Circuit Court for Carroll County
Case No. C-06-CR-19-000833

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 433

September Term, 2021

KEVRON D. WALKER

v.

STATE OF MARYLAND

Nazarian,
Beachley,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: May 4, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On July 10, 2019, Gilbert Dodd was shot multiple times as he left work in Eldersburg, Maryland. The State subsequently indicted Kevron Walker, Appellant, for attempted first-degree murder, conspiracy to commit first-degree murder, and use of a firearm in the commission of a crime of violence, in connection with the shooting.

Walker became a suspect after DNA extracted from vomit left at the scene of the shooting was a match to a record of DNA, known to be Walker's, contained within the State's DNA database. The Carroll County Sheriff's Office, relying on the DNA match, obtained a search warrant for Walker's home and cell phone location data, as well as for an additional DNA sample from Walker, who was thereafter indicted. After a motion to suppress the DNA evidence was denied, Walker entered a conditional guilty plea to all three crimes for which he was indicted and was sentenced to thirty years' incarceration, to be followed by five years of probation.[1]

During a suppression hearing, Walker had challenged the match of his DNA from the vomit to the DNA record in the database, which had been developed from a sample that had been obtained from him via a buccal swab, pursuant to a search warrant issued in July of 2018, because, he alleged, the Maryland DNA Collection Act, Sections 2–501 to 2–514 of the Public Safety Article, Maryland Code (2003, 2018 Repl. Vol.) (hereinafter

[1] On Count 1, Walker was sentenced to life imprisonment, with all but thirty years suspended. He also received concurrent sentences of thirty years for Count 2 and five years for Count 3, along with five years' probation.

"the Act"),[2] required the 2018 sample and its results to be expunged. Here, the sole issue presented is:

> Did the trial court err in denying the motion to suppress DNA evidence?

For the reasons that follow, we answer the question in the negative and affirm the judgment of the Circuit Court.

STATUTORY FRAMEWORK

The Act, which was originally enacted in 1994 and codified in Sections 2–501 to 2–514 of the Public Safety Article, was found to be constitutional by the United States Supreme Court in *Maryland v. King*, 569 U.S. 435 (2013). Individuals, from whom DNA samples are collected and retained under the statute, are felons or those who have been convicted of specified crimes, as identified in Section 2–504(a) of the Act, which, in relevant part, provides:

> (a) *In general.* — (1) In accordance with regulations adopted under this subtitle, an individual who is convicted of a felony or a violation of § 6-205 or § 6-206 of the Criminal Law Article shall:
>
> (i) have a DNA sample collected either at the time of sentence or on intake to a correctional facility, if the individual is sentenced to a term of imprisonment; or
>
> (ii) provide a DNA sample as a condition of sentence or probation, if the individual is not sentenced to a term of imprisonment.
>
> (2) An individual who was convicted of a felony or a violation of §

[2] Unless otherwise noted, all statutory references are to the Public Safety Article, Maryland Code (2003, 2018 Repl. Vol.).

> 6-205 or § 6-206 of the Criminal Law Article on or before October 1, 2003 and who remains confined in a correctional facility on or after October 1, 1999, shall submit a DNA sample to the Department.

The Act also provides for the collection and retention of "arrestee samples," which are DNA samples from individuals charged with certain crimes:

> (3)(i) In accordance with regulations adopted under this subtitle, a DNA sample shall be collected from an individual who is 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.
>
> * * *
>
> (iii) DNA evidence collected from a crime scene or collected as evidence of sexual assault at a hospital that a law enforcement investigator considers relevant to the identification or exoneration of a suspect shall be tested as soon as reasonably possible following collection of the sample.

Section 2–504(a)(3)(i, iii) of the Act. The purposes of collection and testing of DNA samples, pursuant to the Act, are:

> (1) to analyze and type the genetic markers contained in or derived from the DNA samples;
>
> (2) as part of an official investigation into a crime;
>
> (3) to help identify human remains;
>
> (4) to help identify missing individuals; and
>
> (5) for research and administrative purposes, including:
>
> (i) development of a population data base after personal identifying information is removed;
>
> (ii) support of identification research and protocol development of forensic DNA analysis methods; and
>
> (iii) quality control.

Section 2–505(a) of the Act.

A match, as a result of testing between a DNA sample[3] collected as a result of the Act or during a criminal investigation and a DNA record[4] within the State DNA database, commonly referred to as CODIS,[5] "may be used only as probable cause and is not admissible at trial unless confirmed by additional testing." Section 2–510 of the Act.

[3] A DNA sample is defined in Section 2–501(i) of the Act as:

> (i) *DNA sample.* — "DNA sample" means a body fluid or tissue sample that is:
>
> (1) provided by an individual who is convicted of a felony or a violation of § 6-205 or § 6-206 of the Criminal Law Article;
>
> (2) provided by an individual who is charged with:
>
> (i) a crime of violence or an attempt to commit a crime of violence; or
>
> (ii) burglary or an attempt to commit burglary; or
>
> (3) submitted to the statewide DNA data base system for testing as part of a criminal investigation.

[4] A DNA record is defined in Section 2–501(h) of the Public Safety Article as:

> (h) *DNA record.* — (1) "DNA record" means DNA information stored in CODIS or the statewide DNA data base system.
>
> (2) "DNA record" includes the information commonly referred to as a DNA profile.

A DNA profile is "the genetic constitution of an individual at defined locations (also known as loci) in the DNA," which is contained within a DNA record, such that the DNA record "serves as the administrative envelope for the DNA profile" within CODIS. *Allen v. State*, 440 Md. 643, 660 (2014) (citation omitted).

[5] The acronym "CODIS," as defined in Section 2–501(c) of the Act, means:

> (c) *CODIS.* — (1) "CODIS" means the Federal Bureau of Investigation's "Combined DNA Index System" that allows the storage and exchange of DNA records submitted by federal, state, and local forensic DNA laboratories.

(continued . . .)

DNA samples and records collected pursuant to the Act, with respect to those who are not convicted or those who have their conviction reversed or those who are pardoned, are subject to the destruction and expungement provisions of Section 2–511 of the Act, which provides:

> (a) *Conditions; exception.* — (1) Except as provided in paragraph (2) of this subsection, any DNA samples and records generated as part of a criminal investigation or prosecution shall be destroyed or expunged automatically from the State DNA data base if:
>
> (i) a criminal action begun against the individual relating to the crime does not result in a conviction of the individual;
>
> (ii) the conviction is finally reversed or vacated and no new trial is permitted; or
>
> (iii) the individual is granted an unconditional pardon.
>
> (2) A DNA sample or DNA record may not be destroyed or expunged automatically from the State DNA data base if the criminal action is put on the stet docket or the individual receives probation before judgment.
>
> (b) *Case in which eligibility for expungement was established.* — If the DNA sample or DNA record was obtained or generated only in connection with a case in which eligibility for expungement has been established, the DNA sample shall be destroyed and the DNA record shall be expunged.
>
> (c) *Expungement from all local, State, and federal data bases.* — Any DNA record expunged in accordance with this section shall be expunged from every data base into which it has been entered, including local, State, and federal data bases.
>
> (d) *Period for expungement or destruction.* — An expungement or destruction of sample under this section shall occur within 60 days of an event listed in subsection (a) of this section.
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> (e) *Documenting letter.* — A letter documenting expungement of the DNA record and destruction of the DNA sample shall be sent by the Director to the defendant and the defendant's attorney at the address specified by the court in the order of expungement.

(. . . continued)

> (2) "CODIS" includes the national DNA index administered and operated by the Federal Bureau of Investigation.

> (f) *Use or admissibility of qualifying record or sample.* — A record or sample that qualifies for expungement or destruction under this section and is matched concurrent with or subsequent to the date of qualification for expungement:
>
> (1) may not be utilized for a determination of probable cause regardless of whether it is expunged or destroyed timely; and
>
> (2) is not admissible in any proceeding for any purpose.
>
> (g) *Procedures.* — The Director shall adopt procedures to comply with this section.

The seminal issue in the present case, however, is whether the DNA sample taken from Walker, pursuant to a search warrant in July of 2018, was subject to the Act and thereby, should have been expunged.

FACTS AND PROCEDURAL HISTORY

In July of 2018, Walker was charged in Baltimore City for the murder of Stepfon Gabriel. Surveillance camera footage had revealed that two men arrived at the scene of the shooting on a motorcycle and that the rider got off the motorcycle, shot Gabriel, and fled the scene on foot. Walker was arrested, along with the driver of the motorcycle, for the murder. The police, in executing a search warrant, collected DNA from the cycle. The police subsequently also executed another search warrant to secure a sample of Walker's DNA (hereinafter "the 2018 sample") for the purpose of determining whether it matched DNA collected from the motorcycle. In January of 2019, charges against Walker for the murder of Stepfon Gabriel were nol prossed.

In 2019, at the scene of Gilbert Dodd's shooting, Carroll County Sherriff's Deputies collected numerous pieces of evidence and also found what appeared to be

human vomit, a sample of which was collected for the purpose of DNA analysis. Dodd ultimately recovered from his wounds.

In September of 2019, law enforcement received notification that DNA collected from the vomit was a match to a CODIS DNA profile, known to be Walker's. Based upon this information, deputies began investigating Walker, which led to their discovery that police in Baltimore City, while investigating an unrelated case, had recently recovered a handgun, which was subsequently confirmed to be one of the guns used to shoot Gilbert Dodd.

Sheriff's deputies, then, in October of 2019, executed two search warrants, the first for Walker's residence and his cellphone location data, and the second for an additional DNA sample from him. At Walker's residence, police located ammunition, the make of which matched ammunition recovered from the scene of Dodd's shooting. Analysis of Walker's cellphone location data revealed that his phone was in close proximity for several days to the location where Dodd was shot. Walker was arrested and later indicted for the shooting of Gilbert Dodd.

Walker subsequently filed a motion to "suppress all evidence obtained from DNA CODIS match pursuant to MD Pub Safety Code §2–511 and U.S. Const. amend. IV.[6]"

[6] The Fourth Amendment to the United States Constitution, which, pursuant to the Fourteenth Amendment to the United States Constitution, as applicable to the states, provides:

(continued . . .)

Judge Fred S. Hecker of the Circuit Court for Carroll County, held a hearing, during which both sides presented arguments regarding the Motion to Suppress. During the hearing, Walker's attorney argued that the DNA evidence should be suppressed, because the 2018 sample to which DNA from the vomit that had been collected at the scene of Dodd's shooting, had been matched, should have, pursuant to Section 2–511 of the Act, been expunged 60 days after the charges against Walker were nol prossed. Therefore, explained Walker's attorney, law enforcement "should have never known that that vomit was Kevron Walker's."

The State countered that because Walker's DNA was obtained in response to a search warrant and not pursuant to the terms of the Act, the expungement provisions of Section 2–511 of the Act did not apply. Alternatively, the State asserted that even were the 2018 sample to have been improperly retained, evidence collected as a result of the DNA match should not be excluded, because the Act does not provide for exclusion of

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(. . . continued)

> 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.

Before us, the Fourth Amendment argument does not appear to be urged. Even were it to have been, however, the collection of Walker's DNA was made pursuant to a search warrant and retention of DNA collected by warrant does not trigger the Fourth Amendment. *Wilson v. State*, 132 Md. App. 510, 550 (2000) (holding that a person from whom tissue is taken, pursuant to a search warrant, for the purposes of DNA analysis, does not retain a "legitimate expectation of privacy," to implicate the Fourth Amendment.).

evidence obtained as a result of a failure to timely expunge DNA samples and records from CODIS. The State also argued that even if evidence obtained following the DNA match had been collected in violation of the Fourth Amendment or the Act, the doctrines of good faith, inevitable discovery, and attenuation applied to the subsequent searches and, therefore, the exclusionary rule should not be applied.

Judge Hecker, subsequently, issued a Memorandum Opinion and Order, in which he included the following findings of fact related to the Dodd's shooting, which do not appear to be in dispute:

> On October 24, 2019, Defendant was charged in a three (3) count indictment with Attempted First-Degree Murder, Conspiracy to Commit First-Degree Murder, and Use of a Firearm in the Commission of a Crime of Violence. For purposes of the Motion to Suppress, the State alleges that on July 10, 2019 at approximately 5:25 a.m., officers responded to a report of shots fired in the area of 1470 Progress Way, Eldersburg, Maryland, an industrial park that consists of several businesses, including a business known as Dal-Tile. There, officers found the victim, Gilbert Dodd, an employee of Dal-Tile, lying on the sidewalk, suffering from at least 6 gunshot wounds to the torso and head. The head shot was determined to have been fired at close-range. The victim was transported to Shock Trauma and survived his injuries.
>
> Forensic technicians recovered 26 fired shell casings in close proximity to the victim, consisting of .45 and .40 caliber shells which were submitted for further testing, including ballistic and DNA analysis. Also recovered at the scene was a fresh pile of vomit in which there were tire tracks that led to the location where the victim was found. Swabs of the vomit were collected for further processing, including DNA analysis. Ballistics analysis revealed that the .40 caliber casings were all fired from a single weapon as were the .45 caliber casings.

Judge Hecker, then, explained how DNA from the vomit came to be matched to Walker's 2018 sample:

> A DNA profile was developed from the vomit, and that profile was entered into CODIS, the statewide DNA database system. CODIS generated a match between the DNA sample derived from the vomit and is the Defendant's DNA. CODIS maintained a record of Defendant's DNA which had been obtained pursuant to a search warrant issued in connection with a 2018 homicide investigation in Baltimore City. Defendant was charged in connection with the homicide, but the charges against Defendant were later nol prossed. The DNA obtained pursuant to the search warrant was collected from the handlebars of a motorcycle believed to have been used in connection with the Baltimore City homicide, which DNA sample was entered into CODIS.

Judge Hecker, then, elaborated on how the DNA match, as well as other evidence, led to the investigation's focus on Walker:

> The DNA match and monitoring of jail telephone calls between the Defendant and another individual, led to police recovering a .40 caliber handgun while executing a search warrant in an unrelated case in Baltimore City. Ballistics testing determined that the .40 caliber handgun recovered matched the .40 caliber casings found at the scene of the shooting in this case. A search warrant was then obtained for the Defendant's DNA and the Defendant's residence, as well as for cell site location data for the Defendant's cell phone number. DNA confirmatory testing results produced a match between the Defendant's DNA and the DNA recovered from the handgun. Historical cell site location data established that Defendant's cell phone was in close proximity to Dal-Tile with several days prior to the shooting. The search of Defendant's residence yielded, among other evidence, ammunition, the make of which matched the make of the ammunition recovered from the scene of the shooting. DNA recovered from a group of the shell casings located at the scene was analyzed and found to contain a complex mixture of DNA of which the Defendant was determined to be one of the contributors.

In addressing Walker's assertion that his DNA was improperly retained within CODIS, Judge Hecker acknowledged that the 2018 sample had not been expunged:

> It is undisputed that the DNA match obtained from CODIS in this case was not expunged as required by PS § 2-511 within 60 days of January

> 23, 2019, the date of the nol pros of the Defendant's Baltimore City homicide charges. Nor is it disputed that had the Defendant's DNA been timely expunged as required by the Act, the State would not have had the opportunity to match the DNA profile derived from the vomit to the Defendant's DNA stored in CODIS.

He concluded, nevertheless, that the retention of the 2018 sample was not subject to the Act and was not subject to expungement:

> When PS § 2–511 is viewed in context of the larger statutory scheme, its plain language makes clear that the Legislature intended for the expungement provision to apply only to arrestee and convicted-offender DNA samples. *See Varriale v. State*, 218 Md. App. 47, 58 (2014) (reading "the Act as a whole" in interpreting scope of expungement provision), aff'd on other grounds, 444 Md. 4500 (2015), cert. denied, 136 S. Ct. 898 (2016).

In arriving at his conclusion, Judge Hecker began by analyzing the language of Section 2–504 of the Act, which mandates DNA sample be collected from "convicted offenders" and arrestees:

> PS § 2-504(a) requires that DNA samples be collected from certain arrestees and convicted offenders. Qualifying arrestees and convicted offenders include "an individual who is convicted of a felony or a violation of § 6-205 or § 6-206 of the Criminal Law Article," and "an individual who is charged with... a crime of violence or an attempt to commit a crime of violence," or "burglary or an attempt to commit burglary." PS § 2-504(a)(1),(3). The Act's chief focus is on regulating the collection and storage of DNA samples collected from these individuals, and the maintenance of DNA records generated from those samples.

He also noted that the Act requires notification of expungement to arrestees or "convicted offenders," but not to anyone else whose DNA is collected by other means and retained in the DNA database:

> Notably, the Act specifies that an arrestee or convicted offender from whom a sample is taken under PS § 2–504 is entitled to be notified that "the DNA record may be expunged, and the DNA sample destroyed in accordance with PS § 2–511." But the Act contains no such notice requirement for samples collected through other means, such as through execution of a search warrant or by consent[.] [T]he Act also dictates where and when "each DNA sample required to be collected under PS § 2–504 shall be collected," *Id.* § 2–504(b), and who may collect those samples, *Id.* § 2–504(c), but it imposes no similar restrictions on the collection of other types of DNA samples.

With respect to the language contained in Section 2–504 of the Act, Judge Hecker concluded that, with respect to DNA collected by search warrant, "[t]he Act recognizes the existence of other types of DNA samples but does not attempt to regulate them to any significant degree."

Judge Hecker, then, explored how the reporting requirements of the Act differ as a result of how the DNA sample is collected:

> PS § 2-514, recognizes the existence of "crime scene DNA evidence" and establishes annual reporting requirements on the collection of such evidence. PS § 2- 514(a). These reporting requirements are distinct from additional annual reporting requirements in PS § 2-513 "on the status of the statewide DNA data base system," including "the number of DNA samples collected from individuals charged with a crime of violence or burglary or attempt to commit a crime of violence or burglary, as defined in § 2-501 of this subtitle." *Id.* § 2-513(a), (b)(4); see also COMAR 29.05.01.16D(1) (defining "crime scene DNA evidence" as "a forensic or evidence sample as defined in COMAR 29.05.01.01B(17), including samples submitted for biological screening or serology testing"); *Id.* 29.05.01.01B(17) (defining "forensic or evidence sample" to mean "DNA obtained from an item of evidence or a] individual, including suspect samples, other than one required to be collected pursuant to Public Safety Article, § 2-501 et seq., Annotated Code of Maryland.").

Judge Hecker concluded that, "The Act recognizes that 'DNA evidence' will be obtained by other means, such as through collection at a crime scene or during a sexual assault examination, but it does not regulate the collection, storage, expungement, or destruction of such evidence."

Judge Hecker, thereafter, turned to "other sources of legislative intent, included the regulations adopted under the Act and unsuccessful legislative efforts to expand the Act's scope," in order to corroborate his conclusion. The first of these were regulations, promulgated by the Secretary of the State Police, pursuant to the Act, which Judge Hecker stated were "clear evidence of the Legislature's intent" to limit the applicability of the Act to its clear expression. He also referenced "failed legislative efforts to expand the Act's scope," to include any collection of DNA evidence by a "governmental unit":

> In 2013, the Maryland House of Delegates considered and rejected a bill that would have added a § 2-502.1 to the DNA Collection Act, reading: "A governmental unit that collects DNA samples or maintains DNA records for law enforcement purposes shall comply with the requirements of this title governing the collection, use, and expungement of DNA samples and records." H.B. 1523, 2013 Reg. Sess. (Md. 2013).9 A bill with identical language failed the following year. H.B. 680, 2014 Reg. Sess. (Md. 2014).

Because the case at bar referenced a collection of DNA, pursuant to a search warrant in 2018, Judge Hecker also determined that even were the Act to apply to DNA samples and records obtained via search warrants, that the exclusionary rule would not be triggered by failure to timely expunge such samples, so that the DNA sample taken from Walker would not be subject to expungement:

> "[T]he Legislature is capable of providing a suppression remedy when it intends to do so . . . ." *King II*, 434 Md. at 492-93, 494.[7] The limited exclusionary remedy provided here is exclusion of the record or sample to which a match is made. The evidence sought to be suppressed by Defendant was the DNA sample stored in CODIS in 2018 and the DNA evidence derived from the match to the vomit swab in this case. Neither the Act nor any other rule of law demands or even sanctions the exclusion of such evidence.

In response to the denial of his Motion to Suppress, Walker filed a Motion to Reconsider the Denial of the Motion to Suppress, in which he reiterated his argument that his DNA profile had been retained within CODIS in violation of the Act. Judge Hecker subsequently denied, without elaboration, the Motion to Reconsider. Walker entered a conditional guilty plea[8] to all three counts for which he was indicted and timely appealed, after he was convicted and sentenced.

STANDARD OF REVIEW

In reviewing the disposition of a motion to suppress evidence alleged to have been obtained in contravention of a statute, "'we view the evidence adduced at the suppression

[7] Judge Hecker's reference is to the Court of Appeals' opinion in *King v. State*, 434 Md. 472 (2013).

[8] Conditional guilty pleas may be entered, pursuant to Rule 4–424(d), which, in relevant part, provides:

> (2) **Entry of Plea; Requirements.** — With the consent of the court and the State, a defendant may enter a conditional plea of guilty. The plea shall be in writing and, as part of it, the defendant may reserve the right to appeal on or more issues specified in the plea[.]

hearing, and the inferences fairly deducible therefrom, in the light most favorable to the party that prevailed on the motion.'" *Varriale v. State*, 218 Md. App. 47, 53 (2014) (quoting *Williamson v. State*, 413 Md. 521, 531-32 (2010)). We review *de novo* a trial court's interpretation of a statute. *Id.* at 55 (stating that standard of review for a denial of a motion to suppress evidence based upon an alleged statutory violation is the same as the standard of review applied to a denial of a motion to suppress based upon an alleged violation of the Fourth Amendment).

ANALYSIS

In this appeal, Walker argues that the Act applies to any DNA sample "that is collected from an individual after the individual is arrested and charged with a crime of violence." (citing Section 2–504(a)(3)(i) of the Act). According to Walker, since the collection of his DNA in 2018, pursuant to a search warrant, occurred after he had been arrested and charged with a crime of violence, it qualifies as an arrestee sample for the purposes of Section 2–511 of the Act. Since the charges against him, following the homicide that occurred in Baltimore City in July of 2018, were ultimately nol prossed, Walker argues that requirements for expungement in the Act had been met, and the 2018 sample should have been expunged prior to the shooting of Gilbert Dodd, which occurred in July of 2019.

Walker also asserts that, the fact that he had received, in November of 2019, notice that the 2018 DNA sample had been expunged from CODIS, confirms that the

Maryland Department of State Police "determined that the DNA sample met the statutory requirements for expungement[.]" Since "courts must give 'considerable weight to an administrative agency's interpretation and application of the statute the agency administers[,]'" Walker asserts that the fact that the DNA sample and record were expunged proves that the Maryland Department of State Police determined that the 2018 DNA sample was subject to Section 2–511 of the Act.

Lastly, Walker argues that Section 2–511 does not contain language exempting DNA samples and records, collected pursuant to search warrants, from expungement and, therefore, regulations that state that DNA samples collected pursuant to search warrants are not subject to automatic expungement, conflict with, and should, therefore, yield to the statute.

The State urges affirmance of the trial court's decision to deny the Motion to Suppress and, in so doing, relies on its previous arguments: that DNA samples and records obtained via search warrants are not subject to expungement, and that, even were the Act to be applicable, the exclusionary rule should not be employed, because the Act does not contain an explicit exclusionary rule.

The DNA Collection Act provides a statutory framework for the warrantless collection, analysis, and retention of DNA samples from convicted felons and certain arrestees indicted or charged with crimes specified within the Act. *Maryland v. King*, 569 U.S. 435, 443-44 (2013). In *Maryland v. King*, 569 U.S. 435 (2013), in reviewing the Maryland Act, the Supreme Court held that the warrantless collection of DNA, pursuant

to the Act, was constitutional. In that case, DNA that had been collected from King, pursuant to the Act, when he was arrested, was matched to a DNA record within CODIS, which had been developed from a sample from the victim of a rape. Following King's indictment for the rape, police obtained a search warrant for a tissue sample from King for DNA testing. Analysis of the additional sample confirmed that King's DNA matched the DNA that had been collected from the rape victim. *Id.* at 440. King's challenge to the constitutionality of the collection of his DNA was based on the fact that such collections at the time of his arrest, made pursuant to the Act and without a warrant, were unreasonable under the Fourth Amendment. *Id.*

In upholding the constitutionality of the collection of King's DNA, the Court recognized that the warrantless "taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment[,]" which constituted a modality of DNA collection that is separate and distinct from DNA collection made pursuant to a search warrant. *Id.* at 465-66. *See also id.* at 447-48 (distinguishing searches effectuated via search warrants from "reasonable" warrantless searches, such as collection of DNA via a buccal swab).

What is important for our purpose, goes beyond the Court's determination of the constitutionality of the Act, but also the fact that the Supreme Court differentiated between warrantless searches under the Act from seizure of DNA pursuant to a warrant. A search warrant authorizes law enforcement to seize and analyze evidence, including

DNA. *See, e.g.*, *Wilson v. State*, 132 Md. App. 510, 543 (2000) (explaining that "the appellant enjoyed a Fourth Amendment interest not to have the police invade his body and take a sample of his blood except when authorized to do so by a search warrant or court order."). A valid search warrant requires that a judicial officer determine that there is probable cause to search for and seize such evidence. *See id.* at 533-34. *See also Greenstreet v. State*, 392 Md. 652, 667-68 (2006) ("The task of the issuing judge is to reach a practical and common-sense decision, given all of the circumstances set forth in the affidavit, as to whether there exists a fair probability that contraband or evidence of a crime will be found in a particular search."). The search warrant for Walker's DNA, which was based upon probable cause, provided a legal basis for the collection of his DNA in 2018, outside of the scope of the Act, which only provides for warrantless DNA collection in various situations. *Maryland v. King*, 569 U.S. 435, 447-48 (2013) (distinguishing warrantless searches from those based upon search warrants).

That the Act distinguishes between DNA collected pursuant to its terms from DNA collected via alternative legal bases is evidenced by provisions of the Act that differentiate the treatment of DNA evidence based upon its source. For example, the first section of the Act distinguishes DNA collected from "an individual who is convicted of a felony or a violation of § 6–205 or an individual who is convicted of a felony or a violation of § 6–205 or § 6–206 of the Criminal Law Article[,]" Section 2–501(i)(1) of the Act, individuals charged with certain crimes, Section 2–501(i)(2) of the Act, and

other DNA evidence that is "submitted to the statewide DNA data base system for testing as a part of a criminal investigation," Section 2–501(i)(3) of the Act.

The Act also mandates that, at the time of "collection of the DNA sample under this paragraph," the individual is given notice that the sample may be expunged, Section 2–504(a)(3)(ii) of the Act. The Act, however, provides no such notice requirement for "DNA evidence collected from a crime scene or collected as evidence of sexual assault at a hospital." Section 2–504(a)(3)(iii) of the Act.

The Act also provides for disparate treatment of DNA evidence collected pursuant to it and evidence derived from other sources. For example, the Act defines places of collection and persons authorized to collect DNA under the Act, without extending those requirements to other sources of DNA evidence. Section 2–504 of the Act. Annual reporting requirements for DNA evidence collected from arrestees, pursuant to the Act, differ from reporting requirements for DNA evidence collected at crime scenes. *Compare* Section 2–514 of the Act (defining annual reporting requirements for DNA evidence collected from "individuals charged with a crime of violence or burglary, or attempt to commit a crime of violence or burglary[.]") *with* Section 2–514 of the Act (defining annual reporting requirements for "crime scene DNA evidence[.]").

A narrow interpretation of the Act's applicability is supported by a failed attempt by the Legislature, in 2013, to add language to the Act that provided: "A governmental unit that collects DNA samples or maintains DNA records for law enforcement purposes shall comply with the requirements of this title governing the collection, use, and

expungement of DNA samples and records." H.B. 1523, 2013 Leg., Reg. Sess. (Md. 2013). *See also Varriale*, 218 Md. App. at 58 (explaining that H.B. 1523 would have expanded the applicability of expungement provisions of the Act to DNA evidence collected upon a suspect's voluntary consent). Had the Legislature intended for the Act to have omnibus applicability to DNA evidence, such additional language would have been unnecessary. There is no indication in the plain language of the expungement provision of the Act that it was intended to apply to the seizure of DNA pursuant to a search warrant.

With respect to the expungement language in Section 2–511 of the Act, a narrow interpretation of its applicability is evidenced by its implementing regulations. In interpreting a statute, "we must give 'considerable weight' to an administrative agency's interpretation and application of the statute that the agency administers. *Varriale*, 218 Md. App. at 59 (quoting *Bowen v. City of Annapolis*, 402 Md. 587, 612 (2007)). In this case, the Maryland Department of State Police has put in place regulations that exclude DNA evidence that is collected pursuant to a search warrant from expungement:

> (1) This chapter governs only the collection, submission, receipt, identification, testing, storage, and disposal of DNA samples from individuals arrested and charged or convicted, or both, for various specified crimes and the entry of the samples into the State DNA Data Base System and CODIS pursuant to Public Safety Article, §2-501 et seq., Annotated Code of Maryland. *This chapter does not govern evidentiary, suspect, and forensic samples otherwise legally obtained, whether by search warrant, court order, consent, or other method except as specifically provided in Regulation .16 of this chapter.*
>
> (2) If an individual is suspected of committing a crime and a law enforcement agency wishes to obtain a DNA sample from the suspect to

> compare to evidence collected at a crime scene, and obtains court authorization to collect the DNA sample at the time of arrest, *this sample is not one collected pursuant to this chapter and is not, therefore, handled in accordance with this chapter*.

COMAR 29.05.01.02(A)(1-2) (emphasis added).

In addition, the Department of State Police has defined "expungement" narrowly, to mean "the removal and destruction of the arrestee or convicted offender DNA sample and the deletion of testing results from CODIS." COMAR 29.05.01.01(B)(15)(a). Therefore, although Walker had been arrested prior to the execution of the 2018 search warrant for his DNA, the resulting sample would not have qualified as an "arrestee" sample, as defined by the agency, because his DNA was collected pursuant to a search warrant and not because he was "an individual required to provide a DNA sample, pursuant to Public Safety Article, §2–501 *et seq.*, Annotated Code of Maryland, ..." COMAR 29.05.01.01(B)(2) (defining "Arrestee").

That the 2018 sample in issue was not an "arrestee" sample and, therefore subject to expungement, is further elucidated by the fact that the regulations mandate that, for arrestees to whom the Act applies, a second DNA sample be collected if, at the time of arrest, DNA is collected pursuant to an independent legal authorization, such as a search warrant:

> (3) As noted in §A(2) of this regulation, if an individual's DNA sample is collected pursuant to a court authorization, such as a search warrant or court order, at the time of the individual's arrest, another DNA sample shall also be taken upon charging if the arrest is for a qualifying crime as set forth in this chapter. This DNA data base sample shall be

> handled in accordance with the terms of this chapter, including the time of taking, analyzing, and expungement, if applicable.

COMAR 29.05.01.02(A)(3). We note that the above language defines the manner by which the "DNA data base sample" is handled without applying those standards to the sample collected pursuant to a search warrant. Such a differentiation supports the conclusion that the Act recognizes, but does not regulate, DNA evidence obtained pursuant to search warrant.

We disagree with Walker, that *Varriale v. State*, 218 Md. App., *supra*, stands for the proposition that the satisfaction of the conditions delineated in Section 2–511 of the Act is sufficient to trigger expungement of DNA evidence. In *Varriale*, we concluded that a DNA sample, given voluntarily by a suspect as part of a criminal investigation, is not subject to expungement unless it had been given after the suspect is charged with a crime for which he is, ultimately, not convicted.

Varriale was a homeless person who had voluntarily provided a DNA sample to law enforcement as part of a rape investigation. *Id.* at 50. The comparison of Varriale's DNA to DNA collected from the victim cleared him as a suspect in the rape. *Id.* at 51. His DNA sample, however, was uploaded to CODIS and subsequently linked to DNA collected from the scene of a burglary, which had occurred several years earlier. *Id.* at 52. Varriale was then charged in the burglary. Prior to trial, he moved to suppress the DNA evidence and, following the denial of his motion, Varriale entered a conditional guilty plea. *Id.* at 49.

On appeal, Varriale argued, *inter alia*, "that [Section 2–511 of] Maryland's DNA Collection Act does not permit the retention of a person's DNA if he or she has been cleared of suspicion in the investigation in which the sample was obtained." *Id.* at 55. In analyzing Varriale's argument regarding the applicability of the Act's expungement provision, we explained that, in order for it to be triggered, two conditions must be satisfied: " (1) a "criminal action" must have begun against a person, and (2) the person must not have been convicted of the crime with which he or she was charged. *Id.* at 56. We then determined that Varriale's DNA sample did not satisfy both conditions: "Varriale certainly met the second criterion, as he was never convicted of the alleged rape; he did not, however, meet the first, as the State never began a 'criminal action' against him as a result of the rape investigation." *Id.* at 56-57.

Walker interprets *Varriale* to infer that since he was charged in the 2018 murder that he met both criteria of the DNA Act, so that seizure of his DNA pursuant to a search warrant in 2018 should have been expunged. He fails to address, however, that the DNA Act applies only to warrantless seizures of DNA,[9] while Walker's DNA in 2018 was seized pursuant to a search warrant and is not subject to the Act.

We note, in passing, a number of other problems with Walker's arguments. One, even were the 2018 sample to have been subject to expungement, the State's failure to do so pursuant to the timeframe defined in the Act, does not trigger the suppression of the

[9] We take no position on whether warrantless seizure pursuant to consent is subject to the Act, when the Act's preconditions are met.

2018 search warrant sample. *King v. State* ("*King II*"), 434 Md. 472, 494 (2013). In that case, "[King] contended that the DNA database match stemming from the second DNA sample, collected pursuant to the warrant and court order, should be suppressed on the grounds that the initial DNA sample was collected in violation of the Act." *Id.* at 486. The Court of Appeals characterized this argument "as a corollary of the fruit of the poisonous tree doctrine[,]" which, the Court explained "recognizes that evidence obtained in violation of a statute subject to the exclusionary rule is tainted and should be suppressed[,]" *Id.* at 487, such that the question was "whether the Constitution or the Act requires suppression of a DNA database match when the State violates technical statutory requirements." *Id.* at 490.

The Court, having first determined that a violation of the "technical requirements" of the Act would not render the search "unreasonable" under the Fourth Amendment, asked "whether the statute demands exclusion as a remedy for a statutory violation[?]" *Id.* at 492. In answering in the negative, the Court stated that, "'[o]ne may not wish an exclusionary rule into being by waiving (sic) a magic wand. It is something that must be deliberately and explicitly created to cover a given type of violation.'" *Id.* at 492-93 (quoting *Sun Kim Chan v. State*, 78 Md. App. 287, 311 (1989)). Therefore, explained the Court, "where the Legislature does not provide explicitly for a suppression remedy, courts generally should not read one into the statute." *Id.* at 493 (citations omitted).

The Court determined that "[n]o explicit exclusionary provision exists in the DNA Collection Act." *Id.* at 494, and explained:

> The Act provides criminal sanctions for certain, limited prohibited acts. *See* Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2–512 (prescribing criminal sanctions for disclosing DNA information to unauthorized persons, obtaining DNA information from the database system without authorization, testing a DNA sample for information unrelated to identification, and failing to destroy a DNA sample in specified circumstances). For the remaining majority of its provisions, such as those alleged to be violated in this case, the Act is silent on any remedy for a violation.

Id. The Court concluded that,

> [A]lthough the Maryland Legislature could have created a statutory exclusionary provision in the DNA Collection Act, . . . it chose not to do so. . . . Accordingly, we may assume that the Legislature did not envision suppression as a remedy for a statutory violation of the DNA Collection Act.

Id. at 494-95. (citation omitted). Suppression was not envisioned as a remedy for a violation of Section 2–511 of the Act, the language of which has remained unchanged since it was revised in 2008, and which, was in effect at the time the Court of Appeals decided *King II*.

Secondly, we are also unpersuaded by Walker's argument that the fact that he had received, in November of 2019, notification that his DNA sample and record, which had been collected in July of 2018, had been expunged, demonstrates that Section 2–511 of the Act applied to the 2018 sample. Although the COMAR regulations do anticipate expungement of samples taken under the Act, we fail to see how expungement of a sample, in and of itself, is proof that DNA collected pursuant to a search warrant is subject to the Act.

In conclusion, we hold that the 2018 DNA sample obtained from Walker, pursuant to a search warrant, was not subject to the DNA Act and was, therefore, properly retained within CODIS in 2019, when it was matched to DNA evidence collected at the scene of the shooting of Gilbert Dodd. We affirm.

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.