring).

253. See *Bull v. City & Cnty. of S.F.*, 595 F.3d 964, 968 (9th Cir. 2010) (en banc).

254. MD. CODE ANN., PUB. SAF. § 2-505(b)(1) (LexisNexis 2011) ("[O]nly DNA records that directly relate to the identification of individuals shall be collected and stored.").

VI. CONCLUSION

As a result of the Supreme Court's decisions in *King* and *Florence*, if you are arrested today for a minor offense, such as a traffic violation, the police may be permitted to force you to strip, bend over, and cough and to inspect your anus and genitals, but they may not swab the inside of your cheek for a DNA sample. This absurd predicament is the result of the Court's inconsistent application of the Fourth Amendment.

The Fourth Amendment exists "to protect personal privacy and dignity against unwarranted intrusion by the State."²⁵⁵ The Supreme Court is responsible for administering this protection; law enforcement officials are not in the position to balance individuals' rights against their own interest in prison safety. However, the Court abdicated this responsibility in both cases.

In *King*, the Court deferred to law enforcement in determining who would be arrested for a serious offense, holding that DNA could be collected only from individuals arrested for serious offenses and before any initial evaluation of probable cause. In *Florence*, the Court confused deference with abdication and permitted law enforcement officials to strip search all detainees who will be held in the general jail population, even those arrested for crimes that do not impose incarceration as a penalty. The Court accepted the prison officials' assertion that strip searches are necessary to protect the general jail population.

As the Court noted in *King*, "urgent government interests are not a license for indiscriminate police behavior."²⁵⁶ Yet, these two cases permit indiscriminate police behavior. Although the Court correctly ruled in *King* that the cheek swab was permissible because the government's interest in identifying the detainee outweighs the minimal intrusiveness of the search, the Court should have permitted the search only after a neutral magistrate found that probable cause existed to charge King with a serious crime. The Court should also have clearly distinguished the use of the DNA sample for identification purposes from its use to uncover genetic markers so that DNA evidence is not misused in the future. Additionally, the Court should have concluded that the strip and visual cavity search in *Florence* was unconstitutional and should only permit strip searches if reasonable suspicion exists that the detainee is carrying contraband. Like in *King*, the search of Florence should not have been conducted until a neutral magistrate determined that probable cause existed to detain him in the general jail population.

As a result, law enforcement officials now have the ability to conduct intrusive searches merely in the hope that they will discover contraband. This unfettered discretion is what has been described as the "hallmark of a police state"²⁵⁷ and

255. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

256. *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013).

257. *United States v. Montoya de Hernandez*, 473 U.S. 531, 550 (1985) (Brennan, J., dissenting).

eliminates the checks and balances required by the Constitution. Until states and agencies provide more individual protections to remedy the problems and abuses resulting from these decisions, citizens should recognize that, if they are arrested, they run the risk of having both of their cheeks inspected.