1   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - - - - - - - - - - - - - x

3   MARYLAND,   :

4   Petitioner   :   No. 12-207

5   v.   :

6   ALONZO JAY KING, JR.   :

7   - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Tuesday, February 26, 2013

10

11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 11:10 a.m.

14   APPEARANCES:

15   KATHERINE WINFREE, ESQ., Chief Deputy Attorney General,

16   Baltimore, Maryland; on behalf of Petitioner.

17   MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,

18   Department of Justice, Washington, D.C.; for United

19   States, as amicus curiae, supporting Petitioner.

20   KANNON K. SHANMUGAM, ESQ., Washington, D.C.; on behalf

21   of Respondent.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (11:10 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4 argument next this morning in Case 12-207,

5 Maryland v. King.

6   Ms. Winfree?

7   ORAL ARGUMENT OF KATHERINE WINFREE

8   ON BEHALF OF THE PETITIONER

9   MS. WINFREE: Mr. Chief Justice, and may it

10 please the Court:

11   Since 2009, when Maryland began to collect

12 DNA samples from arrestees charged with violent crimes

13 and burglary, there had been 225 matches, 75

14 prosecutions and 42 convictions, including that of

15 Respondent King.

16   JUSTICE SCALIA: Well, that's really good.

17 I'll bet you if you conducted a lot of unreasonable

18 searches and seizures, you'd get more convictions, too.

19   (Laughter.)

20   JUSTICE SCALIA: That proves absolutely

21 nothing.

22   MS. WINFREE: Well, I think, Justice Scalia,

23 it does, in fact, point out the fact that -- that the

24 statute is working, and in the State's view the act is

25 constitutional.

3

1   JUSTICE SCALIA: So that's its purpose, to

2   enable you to identify future criminals, the

3   perpetrators of future crimes? That's the purpose of

4   it? I thought that that wasn't the purpose set forth in

5   the -- in the statute.

6   MS. WINFREE: No, not -- not just to

7   identify people. The purpose of the statute is to

8   enable the State to identify perpetrators of serious

9   crimes and -- and to use the information to make bail

10   determinations for people who are validly in their

11   custody.

12   JUSTICE SOTOMAYOR: And I'm having a hard

13   time understanding the bail argument. Because in my

14   time, most bail decisions were made at the time of

15   arrest. And here the arrest was in April and the

16   results didn't come up until August.

17   MS. WINFREE: That's true,

18   Justice Sotomayor.

19   JUSTICE SOTOMAYOR: And yet, he was detained

20   anyway, correct?

21   MS. WINFREE: He was detained anyway.

22   JUSTICE SOTOMAYOR: And -- and there might

23   be a case where someone's gotten out, but it would be

24   the rare case.

25   MS. WINFREE: Well --

1   JUSTICE SOTOMAYOR: You don't use it

2 routinely for the bail determination.

3   MS. WINFREE: At this point, you're

4 absolutely correct, Justice Sotomayor. We don't use it

5 routinely for a couple of reasons. For one, as in Mr.

6 King's case, there has been in the past a more

7 substantial delay in getting those results back. Our --

8 our lab now is getting results between 11 and 17 days.

9 Now, that, of course --

10   JUSTICE SOTOMAYOR: Well, it doesn't include

11 the time to collect the sample, send it to you or the

12 time to do the match. It's just to do the genome rapid,

13 correct?

14   MS. WINFREE: No, that's the whole -- that's

15 the whole process, Justice Sotomayor. It's for getting

16 the sample and getting it into the system, the DNA

17 profile and getting the match back. That's what we're

18 being told. It's from 11 to 17 days.

19   Now, of course, that wouldn't be timely for

20 that first bail determination, but the State under

21 Maryland's procedure certainly has the ability to go

22 back to -- to the judge and ask that sentence -- or

23 that -- I'm sorry -- that bail determination to be

24 modified. And in point of fact, though, we don't have

25 any particular statistics in Maryland.

1   In California's amicus brief, which was

2   joined by the 49 other States and D.C. and Puerto Rico,

3   they actually do cite two particular examples where --

4   where two people, Castillo and Shamblin, were arrested.

5   One was arrested on a credit card charge and another on

6   a drug charge. Mr. Castillo was actually released on

7   his -- on OR and when his sample was matched, it came

8   back to a -- an unsolved rape and sodomy and his OR was

9   revoked.

10   In Mr. Shamblin's case, he was granted

11   diversion, because his drug charge is a relatively low

12   level offense and when the match came back, it -- it

13   tied him to a rape and murder. His diversion was

14   revoked, and he's currently pending charge -- pending

15   trial on both of those charges.

16   CHIEF JUSTICE ROBERTS: Your procedure

17   limits the collection to certain violent offenses,

18   right?

19   MS. WINFREE: It does, Mr. Chief Justice.

20   CHIEF JUSTICE ROBERTS: But your argument

21   would not be so limited, would it? Under your theory,

22   there's no reason you couldn't undertake this procedure

23   with respect to anybody pulled over for a traffic

24   violation?

25   MS. WINFREE: Well, in Maryland, it's not

6

1   just the fact that we have those -- those violent crimes

2   and burglaries. Actually, we don't collect DNA unless

3   someone is physically taken into custody. Now, with

4   respect to --

5   CHIEF JUSTICE ROBERTS: Well, I understand.

6   But there's no reason you couldn't, right? I gather

7   it's not that hard. Police officers who give

8   Breathalyzer tests, they can also take a Q-tip or

9   whatever and get a DNA sample, right?

10   MS. WINFREE: Well, what I would say to that

11 is that with respect to a traffic stop, this Court said

12 in Berkheimer that a motorist has an expectation that a

13 traffic stop is going to be relatively brief and

14 temporary, that he or she will be given a citation and

15 sent on their way.

16   CHIEF JUSTICE ROBERTS: Well, how long does

17 it take to -- to undergo the procedure? You say, ah

18 and then --

19   MS. WINFREE: It doesn't take long, but what

20 I was suggesting is that because of the nature of a

21 traffic stop, this Court might well decide that a

22 motorist has a reasonable expectation of privacy not

23 to --

24   JUSTICE GINSBURG: How about a Terry stop?

25 A Terry stop?

1   MS. WINFREE: In a Terry -- well, this

2   Court, I guess, we would look at two -- one case in

3   particular, this Court's case -- decision in Hayes

4   v. Florida. That involved a defendant who was taken

5   into custody, so his -- he was not arrested, but taken

6   into custody for -- to get his fingerprints, and this

7   Court held that that was not -- that was not

8   constitutional. But the Court further said that there

9   could be a circumstance in a Terry stop if the officer

10   had reasonable suspicion to believe that the individual

11   was --

12   JUSTICE GINSBURG: But these -- these are

13   all cases, I mean, the dominant use is to solve what

14   they call cold -- cold cases, and you gave one example.

15   This case is another. A rape committed 6 years before,

16   right? And there was no reasonable suspicion, there was

17   no nothing, right? And the suspicion comes up only

18   because the DNA sample comes back as a match. So is it

19   the -- this is a -- a very reliable tool, but it's not

20   based on any kind of suspicion of the individual who's

21   being subjected to it, right?

22   MS. WINFREE: That's correct, Your Honor.

23   And if I could go back to your question

24   about the Terry stop. The cornerstone of our -- and I

25   do believe that this Court could -- could -- who knows

1   how this Court would come out in that situation, but I

2   think in terms of our argument, the corner --

3   JUSTICE SCALIA: I do.

4   (Laughter.)

5   MS. WINFREE: Well, happily we don't have to

6   decide that one today. But what I -- the cornerstone of

7   our argument is that when an individual is taken into

8   custody, an individual is arrested on a probable cause,

9   on a probable cause arrest, that person by virtue of

10   being in that class of individuals whose conduct has led

11   the police to arrest him on -- based on probable cause

12   surrenders a substantial amount of liberty and privacy.

13   JUSTICE KAGAN: But, Ms. Winfree, that can't

14   be quite right, can it? I mean, such a person, assume

15   you've been arrested for something, the State doesn't

16   have the right to go search your house for evidence of

17   unrelated crimes; isn't -- isn't that correct?

18   MS. WINFREE: That's correct, Justice Kagan.

19   JUSTICE KAGAN: It doesn't have the right to

20   search your car for evidence of unrelated crimes.

21   MS. WINFREE: That's correct.

22   JUSTICE KAGAN: Just because you've been

23   arrested doesn't mean that you lose the privacy

24   expectations and things you have that aren't related to

25   the offense that you've been arrested for.

9

1   MS. WINFREE: That's correct. But what

2   we're seizing here is not evidence of crime, what it is,

3   is information related to that person's DNA profile.

4   Those 26 numbers --

5   JUSTICE KAGAN: Well, and if there were a

6   real identification purpose for this, then I understand

7   that argument. But if it's just to solve cold cases,

8   which is the way you started, then it's just like

9   searching your house, to see what's in your house that

10   could help to solve a cold case.

11   MS. WINFREE: Well, I would say there's a

12   very real distinction between the police generally

13   rummaging in your home to look for evidence that might

14   relate to your personal papers and your thoughts. It's

15   a very real difference there than swabbing the inside of

16   an arrestee's cheek to determine what that person's

17   CODIS DNA profile is. It's looking only at 26 numbers

18   that tell us nothing more about that individual.

19   JUSTICE KAGAN: Well, but if that's what

20   you're basing it on, then you're not basing it on an

21   arrestee. I mean, then the Chief Justice is right, it

22   could be any arrestee, no matter how minor the offense.

23   It could be just any old person in the street. Why

24   don't we do this for everybody who comes in for a

25   driver's license because it's very effective?

1   MS. WINFREE: I think the difference there

2   is these people are lawfully in custody having been

3   arrested based on probable cause. And that --

4   JUSTICE SOTOMAYOR: All right. So now, I

5   see two lines of cases, okay? The Fourth Amendment,

6   which says you can't do a search without a warrant and

7   probable cause. And Samson. And most of your brief

8   argument was based on Samson.

9   As I read Samson, it was the special

10   relationship between the parolee or the probationary

11   person, that line of cases, and the assumption being

12   that they're out in the world, I think, by the largesse

13   of the State. So a State has a right to search their

14   home just as it would their cell essentially. Why is

15   that true for an arrestee? What about -- what creates

16   this special relationship that permits you to intrude,

17   search their home, search their car, search their

18   person, to solve other cases?

19   MS. WINFREE: Well --

20   JUSTICE SOTOMAYOR: Because you're going to

21   have to tell me why searching their person is different

22   than searching their home or car.

23   MS. WINFREE: Well, if I could start at the

24   back end of your question, Justice Sotomayor, we're not

25   suggesting and this statute doesn't permit the State or

 1   police to search an arrestee's home or his person

 2   beyond -- beyond simply swabbing the cheek for the DNA.

 3   Now, in terms of the -- the individual's

 4   relationship to the State, an arrestee is not that

 5   dissimilar. There is obviously a range of -- of

 6   relationships with the State. Those of us who are out

 7   on the street, ordinary citizens are at one end, people

 8   who are imprisoned upon conviction are at the other end.

 9   And -- but in terms of when an arrestee is

10   physically in custody, he has a reduced expectation of

11   privacy and that's what makes, in our view, it makes

12   this case more similar. To be sure, this is not Samson,

13   there's no -- there's no one case in this Court's

14   jurisprudence that's exactly like this.

15   JUSTICE SOTOMAYOR: There's no other case

16   but Samson in that line that permits searches on this

17   balancing.

18   MS. WINFREE: Well --

19   JUSTICE SOTOMAYOR: So what I want to know

20   is what's the legal theory now? How far do we let the

21   State go each time it has some form of custody over you

22   in schools, in workplaces, wherever else the State has

23   control over your person?

24   MS. WINFREE: Well, those are different

25   situations, Justice Sotomayor. We're not suggesting

1   that the police could swab a student for -- for a DNA

2   sample. We're talking about a special class of people

3   who by their conduct have -- have been arrested based on

4   probable cause.

5   JUSTICE BREYER: Can I ask you a particular

6   specific quick question?

7   MS. WINFREE: Yes, Justice Breyer.

8   JUSTICE BREYER: As I read this, this

9   concerns people arrested for a felony, a crime of

10 violence, attempted crime of violence, burglary or

11 attempted burglary.

12   MS. WINFREE: Yes, Justice Breyer.

13   JUSTICE BREYER: And so we're not talking

14 about people who are driving cars and traffic stops and

15 all these other things.

16   MS. WINFREE: That's absolutely correct.

17   JUSTICE BREYER: The only thing we have to

18 decide is whether a person, where there's probable cause

19 to arrest a person for those four crimes, their

20 fingerprints are all taken.

21   MS. WINFREE: Yes.

22   JUSTICE BREYER: And whether they also can

23 take DNA, that's the issue.

24   MS. WINFREE: That's correct,

25 Justice Breyer.

1   JUSTICE BREYER: Okay. Nothing else. Thank

2   you.

3   MS. WINFREE: If there are no further

4   questions, I'll reserve the remainder of my time

5   for rebuttal.

6   CHIEF JUSTICE ROBERTS: Thank you, counsel.

7   Mr. Dreeben?

8   ORAL ARGUMENT OF MICHAEL DREEBEN,

9   FOR UNITED STATES, AS AMICUS CURIAE,

10   SUPPORTING THE PETITIONER

11   MR. DREEBEN: Thank you, Mr. Chief Justice,

12   and may it please the Court:

13   Arrestees are in a unique category, they are

14   on the gateway into the criminal justice system. They

15   are no longer like free citizens who are wandering

16   around on the streets retaining full impact Fourth

17   Amendment rights. The arrest itself substantially

18   reduces the individual's expectation of privacy. The

19   arrestee can be searched and sent to arrest. His

20   property, whether or not connected with a crime, can be

21   inventoried.

22   When he's taken into the jail situation, he

23   can be subjected to a visual strip search. If he's

24   admitted to the population of the jail, he'll be given a

25   TB test and a thorough medical screen. These are not

1   individuals who are like free citizens, and they are not

2   like free citizens in another significant respect.

3   Arrestees are rarely arrested for the first

4   time. They tend to be repeat customers in the criminal

5   justice system. Up to 70 percent of arrestees have been

6   previously arrested.

7   CHIEF JUSTICE ROBERTS: Yes, but that

8   doesn't mean, for example, that you can go into their

9   house without a warrant.

10   MR. DREEBEN: That is certainly correct,

11   Chief Justice Roberts, and the reason for that is going

12   into the house will expose a substantial number of

13   highly private things to the view of the State. Taking

14   a DNA sample is not of that character. It is far more

15   like taking a fingerprint.

16   CHIEF JUSTICE ROBERTS: Well, this is a

17   factual question. I understand your emphasis on the

18   fact that it only looks at 26 loci and they are

19   supposedly not connected in any way with other

20   information. Does the sample that you retain -- can it

21   be evaluated more broadly? In other words, saying,

22   well, the law says we only look at these 13, but we have

23   this saliva, we want to look at all sorts of other

24   stuff.

25   MR. DREEBEN: Well, by law, the government,

1   under CODIS, and the States cannot look at anything

2   except identification information. The sample contains

3   the entire genome. The sample cannot be looked at as a

4   matter of law.

5   And I think it's critical to this case to --

6   for the Court to understand that if the Court concludes,

7   as is probably correct, that the individual will retain

8   a reasonable expectation of privacy in the genomic

9   material that does not reveal identity, then additional

10   Fourth Amendment scrutiny would be required before the

11   government could make use of the rest of the genome.

12   Here, it's making use of an identity

13   indicator that is highly similar to fingerprints with

14   one significant difference: It is far more accurate.

15   When Respondent committed his rape --

16   JUSTICE KAGAN: Well, Mr. Dreeben, is it

17   really? Because if this were like fingerprints, I think

18   that you would have a quite good case. But as I've been

19   reading about this, it seems as though the technology is

20   not the same as the fingerprint technology; and because

21   the technology is different, it is used differently.

22   Fingerprints you go in, you put in a fingerprint, there

23   is identifying information that comes back to you in 5

24   minutes, right?

25   This, you put in something, and Ms. Winfree

1   said was 11 to 17 days, in this case it's four months.

2   And it doesn't seem to be used because the technology

3   doesn't allow it to be used as the kind of routine

4   identifier that fingerprints does. So am I wrong about

5   that?

6   MR. DREEBEN: You are not wrong, Justice

7   Kagan, but the future is very close to where there will

8   be rapid DNA analyzers that are devices that can analyze

9   and produce the identification material in the DNA

10 within 90 minutes. And the design of this program is to

11 put them at the booking station so that DNA can be taken

12 and within 90 minutes that information is known.

13   In that circumstance, it will be highly

14 relevant to the immediate release/custody decision,

15 which it already can play a role in --

16   JUSTICE BREYER: That part surprised us.

17 Then do you think the States are wrong? I mean, they

18 all say in their brief, in footnote 10: DNA

19 identification database samples have been processed in

20 as few as 2 days in California, and although around

21 30 days has been average. So I guess the technology is

22 there now to process this in 2 days, not 9 days.

23   MR. DREEBEN: Yes, Justice Breyer. Yes,

24 Justice Breyer, there is no question it can be done

25 quickly because of the volumes. I'm not contending that

 1   today --

 2   JUSTICE BREYER: In the case of -- do you

 3   have any information -- are there instances with

 4   fingerprints where returns have not come back for as

 5   long as 30 days, or are they all, or almost all, done in

 6   5 minutes?

 7   MR. DREEBEN: Fingerprint histories tend to

 8   come back quickly except if the prints are

 9   unrecognizable or unreadable. It is very significant, I

10   think, that fingerprints are used for crime solution as

11   well as --

12   JUSTICE ALITO: Before you get on to --

13   before you go to that, fingerprints have been taken I

14   believe from people who are booked for offenses for

15   many, many, many years; isn't that right?

16   MR. DREEBEN: Correct.

17   JUSTICE ALITO: When did the FBI's AFIS

18   system for comparing fingerprints by computer begin?

19   MR. DREEBEN: That I cannot tell you,

20   Justice Alito. It is now in use. It is in use both for

21   identification and, contrary to the representation of

22   Respondent in his brief, fingerprints are run against

23   the latent fingerprint database which reflects

24   fingerprints from crime scenes. It returns about 50,000

25   hits a year.

1   JUSTICE ALITO: Well, the question that I

2   had was this: If the constitutionality of taking

3   fingerprints is dependent on the speed with which a

4   fingerprint comparison can be done now by a computerized

5   system, would that mean that the taking of fingerprints

6   was unconstitutional back in, let's say, the '50s when

7   that wasn't possible and fingerprints could only be

8   compared manually?

9   MR. DREEBEN: No, I certainly do not think

10   that it would have been unconstitutional at any point

11   because the State has a compelling interest in taking

12   biometric identification information from the individual

13   that is arrested and using it for a myriad of purposes:

14   Determining criminal history, attempting to solve

15   crimes, funneling that information back --

16   JUSTICE KAGAN: Mr. Dreeben, could I

17   understand how this works exactly? The swab is taken,

18   and if I -- there is a database which is known offenders

19   and there is a database which is kind of crime scene

20   DNA; is that correct?

21   MR. DREEBEN: That is correct.

22   JUSTICE KAGAN: And when the swab is taken

23   and it's put into the system, you check that against the

24   crime scene DNA database; is that correct?

25   MR. DREEBEN: That is the routine method

1   under CODIS, yes.

2   JUSTICE KAGAN: Do you check it -- does

3   Maryland check it against the known offenders database?

4   MR. DREEBEN: I do not know precisely

5   whether Maryland does that. The Federal system does not

6   routinely do that. Upgrades to the software system will

7   permit it to do that, and many States do it.

8   JUSTICE KAGAN: Because that suggests that

9   right now it's functioning as let's solve some crimes,

10   which is a good thing, you know, that we should solve

11   some crimes, but not as an identification device.

12   Because here if it were an identification device you

13   would be comparing it to the known offender database,

14   not to the cold case database.

15   MR. DREEBEN: I agree with that and I think

16   that in California the brief for the States indicates

17   that many States do that and California itself uses it

18   to resolve discrepancies in identity when a fingerprint

19   comes back and it returns to multiple names, or the

20   fingerprint is not good enough to permit an

21   identification. California cross-checks, so it does

22   perform an identification function.

23   And as I suggested, with the advent of rapid

24   DNA, it's not that it is unconstitutional before rapid

25   DNA, but rapid DNA will permit DNA identification to

1   replace fingerprint identification because it's far more

2   accurate and it has far more utility in the secondary

3   purpose of fingerprints, which is to match them to

4   latent prints and solve crimes.

5   And this is highly relevant to both of the

6   major purposes for taking DNA, crime solution and

7   facilitating the release/custody determination. Any

8   judge who is looking at a bail case would like to

9   know -- I have a guy who has been arrested on grand

10   theft auto. He has no criminal history. Should I

11   release him back on the street? Well, it's a first

12   offense, he has family ties; maybe yes. If that

13   judge --

14   JUSTICE GINSBURG: Mr. Dreeben, can you

15   explain how it works, mechanically? Because I

16   understand, at least maybe this is just the Maryland

17   statute, but if you can't use the swab that is taken

18   from the arrestee when he is arrested -- it can't be

19   used, it's inadmissible -- then you do it again. You do

20   it -- but what it does supply is probable cause, because

21   you found out that he was a perpetrator of a rape 6

22   years ago. Then you have probable cause and you get a

23   warrant and do it again.

24   What -- what is the reason for the

25   doubling -- the doing it twice?

1   MR. DREEBEN: That serves an enhanced

2   reliability function to ensure there is no mix-up and it

3   provides an evidentiary function of permitting the new

4   DNA match to be admitted in a sample that is taken under

5   the warrant. It has nothing to do with undercutting the

6   value of taking DNA on the spot because, I was

7   indicating, the judge who would know this defendant's

8   DNA came back and returned a cold case hit to a

9   murder-rape, he's not such a good risk to be put back on

10   the street.

11   CHIEF JUSTICE ROBERTS: That argument only

12   makes sense if we're in your future world where it's

13   90 minutes, right?

14   MR. DREEBEN: No, Mr. Chief Justice.

15   CHIEF JUSTICE ROBERTS: It depends on, if we

16   have a situation such as Maryland says 11 to 17 days,

17   the footnote, whatever, the amicus brief says something

18   else, but you are not going to put off the bail hearing

19   for 2 weeks.

20   MR. DREEBEN: No, but bail can be revoked

21   and the government will go back in and make a motion to

22   revoke bail if new information emerges that indicates

23   this individual is a danger to the community.

24   And the whole point of this is we are

25   talking about arrestees, somebody who has taken a step

1   into the gateway of the criminal justice system. The

2   criminal justice system at that point has to deal with

3   this person. It has to know who is this person, which

4   includes what has this person done so we know whether to

5   release him and, if we keep him, in what situations do

6   we keep him.

7   JUSTICE SOTOMAYOR: That doesn't explain why

8   you can't go into his home.

9   MR. DREEBEN: Yes, it does, Justice --

10   JUSTICE SOTOMAYOR: I mean, you know, if the

11   whole issue is how dangerous is he, you should be able

12   to go into his home, into his car, to any place he has

13   visited, to just sort of run rampant in his life to make

14   sure that he is not a bail risk.

15   MR. DREEBEN: We are not asking for that,

16   and I don't think that the Court's balancing test

17   suggests that these two cases are equivalent. My first

18   submission is that because we are talking about --

19   JUSTICE SOTOMAYOR: But you are, because

20   what you are saying really is law enforcement need

21   alone, without any suspicion whatsoever of another

22   crime, permits you to take this information from the

23   person and use it.

24   MR. DREEBEN: I'm saying that because an

25   arrestee is someone whose conduct has given rise to

23

1   probable cause that he committed a crime, he's in a

2   different position from ordinary citizens. And this

3   Court does, as it did in Samson and in Knights, balance

4   the expectations of privacy against the governmental

5   interests. And here, the expectation of privacy is

6   minimal in the cheek swab, and the information obtained.

7   It's identical --

8   CHIEF JUSTICE ROBERTS: According to Samson

9   and Knights, you're dealing with people who are still

10   subject to the -- a criminal sentence.

11   MR. DREEBEN: Well, they're differently

12   situated in that respect, Mr. Chief Justice. And I will

13   acknowledge that there is no case on my side that

14   decides the case this way. And there's no case that --

15   on Respondent's side that decides the case for him. The

16   Court I think has treated the category of what he calls

17   special needs cases -- what the Court has called special

18   needs cases -- as dealing with suspicionless or

19   warrantless intrusions on ordinary citizens.

20   JUSTICE KAGAN: But the typical special

21   needs case is one in which we say there's no law

22   enforcement interest, that there's an interest other

23   than the interest in solving crime.

24   MR. DREEBEN: Well, we have a strong law

25   enforcement interest with respect to people who are

1   arrested based on probable cause. They are no longer

2   similarly situated to other people. They can be

3   deprived of their liberty. Their property can be

4   searched upon entry into the jail.

5   JUSTICE KAGAN: When you started,

6   Mr. Dreeben, you started by saying, you know, they have

7   a reduced expectation of privacy and we have important

8   interests. You went right into free-form balancing.

9   That's typically not the way we do it.

10   If we said to you, look, you know, the way

11   we do it is, you need a warrant, and if you -- there is

12   some exceptions, then you have to put yourself into a

13   well-recognized exception where you can search without a

14   warrant. And that's especially the case when there is

15   no suspicion whatsoever.

16   How would you do it? How would you do it

17   short of free-form balancing? What exception are you a

18   part of?

19   MR. DREEBEN: We're not asking for a new

20   exception. What we're asking for is for the Court to

21   apply what it called "the key principle of the Fourth

22   Amendment." It said that in Bell v. Wolfish. It said

23   that in Martinez --

24   JUSTICE SOTOMAYOR: The key principle is the

25   Fourth Amendment --

1   JUSTICE KENNEDY: Is it -- is it your

2   position that this is a search incident to an arrest?

3   MR. DREEBEN: No, Justice Kennedy, it's not.

4   That stands on its own doctrinal footing. But we do

5   think the fact that --

6   JUSTICE KENNEDY: Why isn't this is a search

7   incident to an arrest?

8   MR. DREEBEN: It is certainly a search --

9   JUSTICE KENNEDY: Just -- just like taking

10   the pockets out and -- and seeing what's in the person's

11   overcoat and so forth is a search incident to an arrest.

12   MR. DREEBEN: You can certainly look at it

13   as an incident of the arrest. The Court's search

14   incident to arrest cases have been bottomed on different

15   justifications than the ones that we're advancing here.

16   I'm entirely happy if you, Justice Kennedy,

17   view it as an incident to arrest in that sense, because

18   I think that it is appropriately viewed as something

19   that the government has a compelling interest in doing

20   once a person has been arrested, and that is, knowing

21   who that person is, which includes knowing what the

22   person has done. And DNA does that in a far more

23   powerful way than fingerprints have done --

24   JUSTICE SCALIA: Yes, but our -- our search

25   incident to arrest cases don't allow that. That's sort

1   of the point. They -- they allow you to search for

2   firearms, they allow you to search for material that

3   relates to the crime for which the person has been

4   arrested. But you can't search the person for other

5   stuff.

6   MR. DREEBEN: That's inaccurate,

7   Justice Scalia. A search incident to arrest allows a

8   full search of the person for any destructible evidence,

9   because a person who has been arrested has a tremendous

10   incentive to destroy evidence. And I just want to come

11   back --

12   JUSTICE SCALIA: Evidence relating to

13   matters other than the crime of arrest?

14   MR. DREEBEN: Yes, on -- on the individual's

15   person. The crime of arrest limitation appears only in

16   Arizona v. Gant, and it relates to cars. But I think

17   it's critical to note that Respondent has conceded that

18   an individual can have their DNA taken once convicted.

19   Suppose we have the same individual who's

20   picked up on grand theft auto, and that individual knows

21   that if he's convicted of grand theft auto, he is going

22   to have his DNA taken. But he also knows that he's

23   committed a string of rapes. And if the government

24   cannot take his DNA now, it will not connect him -- may

25   I complete the sentence -- it will not connect him to

1   those rapes.

2   So he has a tremendous incentive to flee.

3   The government has a tremendous need for this

4   information at the time of arrest to solve crimes,

5   exonerate the innocent, and give closure to victims.

6   Thank you.

7   CHIEF JUSTICE ROBERTS: Thank you,

8   Mr. Dreeben.

9   Mr. Shanmugam?

10   ORAL ARGUMENT OF KANNON K. SHANMUGAM

11   ON BEHALF OF THE RESPONDENT

12   MR. SHANMUGAM: Thank you, Mr. Chief

13   Justice, and may it please the Court:

14   Maryland searched my client without a

15   warrant in order to investigate crimes for which there

16   was no suspicion. It is settled law that warrantless,

17   suspicionless searches are presumptively

18   unconstitutional.

19   The State cites no --

20   JUSTICE KENNEDY: He was held -- he was held

21   with probable cause --

22   MR. SHANMUGAM: That is correct.

23   JUSTICE KENNEDY: -- and his -- and his

24   custody was restrained. He was in a police station.

25   MR. SHANMUGAM: That is also correct.

28

1   JUSTICE KENNEDY: Were handcuffs put on him

2   during the transport process, do you know?

3   MR. SHANMUGAM: I don't know that the record

4   indicates that.

5   JUSTICE KENNEDY: But they -- they could --

6   they could have been.

7   MR. SHANMUGAM: Yes.

8   JUSTICE KENNEDY: So his liberties were

9   constrained in all of those respects. He would have to

10   take off most of his clothes, subject to a patdown

11   search.

12   MR. SHANMUGAM: We're --

13   JUSTICE KENNEDY: They could look -- they

14   could look in his -- in his briefcase.

15   MR. SHANMUGAM: Yes. Just to be clear,

16   Justice Kennedy, we're not disputing the proposition

17   that certain intrusions on privacy are permissible as to

18   arrestees, but where we fundamentally disagree with the

19   State and the Federal Government is with regard to the

20   argument that this Court should take the rationale of

21   Samson v. California, and essentially extend that

22   rationale to the point of arrest.

23   The government --

24   JUSTICE KENNEDY: I think -- I think there

25   is some merit to your argument in that regard. In

29

1   Samson, he was a parolee, and he actually, as I recall,

2   signed a -- a consent form as part of the probation.

3   MR. SHANMUGAM: That is correct. An agreed

4   part of the condition of parole. That is -- that is

5   correct.

6   CHIEF JUSTICE ROBERTS: Well, that is right.

7   But I'm curious as to why your position is that -- let's

8   say he served his time. He's no longer subject to the

9   criminal justice system. He's not on parole, he's not a

10   probationer. You concede that the DNA evidence can be

11   taken from him, correct?

12   MR. SHANMUGAM: I would concede,

13   Mr. Chief Justice, that it -- that it could be taken at

14   least while he is still under the supervision of the

15   State, because after all, both Samson and Knights were

16   cases in which the individual was still under State

17   supervision. That is to say, we're not arguing that at

18   the point of conviction, that the resulting lessened

19   expectation of privacy extends in perpetuity as, say, a

20   firearm or felon disability does.

21   But what we are arguing is that -- to look

22   at this Court's cases in Samson and Knights, they both

23   centrally depended on the proposition that it is the

24   fact of conviction that deprives an individual of the

25   full protections of the Fourth Amendment.

1   CHIEF JUSTICE ROBERTS: What is the

2   pertinence of the fact -- I mean, this is not something

3   that people are or can keep private. I mean, if you're

4   in the interview room or something, you take a drink of

5   water, you leave, you're done. I mean, they can examine

6   the DNA from that drink of water.

7   MR. SHANMUGAM: Well, Mr. Chief Justice --

8   CHIEF JUSTICE ROBERTS: Doesn't that

9   compromise the -- the expectation of privacy?

10   MR. SHANMUGAM: I think it's an open

11   question as to whether or not there would be a search

12   when DNA is collected from cells that could be said to

13   have been involuntarily or voluntarily abandoned. And

14   to the extent that there's an argument that there would

15   still be a search, it would be based on this Court's

16   reasoning in Skinner, where the Court suggested that the

17   subsequent analysis of a urine sample would constitute a

18   further invasion of the test of --

19   CHIEF JUSTICE ROBERTS: No, it's not a --

20   MR. SHANMUGAM: -- the privacy interest.

21   CHIEF JUSTICE ROBERTS: My question was not

22   trying to get at whether it's a search or not, it's

23   whether -- it's getting at the reasonableness of the

24   expectation of privacy that the -- your DNA is protected

25   from examination when it's left wherever you happened to

1   have been.

2   MR. SHANMUGAM: I would say two things about

3   the privacy interests at stake here. First of all,

4   there is an intrusion into the body, and that is what

5   triggers the applicability of the Fourth Amendment here

6   to be sure. But it is also a relevant intrusion for

7   Fourth Amendment purposes.

8   But secondly, and perhaps more importantly,

9   there is a legitimate expectation of privacy in the

10   contents of an individual's DNA. And to the extent that

11   this Court were to engage in balancing, we certainly

12   think that interest is the --

13   CHIEF JUSTICE ROBERTS: Well, I mean, isn't

14   that part of the -- isn't that part of the question,

15   whether there is a legitimate expectation of privacy in

16   a person's DNA?

17   MR. SHANMUGAM: Yes, and we think that the

18   answer to that question is yes, that an individual

19   has --

20   CHIEF JUSTICE ROBERTS: Well, I know, but

21   you're simply just -- you're -- I guess that's begging

22   the question. And -- but I'd just be repeating my

23   question -- how legitimate is it to you to expect

24   privacy in something that the police can access without

25   you even knowing about it, without any voluntary or

1   involuntary -- if you take a drink of water, if you

2   leave behind a cigarette butt?

3   MR. SHANMUGAM: Mr. Chief Justice, I've

4   heard Mr. Dreeben concede, as I think he must, that an

5   individual retains a legitimate expectation of privacy

6   in at least some of the information contained in the

7   individual's DNA. And I suppose we can have a dispute

8   about what types of information would qualify. But I

9   think it really is settled that there are profound

10   privacy concerns raised by the government's coming into

11   possession of an individual's DNA.

12   JUSTICE SCALIA: Mr. Shanmugam, I -- I

13   wouldn't have made the concession that you've made, that

14   this case is about reasonable expectation of privacy.

15   If there's no reasonable expectation of privacy, there's

16   no search.

17   But here, there is a search. You have a

18   physical intrusion. You -- you pull a guy's cheek apart

19   and stick a -- a swab into his mouth. That's a search.

20   A reasonable expectation of privacy or not.

21   MR. SHANMUGAM: Justice Scalia, I didn't

22   think I was conceding anything.

23   JUSTICE SCALIA: Well, I thought you did.

24   MR. SHANMUGAM: If I was, let me just be

25   clear. We don't think that this Court should be

1   engaging in balancing here. Indeed, that is really our

2   principal submission to the Court.

3   JUSTICE ALITO: Well, do you think the

4   intrusion is worse when you just take a swab and you go

5   inside somebody's cheek, as opposed to rolling

6   fingerprints? Which is the greater intrusion?

7   MR. SHANMUGAM: Well, we think that it is

8   settled that intrusions into the body constitutes a

9   search for Fourth Amendment purposes.

10   JUSTICE ALITO: Which is --

11   MR. SHANMUGAM: I suppose that the argument

12 could be made, Justice Alito, that there is a similar

13 trespass on the person and, therefore, a search when

14 fingerprints are collected. I would note

15 parenthetically that in the first half an hour of this

16 argument we heard no explanation either by the State or

17 by the Federal Government as to their theory as to why

18 fingerprinting is constitutional. Now, we --

19   JUSTICE ALITO: Well, the thrust of a lot of

20 what we have been presented with in the briefs and what

21 we have heard this morning -- and by the way, I think

22 this is perhaps the most important criminal procedure

23 case that this Court has heard in decades.

24   The attorney for the State began by listing

25 a number of crimes just in Maryland that had been solved

1 using this. So this is what is at stake: Lots of

2 murders, lots of rapes that can be -- that can be solved

3 using this new technology that involves a very minimal

4 intrusion on personal privacy.

5   But why isn't this the fingerprinting of the

6 21st century? What is the difference? If it was

7 permissible and it's been assumed to be so for decades,

8 that it is permissible to fingerprint anybody who's

9 booked, why is it not permissible to take a DNA sample

10 from anybody who is arrested?

11   MR. SHANMUGAM: Justice Alito, we think that

12 fingerprinting is distinguishable on three grounds.

13 First of all, as a practical matter, an individual's DNA

14 contains far more information and far more personal

15 information than an individual's fingerprints. But as a

16 doctrinal matter, we think that fingerprinting is

17 distinguishable --

18   JUSTICE ALITO: Well, as to the first, in

19 our cases involving searches for -- where a urine sample

20 is taken to determine drug use. The urine can be

21 analyzed for all sorts of things besides the presence of

22 drugs, and the Court has said in those cases, we are

23 only going to consider that -- we are considering that

24 this is a reasonable search with respect to the

25 determination of whether the person has taken drugs, not

1   all the other information --

2   MR. SHANMUGAM: But that is because --

3   JUSTICE ALITO: -- that can be obtained from

4   it.

5   MR. SHANMUGAM: But that is because,

6   Justice Alito, in those cases, cases like Skinner and

7   Von Raab and Vernonia, there was a special need apart

8   from the ordinary interests in law enforcement. And

9   here it is clear that the primary purpose of the

10   Maryland statute and, indeed, the similar statutes on

11   the Federal and State levels was the ordinary interest

12   in crime control, to solve unsolved crimes.

13   And that is why those special needs cases

14   are distinguishable, and I think that's why the State

15   essentially disavows any reliance on the special needs

16   doctrine.

17   JUSTICE KAGAN: What are your other two

18   distinctions?

19   MR. SHANMUGAM: With regard to

20   fingerprinting, we think that, notwithstanding the

21   physical intrusion involved with taking an individual's

22   fingers and putting them on the pad, that the better

23   view is that fingerprinting is not a search, and to the

24   extent that this Court has addressed the question it has

25   suggested that fingerprinting is not a search because an

1   individual has no expectation of privacy in their

2   fingerprints because their fingers are constantly

3   exposed --

4   JUSTICE BREYER: I would like to give a

5   complete answer to what Justice Alito and Justice Kagan

6   both were asking, I think. To summarize that, if I look

7   in terms of intrusion, I am not talking legally; I am

8   talking practically. It doesn't seem to me -- I can

9   argue that it is certainly a much lesser intrusion than

10   fingerprints. You have to stand there, have the thing

11   rolled; stick out your tongue. I mean, it's hard to say

12   it's more for me. I'm not saying for others.

13   Accuracy, it's much more accurate, and that

14   doesn't just help the defendant. There is a whole brief

15   here filed by the victims that have case after case

16   where people spent 5 years in prison wrongly and where

17   this system and the CODIS helped victims avoid being

18   arrested and sent to jail when they were innocent. So

19   it works both ways.

20   So one, it's no more intrusive. Two, it is

21   much more accurate. And three and four and five, how

22   it's different and worse in practice, is what I would

23   ask you to summarize.

24   MR. SHANMUGAM: Sure.

25   JUSTICE BREYER: And by the way, when you

1   talk about what information you could get out of it,

2   there is a brief filed by leading scientists in the

3   field. And I came away from the brief thinking there

4   isn't much more information, because fingerprints can be

5   abused, too.

6   Of course, you can learn loads from

7   fingerprints. Photos, try photos; my God, you could

8   learn a lot: Who he was, who -- you know, so all these

9   things could be abused. But I came away from that

10   brief, frankly, to think, well, in terms of the

11   possibility of abuse, it's there, but these other

12   things, photos, too.

13   MR. SHANMUGAM: Justice Breyer, let me --

14   JUSTICE BREYER: Now, you tell me in light

15   of that hostile question --

16   (Laughter.)

17   JUSTICE BREYER: -- I would like you -- I

18   would like you to tell me, okay, it's different from

19   fingerprints and worse because of one, two, three, and I

20   will write it down and I'll remember it.

21   JUSTICE SCALIA: He gave us one and two. I

22   have been waiting for three. Will you drop the shoe?

23   (Laughter.)

24   MR. SHANMUGAM: Let me -- I will gladly get

25   to three with regard to fingerprinting, and then I would

38

1   like to say a word about balancing in the event that the

2   Court reaches it. Obviously we don't think that

3   balancing is appropriate here because we don't think

4   that the special needs doctrine is applicable and we

5   don't think that Samson should be extended to arrestees.

6   But with regard to fingerprinting, the other

7   reason why we think fingerprinting is different, above

8   and beyond the fact that we think the better view is

9   that fingerprinting is not a search, is because

10   fingerprinting as it is currently practiced does serve a

11   special need. The primary purpose of fingerprinting is

12   to identify an individual who is being taken into the

13   criminal justice system.

14   JUSTICE KAGAN: Mr. Shanmugam, this seems to

15   me a real distinction in this case as it's been

16   litigated. I take what the government is saying is

17   something like: Give us 5 years and those won't look

18   very different. In other words, we will be able to do

19   in 5 years time exactly what we can do with

20   fingerprinting, except it will be, as Justice Breyer

21   says, more accurate. So we are just about 5 years ahead

22   of that, so give us a break.

23   MR. SHANMUGAM: And my response to that

24   would be that under the special needs doctrine, what is

25   relevant is not how a system could conceivably operate;

1   what is relevant is the primary purpose behind the

2   program at issue.

3   So if the government were to come back in 5

4   years' time with a DNA testing program the primary

5   purpose of which was pretrial supervision or

6   identification, one of these other purposes that is

7   being offered, then sure, the analysis would be

8   different.

9   That is simply a consequence of the fact

10   that this special needs doctrine, unlike the rest of the

11   Fourth Amendment, looks to purpose, namely the purpose

12   of the program at issue.

13   JUSTICE KENNEDY: A person has been arrested

14   for a felony and is in custody. Do the police, does the

15   justice system have an interest in knowing whether that

16   person committed other crimes?

17   MR. SHANMUGAM: The justice system always

18   has an interest in law enforcement and solving crimes,

19   and we certainly don't dispute that proposition. But

20   what we do dispute is Mr. Dreeben's principal submission

21   to this Court, which is that simply because law

22   enforcement can do certain things to arrestees, it can

23   do others. The primary --

24   JUSTICE KENNEDY: My question is whether or

25   not the police who have John Doe in custody for a felony

1   have an interest in knowing at the outset or within a

2   few weeks time whether or not that person has committed

3   other crimes?

4   MR. SHANMUGAM: The difference between an

5   arrestee and an ordinary citizen, Justice Kennedy, is

6   that as to an arrestee the police have probable cause to

7   believe that the arrestee committed a particular

8   offense.

9   JUSTICE KENNEDY: But they also have a

10 reason for keeping him in custody.

11   MR. SHANMUGAM: Related --

12   JUSTICE KENNEDY: And my question is, do

13 they have an interest and a legitimate interest in

14 knowing if that person has committed other crimes?

15   MR. SHANMUGAM: They have that interest, but

16 if they want to investigate other crimes, they have to

17 do what they would have to do as to an ordinary citizen.

18 They have to have a warrant or some level of

19 individualized suspicion.

20   CHIEF JUSTICE ROBERTS: There are two

21 different, two different interests. One is we want to

22 solve unsolved crimes; and the other is we want to be

23 sure -- we have someone in our custody and we want to be

24 sure, before he is released back into the community,

25 that he isn't a person who has committed five violent

1   crimes before that.

2   Now, your brief says, well, the only

3   interest here is the law enforcement interest. And I

4   found that persuasive because of the concern that it's

5   going to take months to get the DNA back anyway, so they

6   are going to have to release him or not before they know

7   it. But if we are in a position where it now takes

8   90 minutes or will soon take 90 minutes to get the

9   information back, I think that's entirely different,

10   because there you can find out whether -- it's just tied

11   in with the bail situation, do you want to release him

12   or not.

13   MR. SHANMUGAM: The touchstone of the

14   analysis under the special needs doctrine is what was

15   the primary purpose of the program at issue. And there

16   is no evidence that pretrial supervision was a purpose

17   of any of these.

18   CHIEF JUSTICE ROBERTS: That's because,

19   that's because we are not yet at a situation where it

20   takes 90 minutes. Sure, it's not going to do you any

21   good if it's taking 4 months or whatever it took in this

22   case. But if it's at the point where it's 90 minutes,

23   it would be critical to make that determination.

24   MR. SHANMUGAM: Well, Mr. Chief Justice, as

25   I said to Justice Kagan, the constitutional analysis may

1 very well change at later point. But I think it's

2 important to underscore that neither the State of

3 Maryland nor the Federal Government identifies a single

4 instance in which a pretrial supervision decision in

5 their jurisdictions was altered as a result of the DNA

6 test.

7   CHIEF JUSTICE ROBERTS: Well, let's put it

8 this way. Let's say the judge or the magistrate is

9 going to make a bail determination and he says: Well,

10 it's important to me to know whether you are going to

11 commit another crime. So we are not saying you have to

12 give a DNA sample, but it will enter into my calculation

13 if you refuse to do it.

14   MR. SHANMUGAM: Well, outside the

15 programmatic context, ordinary Fourth Amendment rules

16 would apply. And ordinary --

17   CHIEF JUSTICE ROBERTS: Well, what does that

18 mean? Is that okay or not?

19   MR. SHANMUGAM: Well, i think in that

20 circumstance, where there is no individualized

21 suspicion, a search cannot occur, and an

22 arrestee stands --

23   CHIEF JUSTICE ROBERTS: Well, we do it --

24 doesn't that sound just like a Breathalyzer? You are

25 pulled over, they say, we want you to take a

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1   Breathalyzer test. They say, you don't have to, but if

2   you don't your license is suspended for 6 months or

3   whatever. Why isn't that the same thing?

4   MR. SHANMUGAM: Well, you know, I will say

5   that the one thing that is slightly different about your

6   hypothetical, Mr. Chief Justice, is that the analysis

7   might be somewhat different where what you are talking

8   about is a condition of release. I think you would

9   trigger the unconstitutional conditions doctrine and the

10   analysis might operate somewhat separately, somewhat

11   differently.

12   But just to conclude with regard to my

13   answer with Justice Kennedy and then to get back to the

14   rest of Justice Breyer's question.

15   Justice Kennedy, with regard to arrestees,

16   the intrusions on privacy that are permissible are all

17   intrusions that relate to the arrest. So to take the

18   two principal examples, the search incident to arrest

19   doctrine, which you mentioned, and searches associated

20   with an individual's continued detention, so the strip

21   searching example, those doctrines have discrete

22   justifications that limit their scope.

23   So the search incident to arrest doctrine

24   permits searches for officer safety, to prevent

25   destruction of evidence, and at least in the vehicular

1   context, to search for evidence related to the offense

2   of arrest.

3   Now, none of those rationales apply here,

4   and I would note parenthetically that in

5   Schmerber v. California, this Court suggested that the

6   search incident to arrest doctrine would not permit

7   searches into the body.

8   JUSTICE KENNEDY: But we are also talking

9   about identity. I assume that in Maryland and in a

10   number of States the time between release on bail and

11   return for trial is more than four months. And if it's

12   found as an identity matter that this person has a

13   criminal record or that they are -- is suspected of

14   serious crimes, that is a mandatory ground for

15   reconsideration of bail. And you say there is no

16   interest in that.

17   MR. SHANMUGAM: I am not disputing that the

18   government has an interest in knowing about prior

19   offenses that an individual has committed. What I am

20   simply saying is that the primary purpose of DNA

21   testing, unlike fingerprinting, is to investigate

22   unsolved crimes. That is the ordinary interest in law

23   enforcement, and when the government is indicating --

24   JUSTICE GINSBURG: I thought

25   fingerprinting -- Mr. Shanmugam, I thought

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1   fingerprinting was used to determine whether they -- the

2   person has a record. We have this person and now we

3   check the fingerprints to find out if he has a prior

4   record, that's different from to find out if he has

5   committed a crime that we don't know about.

6   But are fingerprints used to determine

7   whether the person has a prior record?

8   MR. SHANMUGAM: Fingerprints taken upon

9   booking are primarily used for the purpose of

10   identification, and by identification I would include

11   determining whether the individual had a prior criminal

12   record, because as IAFIS is currently structured, that

13   is information that is returned once there is a hit for

14   that initial search.

15   JUSTICE ALITO: What was the purpose of

16   fingerprinting before it was possible to make

17   fingerprint comparisons by computer?

18   MR. SHANMUGAM: Well, I think fingerprinting

19   really has from the outset served the purpose of

20   identification, because fingerprinting really came into

21   being approximately 100 years ago, because in large

22   urban areas officers could no longer identify

23   individuals on sight.

24   Now, to be sure, fingerprinting does serve a

25   law enforcement purpose as well. As Mr. Dreeben

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1   indicated, there is a latent fingerprint database that

2   roughly corresponds to --

3   JUSTICE ALITO: Well, I would assume that

4   before it was possible to do computer searches, the way

5   in which fingerprinting established identification, what

6   it did in that respect was to identify the person

7   arrested on this occasion so that if the person was

8   arrested again, then the police would know that it was

9   the same person.

10   There was no way of -- no practicable way of

11   taking the fingerprints of somebody who was booked and

12   determining whether that person -- you didn't have

13   anything to compare it to. And they certainly -- you

14   couldn't do it manually.

15   MR. SHANMUGAM: That is true. But again,

16   the purpose of fingerprinting as it developed over time

17   was identification in the sense that as fingerprints

18   were being collected, individuals could proceed to be

19   identified based on prior --

20   JUSTICE SOTOMAYOR: Can we go back to --

21   JUSTICE ALITO: Yes, so you know that on day

22   one you have arrested -- you've arrested Mr. X, and then

23   a year later you arrest somebody else and you know it's

24   Mr. X again. And DNA can do exactly the same thing

25   except more accurately.

1   MR. SHANMUGAM: But I think it's important

2   to realize, Justice Alito, that at least as the DNA

3   system is currently constituted, when an arrestee's

4   profile is prepared, it is compared against the offender

5   and arrestee indices, not the forensic index. And

6   indeed, as we understand it and I think Mr. Dreeben's

7   discussion of this is probably consistent with this, at

8   least on the Federal level, it is not permissible to

9   take that profile and search it against the offender and

10   arrestee indices.

11   Now that very well may occur in certain

12   States. We don't have any reason to believe that that

13   is what takes place in Maryland. But again, this is

14   really what distinguishes the way in

15   which fingerprinting is --

16   JUSTICE BREYER: I think I can totally lose

17   this because I have a confusion that you can clear up.

18   There is something to what you say. I see what you are

19   saying. But what does this word "identification" mean?

20   It's used for identification. We have a person who's

21   been arrested.

22   He writes his name down, Mr. Smith. Maybe

23   he's lying. We have his picture. Well, his picture's

24   pretty good. If he turns up in a bar somewhere in the

25   future, we can look, see, and that's awfully good.

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1   And now you say, well, what is

2   fingerprinting doing that photos aren't doing in terms

3   of identification? What does it do in terms of just

4   identification?

5   MR. SHANMUGAM: Sure.

6   JUSTICE BREYER: What does it do?

7   MR. SHANMUGAM: We think it means

8   determining or confirming the identity of an individual.

9   JUSTICE BREYER: What does that mean,

10   confirming his identity? We have, you mean what, what

11   exactly?

12   MR. SHANMUGAM: Confirming, for instance, in

13   this case that the individual in the government's

14   custody was Alonzo King.

15   JUSTICE BREYER: Oh, really? I mean, do you

16   think the fingerprints -- where do you go to find out if

17   he's Alonzo King? A lot of people have never had their

18   fingerprints taken before.

19   MR. SHANMUGAM: Well, but 73 million people

20   are in the criminal offender --

21   JUSTICE BREYER: But to determine what his

22   name really is.

23   MR. SHANMUGAM: And his criminal entity,

24   sure, his adjudicated criminal history, which can also

25   be --

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 1   JUSTICE BREYER: Right. You want to

 2   determine what his name really is plus his adjudicated

 3   criminal history, and here we have the DNA, which I

 4   guess might or might not help determine what his name

 5   really is; and his criminal history, it does about the

 6   same. And also fingerprints are sometimes used to --

 7   for unsolved crimes, and they are sometimes used for

 8   unsolved crimes but your point really is more for

 9   unsolved crimes. Have I got it?

10   MR. SHANMUGAM: Justice Breyer, no, I think

11   with respect you haven't. With regard to DNA testing, a

12   DNA profile, at least as the Federal system is

13   configured, is compared against the forensic index.

14   That is the index of samples from unsolved crimes. And

15   so that is really in contradistinction to how the

16   fingerprint database works.

17   JUSTICE SOTOMAYOR: Counsel, so I am really

18   worried about the question you haven't satisfied me

19   with, which is I agree completely that today it's used

20   primarily and almost exclusively for purposes of solving

21   other crimes. But let's -- is this -- the question that

22   I think one of my colleagues asked, is that only because

23   technology hasn't moved fast enough?

24   You said we have to look at the

25   constitutional principles 5 years from now when they

1   will use it to pull up a guy's criminal history. Not

2   unsolved crimes, but criminal history. Get to that day.

3   MR. SHANMUGAM: Sure. Well,

4   Justice Sotomayor --

5   JUSTICE SOTOMAYOR: Tell me what the -- why

6   you would then say that would still be unconstitutional.

7   MR. SHANMUGAM: Justice Sotomayor, assuming

8   that this Court does not accept the proposition that

9   arrestees are somehow subject to a lessened expectation

10   of privacy --

11   JUSTICE SOTOMAYOR: Right. Let's assume we

12   go under a normal Fourth Amendment, you need probable

13   cause to search.

14   MR. SHANMUGAM: Right. And the only other

15   potentially applicable exception to the principle that

16   warrantless, suspicionless searches are unconstitutional

17   is the special needs exception, and that exception looks

18   to the primary purpose of the program at issue. And the

19   mere fact that DNA testing could be used for other

20   purposes wouldn't necessarily be dispositive of the

21   inquiry. If the primary purpose of DNA testing is still

22   to investigate unsolved crimes, the program would still

23   not qualify under the special needs doctrine.

24   JUSTICE KAGAN: Just suppose -- I mean, I

25   guess the question is would this be unconstitutional?

1   It's not the world we are living in now, but let me --

2   10 years from now the government says, we are really

3   switching over to a fingerprint system -- to a DNA

4   system and what that system is going to allow us to do,

5   is it's going to allow us to identify, and it's going to

6   allow us to bring up the old criminal history and it's

7   going to allow us to see whether there are also unsolved

8   crimes that we can tag to this person and discover that

9   he's really, really dangerous. All right? And so the

10   government puts that system into effect.

11   Is it constitutional?

12   MR. SHANMUGAM: I think that it could be,

13   and that would simply be because you would have a system

14   where DNA testing is essentially being used as

15   fingerprinting is being used today. But again I don't

16   think --

17   JUSTICE SOTOMAYOR: I was interested in a

18   broader thought process, actually. Do you mind giving

19   it to me?

20   MR. SHANMUGAM: Well --

21   JUSTICE SOTOMAYOR: Which is, there is

22   something inherently dangerous about DNA collection that

23   is not the same as fingerprinting.

24   MR. SHANMUGAM: Well, there is, and that

25   gets me back finally to the rest of Justice Breyer's

1   question from a few minutes ago, because Justice Breyer

2   had kind of asked how the analysis should work in the

3   event that the Court were to proceed to balancing. And

4   so I just want to say a word about the relevant privacy

5   interests and the relevant governmental interests and to

6   explain why we think that the relevant privacy interests

7   outweigh those governmental interests.

8   On the privacy side of the ledger, we

9   certainly believe that there are profound privacy

10   concerns associated with the government's collection of

11   an individual's DNA. And leaving aside the question of

12   how much personal information is contained in the 13

13   loci -- and we certainly think that there is significant

14   personal information even as to those loci -- I don't

15   think there can be any dispute that when you evaluate

16   the entirety of an individual's DNA, there is a great

17   deal of personal information contained there. And in

18   our view, that has to be taken into account when

19   engaging in balancing.

20   Now, the government's response to that is

21   essentially the "just trust us" defense; namely that the

22   government is not looking at all that information, it is

23   only looking at a certain subset of that information.

24   But that has never been how this Court has analyzed

25   privacy interests, at least outside the special needs

 1   context.

 2   Probably the closest analog is this Court's

 3   decision in Tyler v. United States, where the Court said

 4   that it was of no moment that the heat-sensing device

 5   that was at issue in that case did not detect any

 6   information about the intimate details of activities

 7   within the home.

 8   CHIEF JUSTICE ROBERTS: You disclose all of

 9   this intimate private information when you take a drink

10   of water and leave -- leave the glass behind.

11   MR. SHANMUGAM: But, Mr. Chief Justice, as I

12   said at the outset, we believe that there might still

13   be -- indeed, we think the better view under this

14   Court's cases is that there would still be a Fourth

15   Amendment search there. The only difference would be

16   that you don't have the intrusion into the body that

17   makes the question of whether or not there is a search

18   here an easy one.

19   Now, I want to say just a word about the

20   governmental --

21   JUSTICE ALITO: What if someone has a bloody

22   shirt and throws it away in the trash -- in a public

23   trash can along the street, you are saying that the

24   police can't analyze that without a search warrant?

25   MR. SHANMUGAM: The argument would be that

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1   the subsequent analysis of the DNA nevertheless still

2   constitutes a search. And the most significant decision

3   on this issue to date is the Fourth Circuit's decision

4   in United States v. Davis, which I would encourage you

5   to look at if you are interested in this issue, because

6   it holds that the extraction of the DNA from an item

7   that was lawfully in the government's custody still

8   constitutes a search.

9   Let me say just a word, though, about the

10   governmental side of the balance here, because I think

11   this is important. Ms. Winfree started with the

12   statistics about the efficacy of DNA testing of

13   arrestees, but our submission is simply that when you

14   look at the relevant subset of cases, namely individuals

15   who have been arrested but who are not subsequently

16   convicted of the offense of arrest, the law enforcement

17   value of DNA testing is relatively modest.

18   My understanding is that --

19   JUSTICE ALITO: But your client was

20   convicted of the offense of arrest.

21   MR. SHANMUGAM: That is correct.

22   JUSTICE ALITO: And it was a serious offense

23   punishable by up to 10 years imprisonment --

24   MR. SHANMUGAM: Well, my client --

25   JUSTICE ALITO: Isn't that correct? And he

1   was sentenced to 4 years.

2   MR. SHANMUGAM: That is -- my client was

3   convicted of the crime of arrest, to be sure. But under

4   the Maryland statute that crime was not a serious enough

5   crime to qualify for DNA collection at that point.

6   JUSTICE ALITO: For Fourth Amendment

7   purposes -- for Fourth Amendment purposes, do you think

8   that it is -- that it is permissible to take a DNA

9   sample from someone who is convicted of an offense that

10   would qualify as a felony under common law?

11   MR. SHANMUGAM: We think that it would be

12   permissible to collect DNA from any individual who has

13   been convicted and is subjected to the continued

14   supervision of the State. And that is simply because

15   those individuals have a lessened expectation of

16   privacy. But just to get on the table --

17   JUSTICE GINSBURG: When they're no longer in

18   the custody of the State, does the government have to

19   destroy it? They served their time and their privileges

20   have been restored.

21   MR. SHANMUGAM: We don't -- we don't think

22   in that circumstance, Justice Ginsburg, that the

23   government would have to destroy the DNA sample.

24   JUSTICE KENNEDY: Does a felon who's been

25   arrested have a reduced expectation of privacy at the

1   time of arrest?

2   MR. SHANMUGAM: I'm sorry? A felon who has

3   been --

4   JUSTICE KENNEDY: Does a felon -- does a

5   person who has been arrested for a felony have a reduced

6   expectation of privacy at the time of his arrest?

7   MR. SHANMUGAM: I would not say that that

8   person has a reduced expectation of privacy. What I

9   would say is that there are certain intrusions on

10   privacy, some of which are quite substantial, that are

11   permissible because there are justifications unique to

12   the arrest.

13   So in Florence, this Court permitted the

14   strip search of an individual who is being admitted into

15   the general jail population based on the special need of

16   ensuring prison safety and preventing contraband from

17   being introduced into the prison.

18   CHIEF JUSTICE ROBERTS: Thank you, counsel.

19   Ms. Winfree, you have 3 minutes remaining.

20   REBUTTAL ARGUMENT OF KATHERINE WINFREE

21   ON BEHALF OF THE PETITIONER

22   MS. WINFREE: On the question of rapid DNA,

23   the FBI estimates that we're about 18 to 24 months away

24   from that world, and I would cite the National District

25   Attorneys Association's amicus brief on page 20 where it

1   discusses the -- that this is not science fiction. So

2   we are very, very close to that.

3   And I wanted to just address a couple of the

4   questions that arose during Respondent's presentation.

5   Justice Kennedy, the State does have a compelling need

6   and a compelling interest in knowing who is in its

7   custody, and arrestees do not have a legitimate

8   expectation of privacy in their identity. We have a

9   legitimate and compelling need to identify suspects and

10   to aid in solving crimes.

11   And our -- and our definition of what

12   identification is, is somewhat broader than

13   Respondent's. It's not just what his name is and what

14   his face is and what his fingerprints show. It is that

15   CODIS DNA profile, those 26 numbers. So in our view

16   that's a broader definition of identity.

17   And I wanted also just finally to address

18   Justice Alito's question. This is the fingerprinting of

19   the 21st century, but it's better. Typically DNA

20   evidence is used to identify rapes and murderers.

21   Fingerprints typically do not solve those kinds of

22   crimes. And if the primary purpose of fingerprinting is

23   just to identify, it also is used -- fingerprinting now

24   is used, the prints are compared against the latent

25   database in IAFIS and they are used to solve crimes.

1   But they typically don't solve the kind of crimes that

2   we are talking about here, and it wouldn't have been

3   solved in Mr. -- in Mr. King's case.

4   CHIEF JUSTICE ROBERTS: How can I base a

5   decision today on what you tell me is going to happen in

6   2 years? You say, in 2 years we will have this rapid

7   DNA available, but we don't now. Don't I have to base a

8   decision on what we have today?

9   MS. WINFREE: Well, that's really only one

10   component of our argument, Mr. Chief Justice, that

11   certainly with respect to a bail determination we will

12   be able to make it more rapidly at the time that rapid

13   DNA comes into effect.

14   JUSTICE SCALIA: Yes, but if we believe that

15   the purpose of it has much to do with whether it's

16   legitimate or not, you can't demonstrate that the

17   purpose is immediate identification of the people coming

18   into custody. You just can't demonstrate that now.

19   Maybe you can in 2 years. The purpose now is -- is the

20   purpose you began your presentation with, to catch the

21   bad guys, which is a good thing. But you know, the

22   Fourth Amendment sometimes stands in the way.

23   MS. WINFREE: It has a corollary purpose,

24   Justice Scalia. What we are suggesting and arguing is

25   that solving crimes, to be sure, is the key component,

1   but in solving crimes and connecting an arrestee to a

2   crime that's unsolved informs a judge's determination

3   about whether to release that individual.

4   And as Mr. Dreeben said, bail modifications

5   can happen, they do happen all the time. And in

6   Maryland, it's going to have -- it's going to be

7   happening before rapid DNA. Right now we are able to

8   make that determination in a period between 11 and

9   17 days.

10   So we are not asking you to base your

11 decision on the futuristic world, which is really only 2

12 years out with rapid DNA anyway. But we can make those

13 bail determinations now and in fact they are important

14 for where we house prisoners and how we supervise them

15 in custody.

16   CHIEF JUSTICE ROBERTS: Thank you, counsel.

17   The case is submitted.

18   (Whereupon, at 12:11 p.m., the case in the

19 above-entitled matter was submitted.)

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