No. 23-_____

In the Supreme Court of the United States

JERRY LYNN BURNS,

Petitioner,

v.

STATE OF IOWA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the State's warrantless search of a person's unavoidably shed DNA violate the Fourth Amendment where the individual has never been arrested or convicted of any crime and there is no probable cause to believe that the individual has committed a criminal offense?

PARTIES TO THE PROCEEDINGS

Petitioner and Defendant-Appellant below

- Jerry Lynn Burns

Respondent and Plaintiff-Appellee below

- The State of Iowa

LIST OF PROCEEDINGS

Iowa Supreme Court

No. 20-1150

Jerry Lynn Burns v. State of Iowa

Original Opinion: March 31, 2023

Amended Opinion, June 7, 2023 (reported at 988 N.W.2d 352)

Iowa District Court, Lynn County

No. FECR129718

State of Iowa v. Jerry Lynn Burns

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jerry Lynn Burns respectfully petitions for a writ of certiorari to review the judgement of the Iowa Supreme Court.

OPINIONS BELOW

The Iowa Supreme Court's decision affirming Petitioner's conviction on direct review is reported at 988 N.W.2d 352. (App.1a). The trial court's order denying Petitioner's motion to suppress is unpublished. (App.102a). The trial court's order denying Petitioner's posttrial motion, entering judgment, and sentencing him to a term of incarceration is unpublished. (App.98a).

JURISDICTION

The Iowa Supreme Court affirmed Petitioner's conviction and entered judgment against him on March 31, 2023, which it amended on June 7, 2023. (App.1a). On June 14, 2023, the Honorable Justice Kavanaugh granted Petitioner's request for an extension of time to file this petition to and including August 28, 2023. *Jerry Lynn Burns v. Iowa*, No. 22A1079. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. IV

> 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.

Iowa Code § 729.6(3) (In in relevant part; complete statute at App.122a):

> (a) A person shall not obtain genetic information or samples for genetic testing from an individual without first obtaining informed and written consent from the individual or the individual's authorized representative.
>
> (b) A person shall not perform genetic testing of an individual or collect, retain, transmit, or use genetic information without the informed and written consent of the individual or the individual's authorized representative.

INTRODUCTION

This petition is brought by a defendant convicted of a cold-case murder after a warrantless search of his DNA connected him to the dress worn by the victim at the time of her death. Police collected a straw Petitioner used and left behind at a restaurant. Police sent the straw to a lab to extract and analyze Petitioner's DNA. The lab determined that Petitioner's DNA profile could not be excluded from a partial profile found on the victim's dress. Based on the results, police obtained a warrant to collect a buccal swab from Petitioner, and they arrested him.

In a divided opinion, the Iowa Supreme Court held that the warrantless collection and search of Petitioner's DNA did not violate the Fourth Amendment. A majority of the court held that Petitioner abandoned any reasonable expectation of privacy in the DNA on the straw by leaving the straw at the restaurant. Recognizing the inherently sensitive physiologic data that can be obtained by analyzing a person's DNA, the court limited the application of its ruling to situations in which police perform a warrantless search of a person's DNA for the sole purpose of identification.

This Court should grant the instant petition because the Iowa Supreme Court's decision is poorly reasoned and conflicts with this Court's Fourth Amendment precedent. A person's DNA contains a wealth of information that society has long recognized as deeply private and, absent a warrant supported by probable cause, beyond the reach of the state. That modern DNA testing has made the information accessible to police does not remove it from the zone of privacy protected by the Fourth Amendment. On the contrary, "As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to 'assure [] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Carpenter v. United States*, __U.S.__, 138 S.Ct. 2206, 2214 (2018) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)).

The state court's conclusion that a person foregoes any reasonable expectation of privacy in their DNA by leaving it behind in a public place does not withstand scrutiny. Abandonment connotes an intentional, voluntary act that simply does not apply to unavoidably shed DNA. The Iowa Supreme Court only held otherwise through a mechanical application of the Fourth Amendment and decades-old precedent from this Court, an approach that this Court has repeatedly proscribed. *E.g.*, *Riley v. California*, 573 U.S. 373, 385–86 (2014).

Moreover, the state court's reliance on the objective of the search to justify its legality finds no support in this Court's Fourth Amendment jurisprudence. If police conduct a warrantless search of an area in which a person has a reasonable expectation of privacy, then the search is not rescued by their intent to locate

only non-private information. *E.g.*, *Kyllo*, 533 U.S. at 37–38 (the Fourth Amendment's protection "has never been tied to measurement of the quality or quantity of information obtained"). Indeed, the court's attempt to narrow the application of its ruling to those instances in which police search DNA only for identification-related information betrays the perilous underpinnings of its decision. If Petitioner had no reasonable expectation of privacy in his DNA, then police could analyze it for any purpose, including to obtain information that has long been held to be inherently private.

STATEMENT OF THE CASE

1. On December 20, 1979, police discovered the victim, Michelle Martinko ("Martinko"), in her car in the parking lot of the Westdale Mall in Cedar Rapids, Iowa. Martinko had been stabbed to death. (App.4a) Over the next three decades, law enforcement investigated numerous suspects without making any arrests. (App.6a).

In late 2005, DNA testing on a sample taken from the dress Martinko was wearing at the time of her murder yielded a partial male profile. In 2018, utilizing the assistance of a private lab, law enforcement uploaded the partial profile to GEDmatch, a public genealogy website with a database of DNA profiles. Through kinship analysis and genetic genealogy, police identified four sets of great-great-grandparents as relatives of the donor of the unidentified profile. After collecting and testing samples of members of the

great-great-grandparents' family tree, police further narrowed their search to three brothers: Petitioner, Donald Burns, and Kenneth Burns. (App.5a–6a)

On October 29, 2018, police surveilled Petitioner at a restaurant in Manchester, Iowa. After Petitioner left the restaurant, police, without a warrant, collected the drinking straw Petitioner used during his meal. Police submitted the straw to the DCI criminalistics laboratory. The lab extracted Petitioner's DNA from the straw and performed an analysis to determine Petitioner's DNA profile. The lab then compared Petitioner's DNA profile to the partial unidentified profile obtained from the sample of Martinko's dress and concluded that Petitioner could not be excluded as the donor of the unidentified profile. (App.7a).

On December 19, 2018—the 39th anniversary of Martinko's death—police approached Petitioner at his business and confronted him with the DNA test results. They also served Petitioner with a warrant compelling him to submit a buccal swab for DNA testing. The results of the prior warrantless search of Petitioner's DNA served as the probable cause for the warrant. Police took Petitioner into custody, and he was charged with Martinko's murder. (App.8a).

Prior to trial, Petitioner filed a motion to suppress the warrantless search of his DNA from the straw and the evidence derived therefrom. Petitioner argued that the search violated his right to be free from unreasonable searches and seizures as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. (App.8a). After a hearing, the trial court denied Petitioner's motion. The court acknowledged that DNA contains "vast," "intimate," and "personal" information. (App.111a). However, the court

held that Petitioner relinquished any expectation of privacy in the saliva he deposited on the straw and the DNA contained in the saliva when he left the straw at the restaurant. (App.114a–115a).

The DNA evidence was the only evidence that connected Petitioner to the scene or Martinko. The State argued that the DNA came from blood, but its expert at trial conceded that the source of the DNA could not be definitively determined. The experts agreed that DNA can transfer from person to object and from one object to another.

The jury convicted Petitioner, and the trial court sentenced him to a term of natural life in prison without the possibility of parole. (App.98a–101a).

2. Petitioner argued on appeal that the warrantless search of his DNA violated the Fourth Amendment. The Iowa Supreme Court retained jurisdiction of the appeal, and a majority of the court ruled against Petitioner on his Fourth Amendment claim.

The majority held that Petitioner abandoned any subjective expectation of privacy in the straw when he left it at the restaurant and, to the extent he maintained an expectation of privacy in the straw, that expectation was unreasonable. (App.14a–15a). The court reasoned that by failing to maintain a reasonable expectation of privacy in the straw, Petitioner also failed to maintain a reasonable expectation of privacy in his DNA on the straw. (*Id.*). The court rejected the argument that unavoidably shed DNA is distinct from abandoned property, and it held that an expectation of privacy in unavoidably shed DNA is not an expectation of privacy that society would be prepared to recognize as reasonable. (App.16a). In

support of its conclusion, the court cited decisions holding that a person has no reasonable expectation of privacy in his or her DNA once police are in lawful possession of it. (App.16a–17a). Central to the court's decision was that police only searched Petitioner's DNA for purposes of identification, rather than searching it for physiologic information that free citizens normally expect to keep private. (App.20a–21a).

The dissent rejected the notion that unavoidably shed DNA constitutes abandoned property for two reasons. First, the dissent noted that simply because police lawfully possess an item does not mean that they are authorized to search it without a warrant. (App.83a) (citing *Riley*, 573 U.S. at 403). Second, abandonment of property is shown by proof that the owner has voluntarily relinquished all right, title, and interest in it. (App.83a–84a). The dissent analogized unavoidably shed DNA to the cell phone location information at issue in *Carpenter*. In the same way that a cell phone logs a cell-site record by dint of its operation and without any affirmative act of the person, we all have no choice but to leave DNA behind us as we move about public spaces. (App.84a–85a) (citing *Carpenter*, 138 S.Ct. at 2220). The dissent criticized the majority's reliance on the fact that Petitioner's DNA was searched only for the purpose of identification. (App.89a–90a). By holding that Petitioner voluntarily abandoned any expectation of privacy in his DNA, there was no "search" under the Fourth Amendment when police analyzed it. As stated by the dissent, "The conditional proposition the majority lays down—if DNA is abandoned, then police may do with it as they wish without Fourth Amendment

imposition—offers no room for a different result in a future case involving abandoned DNA." (*Id.*).

REASONS FOR GRANTING THE PETITION

This Court has never addressed whether and to what extent the Fourth Amendment protects a free citizen's right to privacy in their unavoidably shed DNA. Without definitive guidance from this Court, courts have relied on the legal fiction that a person "abandons" their DNA by leaving traces of it on items left in public or thrown away. Per these courts, the Fourth Amendment is not implicated where police surreptitiously collect and analyze DNA without a warrant because a person foregoes any reasonable expectation of privacy merely by dint of engaging in daily activities of life in public spaces. *E.g.*, *People v. Gallego*, 117 Cal. Rptr. 3d 907, 911–12 (Cal. Ct. App. 2010); *State v. Williford*, 767 S.E.2d 139, 143–44 (N.C. Ct. App. 2015); *McCurley v. State*, 653 S.W.3d 477, 490–91 (Tex. Ct. App. 2022).

As the science of DNA analysis continues to advance, the question presented in this petition becomes more pressing. No reasonable person would dispute that DNA contains a wealth of information that implicates the privacies of life the Fourth Amendment was intended to protect. However, if DNA is "abandoned" when left in public, it may be lawfully searched by police without a warrant, absent probable cause, and free from the constraints of reasonableness imposed by the Fourth Amendment. This Court should grant the petition to clarify the scope of

protection afforded to unavoidably shed DNA by the Fourth Amendment under the circumstances present here.

I. THE ANALYSIS OF A FREE CITIZEN'S DNA—EVEN DNA COLLECTED FROM AN ITEM IN A PUBLIC SPACE—CONSTITUTES A SEARCH UNDER THE FOURTH AMENDMENT.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, and against unreasonable searches and seizures[.]" U.S. Const. amend. IV. Historically, Fourth Amendment jurisprudence turned on whether the government "obtain[ed] information by physically intruding on a constitutionally protected area." *United States v. Jones*, 565 U.S. 400, 405–06 n.3 (2012). However, this Court subsequently recognized that "the Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). The Amendment's protections were therefore decoupled from common-law trespass. *Kyllo*, 533 U.S. at 32. For Fourth Amendment purposes, a search includes intrusion into an area an individual expects to preserve as private, so long as his expectation is one that society is prepared to recognize as reasonable. *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

The question under the facts of this case is whether Petitioner had an expectation of privacy in DNA deposited on the straw that society is prepared to recognize as reasonable. The answer to this question is undoubtedly, "Yes."

As a threshold matter, the fact that Petitioner's DNA was not obtained directly from his person does not negate the existence of a search. Longstanding

precedent supports the proposition that the chemical analysis of blood implicates the Fourth Amendment. *Skinner v. Ry. Lab. Exec. Ass'n*, 489 U.S. 602, 621 (1989). When the government draws blood to analyze for drugs or alcohol, two searches that invade a person's privacy interests occur: first, the compelled physical intrusion of the skin, and second, the ensuing chemical analysis of the sample to obtain physiologic data. *Id.* The chemical analysis of blood constitutes a search under the Fourth Amendment in part because it "can reveal a host of private medical facts about" an individual. *Id.* at 617. Extending the rationale of *Skinner*, several federal courts have held that the analysis of DNA constitutes a search separate and apart from its collection. *E.g.*, *Nicholas v. Goord*, 430 F.3d 652, 670 (2nd Cir. 2005) ("The second intrusion to which offenders are subject is the analysis and maintenance of their DNA information[.]");*United States v. Davis*, 690 F.3d 226, 246 (4th Cir. 2012) (holding that the extraction of DNA and the creation of a DNA profile each constitute a search).

There is no doubt that rifling through a person's DNA implicates significant privacy concerns. It is difficult to conceive of information more personal than the genetic code that contributes so much to our very being. DNA can identify our ancestry, relatives, and parentage.[1] DNA can be used to determine whether we have certain diseases or are susceptible

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[1] Elaine Y. Y. Cheung, et al., *Predictive DNA analysis for biogeographical ancestry*, AUSTRALIAN JOURNAL OF FORENSIC SCIENCES, 50:6, 651–658 (Jan. 2018).

to cancers or mental disorders.[2] DNA is even thought to be predictive of whether a person is likely to exhibit certain personality traits or engage in particular behaviors.[3] Given the "vast array" of personal data that can be ascertained through an analysis of DNA, the reasonableness of one's expectation of privacy in his or her DNA cannot be questioned. *In re Shabazz*, 200 F.Supp.2d 578, 583 (D.S.C. 2002); *see Rise v. State of Or.*, 59 F.3d 1556, 1569 (9th Cir. 1995) (Nelson, J. dissenting), *overruled on other grounds as recognized by Crowe v. County of San Diego*, 608 F.3d 406 (9th Cir. 2010) ("DNA genetic pattern analysis catalogs uniquely private genetic facts about the individual that should be subject to rigorous confidentiality requirements even broader than the protection of an individual's medical records.")

The reasonableness of Petitioner's expectation of privacy in his DNA is further supported by reference to positive law. *Carpenter*, 138 S.Ct. at 2270 (Alito, J., dissenting) (noting that positive law may help establish a person's Fourth Amendment interest). More than 30 states have enacted measures providing some level of privacy for genetic information. Natalie Ram, *Genetic Privacy After Carpenter*, 105 VA. L. REV. 1357, 1382 (2019). Many of these statutes require informed consent before a third party may either obtain or perform a genetic test. *E.g.*, Nev.

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[2] Stylianos E. Antonarakis, *Diagnosis of Genetic Disorders at the DNA Level*, NEW ENGLAND JOURNAL OF MEDICINe, 320(3): 153–63 (Jan. 19, 1989).

[3] S. Shifman, et al., *A whole genome association study of neuroticism using DNA pooling*, MOLECULAR PSYCHIATRY 13, 302–312 (2008).

Rev. Stat. § 629.151; N.J. Stat. § 10:5-45. Other states explicitly define genetic information as personal property. *E.g.*, Colo. Rev. Stat. Ann. § 10-3-1104.7(1)(a); Fla. Stat. § 760.40(2).

Importantly, Iowa has also conferred upon Iowa citizens a right to privacy in their DNA. Iowa Code § 729.6(3) provides, in relevant part:

> a. A person shall not obtain genetic information or samples for genetic testing from an individual without first obtaining informed and written consent from the individual or the individual's authorized representative.
>
> b. A person shall not perform genetic testing of an individual or collect, retain, transmit, or use genetic information without the informed and written consent of the individual or the individual's authorized representative.

The Iowa Code provides that "genetic testing" has the same definition as provided by 29 U.S.C. § 1191b(d)(7). Iowa Code § 729.6(2)(e). (App.122a). The United States Code defines "genetic test" as "an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes." 29 U.S.C. § 1191b(d)(7). Thus, under the Iowa DNA privacy statute, genetic testing to determine a person's genotype without that person's informed written consent is unlawful.

Not only do the foregoing statutes support the proposition that a person's expectation of privacy in their DNA is one that society is prepared to accept as reasonable, but they also grant rights consistent with those that normally attach to personal property.

"One of the main rights attaching to property is the right to exclude others . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) (citation omitted). That the DNA privacy statutes generally grant individuals the right to exclude others from obtaining or testing their DNA is consistent with the notion that DNA is personal property to which the protections of the Fourth Amendment were intended to apply. *Carpenter*, 138 S.Ct. at 2239–42 (Thomas, J., dissenting) (noting that the text of the Fourth Amendment reflects its close connection to property and was intended to protect against unreasonable searches and seizures thereof).

Significantly, the DNA privacy statutes do not condition their protection on an individual's ability to wipe public spaces clean of his or her DNA. The plain language of the Iowa statute, for example, prohibits an individual from collecting a person's DNA absent the person's informed consent without regard for the location from which the DNA was obtained. In the instant case, a private citizen would have violated the plain language of the statute by extracting Petitioner's DNA from the straw even though it was obtained from a straw found in a public location.

The rationale granting protection to DNA found in public places is more than sound. "Human beings leave trails of genetic data wherever we go. We unavoidably leave genetic traces on the doorknobs we touch, the items we handle, the bottles and cups

we drink from, and the detritus we throw away."[4] People regularly leave genetic material behind by touching items and surfaces. Due to quickly advancing technology, it is possible to analyze and extract DNA from samples containing just a few cells transferred by touching.[5] Studies show that a person's DNA can be collected after handling a garment for as few as 2 seconds.[6] Due to its ubiquitousness, there would be no right to privacy in DNA if DNA privacy statutes did not apply to DNA left in public spaces. Nor is the Fourth Amendment so constrained. "A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, 'what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.'" *Carpenter* 138 S.Ct. at 2217 (citing *Katz*, 389 U.S. at 351–52).

In the not too distant past, the information that can be culled from genetic material could not be obtained without a physical intrusion into the body, *i.e.*, a blood draw. That rapidly advancing technology has made genetic material more accessible does not give police *carte blanche* to search it. This Court has rejected the notion that the government may use advancements in technology to circumvent what

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[4] Natalie Ram, *Gauging Genetic Privacy*, J. THINGS WE LIKE (June 10, 2021)

[5] Linda Jansson, et al., *Individual shedder status and the origin of touch DNA*, FORENSIC SCIENCE INTERNATIONAL: GENETICS, 56:102626 (2022)

[6] Francesco Sessa, et al., *Touch DNA impact of handling time on touch deposit and evaluation of different recovery techniques: An experimental study*, SCIENTIFIC REPORTS, 9:9542 (July 2019).

constitutes a "search" for purposes of the Fourth Amendment. In doing so, the Court noted two "basic guideposts" or aims of the Fourth Amendment: (1) to secure "the privacies of life" against "arbitrary power;" and (2) to "place obstacles in the way of a too permeating police surveillance." *Carpenter,* 138 S.Ct. at 2214 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886); quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

In *Kyllo*, the Court addressed the question of "what limits there are upon [the] power of technology to shrink the realm of guaranteed privacy." *Id.* at 43. There, the government used a thermal imager to detect the amount of heat emanating from the defendant's home. *Id.* at 29–30. In assessing whether the government's use of a thermal imager constituted a search, the Court noted that visual surveillance of the portion of a house in public view is not a search under the Fourth Amendment. *Id.* at 31–32. However, the Court rejected the notion that the government could utilize "sense-enhancing technology" to gather information regarding the interior of a home that could not have otherwise been obtained without physical intrusion into a constitutionally protected area. *Id.* at 35 (citing *Silverman v. United States*, 365 U.S. 505 (1961)). The Court reaffirmed that the Fourth Amendment cannot be interpreted mechanically, because doing so "would leave the homeowner at the mercy of advancing technology[.]" *Id.*

The comparison between the thermal imaging at issue in *Kyllo* and unavoidably shed DNA is especially apt. Just as every home emanates heat, every person sheds DNA. Like thermal imaging, the chemical analysis of DNA makes visible what is invisible to

the naked eye. Most importantly, advancements in technology—a thermal imager on one hand and DNA analysis on the other—enable law enforcement to access private information without physical intrusion which historically would have required a warrant, *i.e.*, a warrant to search the home as to the former, and a warrant to analyze blood as to the latter.

In short, Petitioner had a reasonable expectation of privacy in his DNA—including the DNA he left on the straw—when police collected it and submitted it for analysis.

The warrantless search of Petitioner's DNA was unconstitutional. The text of the Fourth Amendment requires that (1) all searches and seizures be reasonable, and (2) a warrant may not issue unless probable cause is properly established, and the scope of the authorized search is set out with particularity. *Payton v. New York*, 445 U.S. 573, 584 (1980). In most instances a warrant must be secured for a search to be lawful. *King*, 563 U.S. 452, 459 (2011). Because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain reasonable exceptions. *Id.* (citing *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). Nevertheless, "[E]ach exception to the warrant requirement invariably impinges to some extent on the protective purpose of the Fourth Amendment, [and] the few situations in which a search may be conducted in the absence of a warrant have been carefully delineated and the burden is on those seeking the exemption to show the need for it." *California v. Acevedo*, 500 U.S. 565, 589 n.5 (1991) (Stevens, J., dissenting) (citations omitted) (internal quotation marks omitted).

Here, the police did not obtain a warrant to search Petitioner's DNA, and the State never urged any exception to the warrant requirement before the trial court or the Iowa Supreme Court. (App.82a). The search therefore ran afoul of the Fourth Amendment, and the fruits thereof should have been suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963).

II. THE IOWA SUPREME COURT'S RULING THAT PETITIONER ABANDONED HIS DNA MISAPPLIES PRECEDENT AND CANNOT WITHSTAND SCRUTINY.

The Iowa Supreme Court did not address whether a person has a reasonable expectation of privacy in their DNA generally, or whether a person's DNA constitutes his or her property for purposes of the Fourth Amendment. Instead, the court jumped to its conclusion that Petitioner abandoned his DNA and any reasonable expectation of privacy in it by leaving the straw behind at the restaurant.

This Court addressed the interplay between abandoned property and the Fourth Amendment in *California v. Greenwood*, 486 U.S. 35 (1988). In *Greenwood*, this Court held that the Fourth Amendment does not apply to garbage left outside the curtilage of a private residence. *Id.* at 37. In reaching its conclusion, the Court noted it is "common knowledge" that plastic bags left on the side of a public street are "readily accessible to animals, children, scavengers, snoops, and other members of the public." *Id.* at 40. Relatedly, the Court pointed out that police "cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public." *Id.* at 41. The Court determined that the defendants therefore had no rea-

sonable expectation of privacy in the items they had so discarded. *Id*.

The Iowa Supreme Court's application of *Greenwood* to the DNA Petitioner deposited on the straw is a nonstarter. Petitioner did not make his DNA "readily accessible" to members of the public by leaving his drinking straw at the restaurant. It is not as though the waiter at the restaurant could search Petitioner's DNA profile by examining the straw. On the contrary, police were only able to search Petitioner's DNA by sending the straw to a lab which used specialized equipment to extract and analyze it. And even then, the results of the analysis could only be interpreted by individuals with the technical expertise to do so. Petitioner simply did not expose his DNA to the public in the manner contemplated in *Greenwood* by leaving his straw at the restaurant.

More fundamentally, the notion that Petitioner abandoned his DNA is pure legal fiction. Abandonment of property requires the surrender or relinquishment or disclaimer of all rights in the property. *Tyler v. Hennepin County, Minnesota*, 598 US. 631, 647 (2023). Yet, under Iowa's DNA privacy statute, Petitioner did not relinquish or disclaim his right to exclude others from searching his DNA merely by leaving it on an item in a public space. Moreover, "relinquishment" connotes a volitional act. Petitioner did not deposit his DNA on the straw on purpose; rather, his DNA was left on the straw simply because he used it.

The court's related conclusion that police were permitted to search Petitioner's DNA because they lawfully possessed it also fails. "[I]t has been settled that an officer's authority to possess a package is distinct from his authority to examine its contents."

Walter v. United States, 447 U.S. 649, 654–55 (1980) (citing *Arkansas v. Sanders*, 442 U.S. 753, 758 (1979); *United States v. Chadwick*, 433 U.S. 1, 10 (1977)). The same rationale has been extended to cell phones that police lawfully possess incident to a defendant's arrest. *Riley*, 573 U.S. at 401. Thus, even if one assumes that police could lawfully extract Petitioner's DNA from the straw and, in that sense, possess it, that does not mean that police can search the DNA without a warrant.

III. That Law Enforcement's Search Of Petitioner's DNA Revealed Only Information Ostensibly Related To Identity Does Not Render It Constitutional.

In holding that the search of Petitioner's DNA was lawful, the Iowa Supreme Court found it significant that the search of Petitioner's DNA did not, in fact, reveal any of Petitioner's physiologic data. Per the majority, if the search had been used to catalogue traits about Petitioner's physiology or health conditions, a different result might follow. (App.20a–22a). The court's attempt to qualify its decision based on the nature of the information recovered during the search fails. If Petitioner abandoned any reasonable expectation of privacy in his DNA by leaving the straw at the restaurant, then the Fourth Amendment would not impose any limitations on law enforcement's ability to search it. Conversely, if Petitioner had a reasonable expectation of privacy in his genetic material, then a warrant, absent an applicable exception, was required for the search to pass constitutional muster.

The Iowa Supreme Court's suggestion that the reasonableness of a search into a constitutionally

protected area can be determined by an after-the-fact assessment of the nature of the information recovered conflicts with this Court's precedent. In *Arizona v. Hicks*, 480 U.S. 321, 323 (1987), a bullet was fired through the floor of the defendant's apartment. Police lawfully entered the apartment to search for the perpetrator and weapons. *Id.* During the search, one of the officers noticed expensive stereo components he suspected were stolen. *Id.* The officer moved some of the components to access serial numbers on a turntable, which he reported to headquarters. *Id.* It was determined that the turntable had been stolen in an armed robbery, and the officer seized it. *Id.* The defendant was subsequently indicted for the robbery. *Id.* at 323–24.

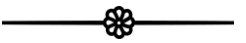
Addressing the legality of the search, this Court held that moving the components to record the serial numbers on the equipment constituted a search separate and apart from the officer's objective in lawfully entering the apartment. *Id.* at 324–25. The Court rejected the argument that the object of the search played any role in whether a search under the Fourth Amendment occurred:

> It matters not that the search uncovered nothing of any great personal value to respondent—serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. A search is a search, even if it happens to disclose nothing but the bottom of a turntable.

Id. at 325 (emphasis added). The Court went on to hold that probable cause was required to sustain the search as constitutional. *Id.* at 326–27.

Likewise, it does not matter that law enforcement did not mine Petitioner's genetic material for physiologic data. The government rifled through Petitioner's private genetic information, from which a host of private facts and information could be obtained. That law enforcement focused on "just" certain loci is a non-event as far as the Fourth Amendment is concerned. *Patel v. City of Los Angeles*, 738 F.3d 1058, 1062–63 (9th Cir. 2013) (That the [police officer's] inspection may disclose "nothing of any great personal value" to the hotel—on the theory, for example, that the records contain "just" the hotel's customer list—is of no consequence."); *Kyllo*, 533 U.S. at 37 (holding that the Fourth Amendment's protection is not tied to the measurement of the quality or quantity of information obtained).

Given the rapid advancement of DNA technology, special care must once again be employed to ensure that the "progress of science" "does not erode Fourth Amendment protections." *Carpenter*, 138 S.Ct. at 2223 (quoting *Olmstead v. United States*, 277 U.S. 438, 473–74 (1928) (Brandeis, J., dissenting)). Without question, DNA is a valuable tool for law enforcement to detect and solve crime. But the potential value of DNA to solving crime makes it even more vulnerable to misuse. This Court should hold that the inherently private information contained within DNA warrants protection under the Fourth Amendment.



CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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