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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 12-207, Maryland v. King.

Ms. Winfree?

ORAL ARGUMENT OF KATHERINE WINFREE

ON BEHALF OF THE PETITIONER

MS. WINFREE: Mr. Chief Justice, and may it please the Court:

Since 2009, when Maryland began to collect DNA samples from arrestees charged with violent crimes and burglary, there have been 225 matches, 75 prosecutions, and 42 convictions, including that of Respondent King.

JUSTICE SCALIA: Well, that's really good. I'll bet you, if you conducted a lot of unreasonable searches and seizures, you'd get more convictions, too.

(Laughter.)

JUSTICE SCALIA: That proves absolutely nothing.

MS. WINFREE: Well, I think, Justice Scalia, it does, in fact, point out the fact that -- that the statute is working, and, in the State's view, the Act is constitutional.

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
20 detained 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: It's -- 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
6 Mr. King's case, there has been, in the past, a more
7 substantial delay in getting those results back.

8 Our -- our lab now is getting results
9 between 11 and 17 days. Now, that, of course --

10 JUSTICE SOTOMAYOR: Well, that doesn't
11 include the time to collect the sample, send it to you,
12 or the time to do the match. It's just to do the genome
13 rapid, 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
6 another on a drug charge. Mr. Castillo was actually
7 released on his -- on OR, and, when his sample was
8 matched, it came back to a -- an unsolved rape and
9 sodomy, and his OR was revoked.

10 In Mr. Shamblin's case, he was granted
11 diversion because his drug charge is a relatively
12 low-level offense and, when the match came back, it --
13 it 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 -- your
17 procedure limits the collection to certain violent
18 offenses, 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

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.

4 Now, with 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
12 said, in Berkemer, that a motorist has an expectation
13 that a 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 know, you
18 say, ah, and then -- you know.

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.

9 But the Court further said that there could
10 be a circumstance in a Terry stop, if the officer had
11 reasonable suspicion to believe that -- that the
12 individual was --

13 JUSTICE GINSBURG: But these -- these are
14 all cases -- I mean, the dominant use is to solve what
15 they call cold -- cold cases, and you gave one example.
16 This case is another. A rape committed 6 years before,
17 right?

18 And there was no reasonable suspicion, there
19 was no -- nothing, right? And the suspicion comes up
20 only because the DNA sample comes back as a match. So
21 is it the -- this is a very reliable tool, but it's not
22 based on any kind of suspicion of the individual who's
23 being subjected to it, right?

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

25 And, if I could go back to your question

1 about the Terry stop, the cornerstone of our -- and I do
2 believe that this Court could -- could -- who knows how
3 this Court would come out in that situation, but I
4 think, in terms of our argument, the corner --

5 JUSTICE SCALIA: I know.

6 (Laughter.)

7 MS. WINFREE: Well, happily, we don't have
8 to decide that one today. But what -- what I -- the
9 cornerstone of our argument is that when an individual
10 is taken into custody, an individual is arrested on a
11 probable cause -- a probable cause arrest, that person,
12 by virtue of being in that class of individuals whose
13 conduct has led the police to arrest him on -- based on
14 probable cause, surrenders a substantial amount of
15 liberty and privacy.

16 JUSTICE KAGAN: But, Ms. Winfree, that can't
17 be quite right, can it? I mean, such a person -- assume
18 you've been arrested for something, the State doesn't
19 have the right to go search your house for evidence of
20 unrelated crimes; isn't -- isn't that correct?

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

22 JUSTICE KAGAN: It doesn't have the right to
23 go search your car for evidence of unrelated crimes.

24 MS. WINFREE: That's correct.

25 JUSTICE KAGAN: Just because you've been

1 arrested doesn't mean that you lose the privacy
2 expectations and things you have that aren't related to
3 the offense that you've been arrested for.

4 MS. WINFREE: That's correct, but what we're
5 seizing here is not evidence of crime. What it is, is
6 information related to that person's DNA profile. Those
7 26 numbers --

8 JUSTICE KAGAN: Well -- and if there were a
9 real identification purpose for this, then I understand
10 that argument. But, if it's just to solve cold cases,
11 which is the way you started, then it's just like
12 searching your house, to see what's in your house that
13 could help to solve a cold case.

14 MS. WINFREE: Well, I would say there's a
15 very real distinction between the police generally
16 rummaging in your home to look for evidence that might
17 relate to your personal papers and your thoughts. It's
18 a very real difference there than swabbing the inside of
19 an arrestee's cheek to determine what that person's
20 CODIS DNA profile is.

21 It's looking only at 26 numbers that tell us
22 nothing more about that individual.

23 JUSTICE KAGAN: Well, but, if that's what
24 you're basing it on, then you're not basing it on an
25 arrestee. I mean, then the Chief Justice is right, it

1 could be any arrestee, no matter how minor the offense.
2 It could be just any old person in the street.

3 Why don't we do this for everybody who comes
4 in for a driver's license because it's very effective?

5 MS. WINFREE: I think the difference there
6 is these people are lawfully in custody, having been
7 arrested based on probable cause, and that --

8 JUSTICE SOTOMAYOR: All right. So, now, I
9 see two lines of cases, okay? The Fourth Amendment,
10 which says you can't do a search without a warrant and
11 probable cause, and Samson, and most of your brief
12 argument was based on Samson.

13 As I read Samson, it was the special
14 relationship between the parolee or the probationary
15 person, that line of cases, and the assumption being
16 that they're out in the world, I think, by the largesse
17 of the State. So the State has a right to search their
18 home, just as it would their cell, essentially.

19 Why is that true for an arrestee? What
20 about -- what creates this special relationship that
21 permits you to intrude, search their home, search their
22 car, search their person, to solve other cases?

23 MS. WINFREE: Well --

24 JUSTICE SOTOMAYOR: Because you're going to
25 have to tell me why searching their person is different

1 than searching their home or car.

2 MS. WINFREE: Well, if I could start at the
3 back end of your question, Justice Sotomayor, we're not
4 suggesting -- and this statute doesn't permit the State
5 or police to search an arrestee's home or his person
6 beyond -- beyond simply swabbing the cheek for the DNA.

7 Now, in terms of the -- the individual's
8 relationship to the State, an arrestee is not that
9 dissimilar. There is, obviously, a range of -- of
10 relationships with the State. Those of us who are out
11 on the street, ordinary citizens are at one end, people
12 who are imprisoned upon conviction are at the other end.

13 And -- but, in terms of when an arrestee is
14 physically in custody, he has a reduced expectation of
15 privacy, and that's what makes, in our view, it makes
16 this case more similar. To be sure, this is not Samson.
17 It's -- there's no -- there's no one case in this
18 Court's jurisprudence that's exactly like this.

19 JUSTICE SOTOMAYOR: There's no other case,
20 but Samson, in that line that permits searches on this
21 balancing.

22 MS. WINFREE: Well --

23 JUSTICE SOTOMAYOR: So what I want to know
24 is what's the legal theory now? How far do we let the
25 State go each time it has some form of custody over you,

1 in schools, in workplaces, wherever else the State has
2 control over your person?

3 MS. WINFREE: Well, those are different
4 situations, Justice Sotomayor. We're not suggesting
5 that -- that the police could swab a student for -- for
6 a DNA sample. We're talking about a special class of
7 people who, by their conduct, have -- have been arrested
8 based on probable cause.

9 JUSTICE BREYER: Can I ask you a particular
10 specific quick question?

11 MS. WINFREE: Yes, Justice Breyer.

12 JUSTICE BREYER: As I read this, this
13 concerns people arrested for a felony, a crime of
14 violence, attempted crime of violence, burglary, or
15 attempted burglary.

16 MS. WINFREE: Yes, Justice Breyer.

17 JUSTICE BREYER: And so we're not talking
18 about people who are driving cars and traffic stops and
19 all these other things?

20 MS. WINFREE: That's absolutely correct.

21 JUSTICE BREYER: The only thing we have to
22 decide is whether a person, where there's probable cause
23 to arrest a person for those four crimes, their
24 fingerprints are all taken.

25 MS. WINFREE: Yes.

1 JUSTICE BREYER: And whether they also can
2 take DNA. That's the issue?

3 MS. WINFREE: That's correct,
4 Justice Breyer.

5 JUSTICE BREYER: Okay. Nothing else. Thank
6 you.

7 MS. WINFREE: If there are no further
8 questions, I'll reserve the remainder of my time
9 for rebuttal.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Mr. Dreeben?

12 ORAL ARGUMENT OF MICHAEL DREEBEN,
13 FOR UNITED STATES, AS AMICUS CURIAE,
14 SUPPORTING THE PETITIONER

15 MR. DREEBEN: Thank you, Mr. Chief Justice,
16 and may it please the Court:

17 Arrestees are in a unique category. They
18 are on the gateway into the criminal justice system.
19 They are no longer like free citizens who are wandering
20 around on the streets retaining full impact Fourth
21 Amendment rights.

22 The arrest itself substantially reduces the
23 individual's expectation of privacy. The arrestee can
24 be searched and sent to arrest. His property, whether
25 or not connected with a crime, can be inventoried.

1 When he's taken into the jail situation, he
2 can be subjected to a visual strip search. If he's
3 admitted to the population of the jail, he'll be given a
4 TB test and a thorough medical screen. These are not
5 individuals who are like free citizens, and they are not
6 like free citizens in another significant respect.

7 Arrestees are rarely arrested for the first
8 time. They tend to be repeat customers in the criminal
9 justice system. Up to 70 percent of arrestees have been
10 previously arrested.

11 CHIEF JUSTICE ROBERTS: Yes, but that
12 doesn't mean, for example, that you can go into their
13 house without a warrant.

14 MR. DREEBEN: That is certainly correct,
15 Chief Justice Roberts, and the reason for that is going
16 into the house will expose a substantial number of
17 highly private things to the view of the State. Taking
18 a DNA sample is not of that character. It is far more
19 like taking a fingerprint.

20 CHIEF JUSTICE ROBERTS: Well, that -- this
21 is a factual question. I understand your emphasis on
22 the fact that it only looks at 26 loci, and they are
23 supposedly not connected in any way with other
24 information.

25 Does the sample that you retain, can it be

1 evaluated more broadly? In other words, saying, well,
2 the law says we only look at these 13, but we have this
3 saliva, we want to look at all sorts of other stuff.

4 MR. DREEBEN: Well, by law, the -- the
5 government, under CODIS, and the States cannot look at
6 anything except identification information. The sample
7 contains the entire genome. The sample cannot be looked
8 at as a matter of law.

9 And I think it's critical to this case to --
10 for the Court to understand that, if the Court
11 concludes, as is probably correct, that the individual
12 will retain a reasonable expectation of privacy in the
13 genomic material that does not reveal identity, then
14 additional Fourth Amendment scrutiny would be required
15 before the government could make use of the rest of the
16 genome.

17 Here, it's making use of an identity
18 indicator that is highly similar to fingerprints with
19 one significant difference: It is far more accurate.

20 When Respondent committed his rape --

21 JUSTICE KAGAN: Well, Mr. Dreeben, is it
22 really? Because, if this were like fingerprints, I
23 think that you would have a quite good case. But, as
24 I've been reading about this, it -- it seems as though
25 the technology is not the same as the fingerprint

1 technology; and, because the technology is different, it
2 is used differently.

3 Fingerprints, you go in, you put in a
4 fingerprint, there is identifying information that comes
5 back to you in 5 minutes, right?

6 This, you put in something, and Ms. Winfree
7 said was 11 to 17 days, in this case, it's four months,
8 and it doesn't seem to be used because the technology
9 doesn't allow it to be used as the kind of routine
10 identifier that fingerprints does.

11 So am I wrong about that?

12 MR. DREEBEN: You are not wrong, Justice
13 Kagan, but the future is very close to where there will
14 be rapid DNA analyzers that are devices that can analyze
15 and produce the identification material in -- in the DNA
16 within 90 minutes. And the design of this program is to
17 put them at the booking station, so that DNA can be
18 taken, and, within 90 minutes, that information is
19 known.

20 In that circumstance, it will be highly
21 relevant to the immediate release/custody decision,
22 which it already can play a role in --

23 JUSTICE BREYER: That -- that part is
24 surprising. Then do you think the States are wrong? I
25 mean, they all say in their brief, in footnote 10, DNA

1 identification database samples have been processed in
2 as few as 2 days in California and -- although around
3 30 days has been average.

4 So I guess the technology is there, now, to
5 process this in 2 days, not 9 days.

6 MR. DREEBEN: Yes, Justice Breyer -- Yes,
7 Justice Breyer. There is no question it can be done
8 quickly because of the volumes. I'm not contending
9 that, today, it is --

10 JUSTICE BREYER: In the case of -- do you
11 have any information -- are there instances with
12 fingerprints where returns have not come back for as
13 long as 30 days? Or are they all, or almost all, done
14 in 5 minutes?

15 MR. DREEBEN: Fingerprint histories tend to
16 come back quickly, except if the prints are
17 unrecognizable or unreadable. It is very significant, I
18 think, that fingerprints are used for crime solution, as
19 well as --

20 JUSTICE ALITO: Well, before you get on
21 to -- before you go to that, fingerprints have been
22 taken, I believe, from people who are booked for
23 offenses for many, many, many years; isn't that right?

24 MR. DREEBEN: Correct.

25 JUSTICE ALITO: When did -- when did the

1 FBI's AFIS system for comparing fingerprints by computer
2 begin?

3 MR. DREEBEN: That, I cannot tell you,
4 Justice Alito. It is now in use. It is in use both for
5 identification, and, contrary to the representation of
6 Respondent in his brief, fingerprints are run against
7 the latent fingerprint database, which reflects
8 fingerprints from crime scenes.

9 It returns about 50,000 hits a year.

10 JUSTICE ALITO: Well, the question that I
11 had was this: If the constitutionality of taking
12 fingerprints is dependent on the speed with which a
13 fingerprint comparison can be done now by a computerized
14 system, would that mean that the taking of fingerprints
15 was unconstitutional back in, let's say, the '50s, when
16 that wasn't possible, and fingerprints could only be
17 compared manually?

18 MR. DREEBEN: No, I certainly do not think
19 that it would have been unconstitutional at any point
20 because the State has a compelling interest in taking
21 biometric identification information from the individual
22 that is arrested and using it for a myriad of purposes,
23 determining criminal history, attempting to solve
24 crimes, funneling that information back --

25 JUSTICE KAGAN: Mr. Dreeben, could I

1 understand how this works, exactly? The swab is taken,
2 and if I -- there is a database which is known
3 offenders, and there is a database which is kind of
4 crime scene DNA, is that correct?

5 MR. DREEBEN: That is correct.

6 JUSTICE KAGAN: And, when the swab is taken
7 and it's put into the system, you check that against the
8 crime scene DNA database, is that correct?

9 MR. DREEBEN: That is the routine method
10 under CODIS, yes.

11 JUSTICE KAGAN: Do you check it -- does
12 Maryland check it against the known offenders database?

13 MR. DREEBEN: I do not know precisely
14 whether Maryland does that. The Federal system does not
15 routinely do that. Upgrades to the software system will
16 permit it to do that, and many States do it.

17 JUSTICE KAGAN: Because that suggests that,
18 right now, it's functioning as let's solve some crimes,
19 which is a good thing -- you know, that we should solve
20 some crimes, but not as an identification device because
21 you're -- if it were an identification device, you would
22 be comparing it to the known offender database, not to
23 the cold case database.

24 MR. DREEBEN: I agree with that, and I think
25 that, in California, the brief for the States indicates

1 that many States do that, and California itself uses it
2 to resolve discrepancies in identity when a fingerprint
3 comes back and it returns to multiple names, or the
4 fingerprint is not good enough to permit an
5 identification. California cross-checks, so it does
6 perform an identification function.

7 And, as I suggested, with the advent of
8 rapid DNA, it's not that it is unconstitutional before
9 rapid DNA, but rapid DNA will permit DNA identification
10 to replace fingerprint identification because it's far
11 more accurate, and it has far more utility in the
12 secondary purpose of fingerprints, which is to match
13 them to latent prints and solve crimes.

14 And this is highly relevant to both of the
15 major purposes for taking DNA, crime solution and
16 facilitating the release/custody determination. Any
17 judge who is looking at a bail case would like to
18 know -- I have a guy who has been arrested on grand
19 theft auto. He has no criminal history.

20 Should I release him back on the street?
21 Well, it's a first offense, he has family ties, maybe
22 yes. If that judge --

23 JUSTICE GINSBURG: Mr. Dreeben, can you
24 explain how it works, mechanically? Because I
25 understand -- at least maybe this is just the Maryland

1 statute, but if you can't use the swab that is taken
2 from the arrestee when he is arrested -- it can't be
3 used, it's inadmissible -- then you do it again. You do
4 it -- but what it does supply is probable cause because
5 you found out that he was a perpetrator of a rape 6
6 years ago.

7 Then you have probable cause and you get a
8 warrant and do it again. What -- what is the reason for
9 the doubling -- the doing it twice?

10 MR. DREEBEN: That serves an enhanced
11 reliability function, to ensure that there is no mix-up,
12 and it provides an evidentiary function of permitting
13 the new DNA match to be admitted in a sample that is
14 taken under the warrant.

15 It has nothing to do with undercutting the
16 value of taking DNA on the spot because I was indicating
17 the judge who would know this defendant's DNA came back
18 and returned a cold case hit to a murder-rape. He's not
19 such a good risk to be put back on the street.

20 CHIEF JUSTICE ROBERTS: That argument only
21 makes sense if we're in your -- your future world where
22 it's 90 minutes, right?

23 MR. DREEBEN: No, Mr. Chief Justice --

24 CHIEF JUSTICE ROBERTS: It depends on -- if
25 we have a situation such as Maryland says, 11 to

1 17 days, the footnote, whatever, the amicus brief says
2 something else, but you are not going to put off the
3 bail hearing for 2 weeks?

4 MR. DREEBEN: No, but bail can be revoked,
5 and the government will go back in and make a motion to
6 revoke bail, if new information emerges that indicates
7 this individual is a danger to the community.

8 And the whole point of this is we are
9 talking about arrestees, somebody who has taken a step
10 into the gateway of the criminal justice system. The
11 criminal justice system, at that point, has to deal with
12 this person.

13 It has to know who is this person, which
14 includes what has this person done, so we know whether
15 to release him and, if we keep him, in what situations
16 do we keep him.

17 JUSTICE SOTOMAYOR: That doesn't explain why
18 you can't go into his home.

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

20 JUSTICE SOTOMAYOR: I mean -- you know, if
21 the whole issue is how dangerous is he, you should be
22 able to go into his home, into his car, to any place he
23 has visited, to just sort of run rampant in his life to
24 make sure that he is not a bail risk.

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

1 and I don't think that the Court's balancing test
2 suggests that these two cases are equivalent. My first
3 submission is that because we are talking about --

4 JUSTICE SOTOMAYOR: But you are because what
5 you are saying really is law enforcement need, alone,
6 without any suspicion whatsoever of another crime,
7 permits you to take this information from the person and
8 use it.

9 MR. DREEBEN: I'm saying that because an
10 arrestee is someone whose conduct has given rise to
11 probable cause that he committed a crime, he's in a
12 different position from ordinary citizens. And this
13 Court does, as it did in *Samson* and in *Knights*, balance
14 the expectations of privacy against the governmental
15 interests.

16 And, here, the expectation of privacy is
17 minimal in the cheek swab, and the information obtained.
18 It's identical --

19 CHIEF JUSTICE ROBERTS: According to *Samson*
20 and *Knights*, you're dealing with people who are still
21 subject to the -- a criminal sentence.

22 MR. DREEBEN: Well, they're differently
23 situated in that respect, Mr. Chief Justice. And I will
24 acknowledge that there is no case on my side that
25 decides the case this way. And there's no case that --

1 on Respondent's side that decides the case for him. The
2 Court, I think, has treated the category of what he
3 calls special needs cases -- what the Court has called
4 special needs cases -- as dealing with suspicionless or
5 warrantless intrusions on ordinary citizens.

6 JUSTICE KAGAN: But the typical special
7 needs case is one in which we say there's no law
8 enforcement interest, that there's an interest other
9 than the interest in solving crime.

10 MR. DREEBEN: Well, we have a strong law
11 enforcement interest with respect to people who are
12 arrested based on probable cause. They are no longer
13 similarly situated to other people. They can be
14 deprived of their liberty. Their property can be
15 searched upon entry into the jail.

16 JUSTICE KAGAN: When you started,
17 Mr. Dreeben, you started by saying -- you know, they
18 have a reduced expectation of privacy, and we have
19 important interests. You went right into free-form
20 balancing. That's typically not the way we do it.

21 If we said to you, look -- you know, the way
22 we do it is you need a warrant, and if you -- there is
23 some exceptions, then you have to put yourself into a
24 well-recognized exception where you can search without a
25 warrant. And that's especially the case when there is

1 no suspicion whatsoever.

2 How would you do it? How would you do it
3 short of free-form balancing? What exception are you a
4 part of?

5 MR. DREEBEN: We're not asking for a new
6 exception. What we're asking for is for the Court to
7 apply what it called "the key principle of the Fourth
8 Amendment." It said that in Bell v. Wolfish. It said
9 that in Martinez --

10 JUSTICE SOTOMAYOR: The key principle is the
11 Fourth Amendment --

12 JUSTICE KENNEDY: Is it -- is it your
13 position that this is a search incident to an arrest?

14 MR. DREEBEN: No, Justice Kennedy, it's not.
15 That stands on its own doctrinal footing. But we do
16 think the fact that --

17 JUSTICE KENNEDY: Why isn't this is a search
18 incident to an arrest?

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

20 JUSTICE KENNEDY: Just -- just like taking
21 the pockets out and -- and seeing what's in the person's
22 overcoat and so forth is a search incident to an arrest.

23 MR. DREEBEN: You can certainly look at it
24 as an incident of the arrest. The Court's search
25 incident to arrest cases have been bottomed on different

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

2 I'm entirely happy if you, Justice Kennedy,
3 view it as an incident to arrest in that sense because I
4 think that it is appropriately viewed as something that
5 the government has a compelling interest in doing once a
6 person has been arrested, and that is, knowing who that
7 person is, which includes knowing what the person has
8 done.

9 And DNA does that in a far more powerful way
10 than fingerprints has done --

11 JUSTICE SCALIA: Yes, but our -- our search
12 incident to arrest cases don't allow that. That's sort
13 of the point. They -- they allow you to search for
14 firearms, they allow you to search for material that
15 relates to the crime for which the person has been
16 arrested.

17 But you can't search the person for other
18 stuff.

19 MR. DREEBEN: That's inaccurate,
20 Justice Scalia. A search incident to arrest allows a
21 full search of the person for any destructible
22 evidence because a person who has been arrested has a
23 tremendous incentive to destroy evidence.

24 And I just want to come back --

25 JUSTICE SCALIA: Well, wait. Evidence

1 relating to matters other than the crime of arrest?

2 MR. DREEBEN: Yes, on -- on the individual's
3 person. The crime of arrest limitation appears only in
4 Arizona v. Gant, and it relates to cars. But I think
5 it's critical to note that Respondent has conceded that
6 an individual can have their DNA taken once convicted.

7 Suppose we have the same individual who's
8 picked up on grand theft auto, and that individual knows
9 that, if he's convicted of grand theft auto, he is going
10 to have his DNA taken, but he also knows that he's
11 committed a string of rapes. And, if the government
12 cannot take his DNA now, it will not connect him -- may
13 I complete the sentence -- it will not connect him to
14 those rapes.

15 So he has a tremendous incentive to flee.
16 The government has a tremendous need for this
17 information at the time of arrest to solve crimes,
18 exonerate the innocent, and give closure to victims.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Mr. Dreeben.

22 Mr. Shanmugam?

23 ORAL ARGUMENT OF KANNON K. SHANMUGAM

24 ON BEHALF OF THE RESPONDENT

25 MR. SHANMUGAM: Thank you, Mr. Chief

1 Justice, and may it please the Court:

2 Maryland searched my client without a
3 warrant, in order to investigate crimes for which there
4 was no suspicion. It is settled law that warrantless,
5 suspicionless searches are presumptively
6 unconstitutional.

7 The State cites no --

8 JUSTICE KENNEDY: He was held -- he was held
9 with probable cause --

10 MR. SHANMUGAM: That is correct.

11 JUSTICE KENNEDY: -- and his -- and his
12 custody was restrained. He was in a police station.

13 MR. SHANMUGAM: That is also correct.

14 JUSTICE KENNEDY: Were handcuffs put on him
15 during the transport process? Do you know?

16 MR. SHANMUGAM: I don't know that the record
17 indicates that.

18 JUSTICE KENNEDY: But they -- they could --
19 they could have been?

20 MR. SHANMUGAM: Yes.

21 JUSTICE KENNEDY: So his liberties were
22 constrained in all of those respects. He would have to
23 take off most of his clothes, subject to a patdown
24 search?

25 MR. SHANMUGAM: We're --

1 JUSTICE KENNEDY: They could look -- they
2 could look in his -- in his briefcase?

3 MR. SHANMUGAM: Yes. Just to be clear,
4 Justice Kennedy, we're not disputing the proposition
5 that certain intrusions on privacy are permissible as to
6 arrestees, but where we fundamentally disagree with the
7 State and the Federal Government is with regard to the
8 argument that this Court should take the rationale of
9 *Samson v. California* and essentially extend that
10 rationale to the point of arrest.

11 The government --

12 JUSTICE KENNEDY: I think -- I think there
13 is some merit to your argument in that regard. In
14 *Samson*, he was a parolee, and he actually, as I recall,
15 signed a -- a consent form as part of the probation.

16 MR. SHANMUGAM: That is correct. An agreed
17 part of the condition of parole. That is -- that is
18 correct.

19 CHIEF JUSTICE ROBERTS: Well, that is right.
20 But I'm curious as to why your position is that -- let's
21 say he served his time. He's no longer subject to the
22 criminal justice system. He's not on parole; he's not a
23 probationer. You concede that the DNA evidence can be
24 taken from him, correct?

25 MR. SHANMUGAM: I would concede,

1 Mr. Chief Justice, that it -- that it could be taken at
2 least while he is still under the supervision of the
3 State because, after all, both Samson and Knights were
4 cases in which the individual was still under State
5 supervision; that is to say, we're not arguing that, at
6 the point of conviction, that the resulting lessened
7 expectation of privacy extends in perpetuity as, say, a
8 firearm or felon disability does.

9 But what we are arguing is that -- to look
10 at this Court's cases in Samson and Knights, they both
11 centrally depended on the proposition that it is the
12 fact of conviction that deprives an individual of the
13 full protections of the Fourth Amendment.

14 CHIEF JUSTICE ROBERTS: What is the
15 pertinence of the fact -- I mean, this is not something
16 that people are or can keep private. I mean, if you're
17 in the interview room or something, you take a drink of
18 water, you leave, you're done. I mean, they can examine
19 the DNA from that drink of water.

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

21 CHIEF JUSTICE ROBERTS: Doesn't that
22 compromise the -- the expectation of privacy?

23 MR. SHANMUGAM: I think it's an open
24 question as to whether or not there would be a search
25 when DNA is collected from cells that could be said to

1 have been involuntarily or voluntarily abandoned.

2 And, to the extent that there's an argument
3 that there would still be a search, it would be based on
4 this Court's reasoning in *Skinner*, where the Court
5 suggested that the subsequent analysis of a urine sample
6 would constitute a further invasion of the test of --

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

8 MR. SHANMUGAM: -- the privacy interest.

9 CHIEF JUSTICE ROBERTS: My question was not
10 trying to get at whether it's a search or not. It's
11 whether -- it's getting at the reasonableness of the
12 expectation of privacy that the -- your DNA is protected
13 from examination when it's left wherever you happened to
14 have been.

15 MR. SHANMUGAM: I would say two things about
16 the privacy interests at stake here. First of all,
17 there is an intrusion into the body, and that is what
18 triggers the applicability of the Fourth Amendment here,
19 to be sure, but it is also a relevant intrusion for
20 Fourth Amendment purposes.

21 But, secondly, and perhaps more importantly,
22 there is a legitimate expectation of privacy in the
23 contents of an individual's DNA. And, to the extent
24 that this Court were to engage in balancing, we
25 certainly think that interest is --

1 CHIEF JUSTICE ROBERTS: Well, I mean, isn't
2 that part of the -- isn't that part of the question,
3 whether there is a legitimate expectation of privacy in
4 a person's DNA?

5 MR. SHANMUGAM: Yes, and we think that the
6 answer to that question is yes, that an individual
7 has --

8 CHIEF JUSTICE ROBERTS: Well, I know, but
9 you're simply just -- you're -- I guess that's begging
10 the question. And -- but I'd just be repeating my
11 question -- how legitimate is it to you to expect
12 privacy in something that the police can access without
13 you even knowing about it, without any voluntary or
14 involuntary -- if you take a drink of water, if you
15 leave behind a cigarette butt?

16 MR. SHANMUGAM: Well -- Mr. Chief Justice,
17 I've heard Mr. Dreeben to concede, as I think he must,
18 that an individual retains a legitimate expectation of
19 privacy in at least some of the information contained in
20 the individual's DNA.

21 And I suppose we can have a dispute about
22 what types of information would qualify. But I think it
23 really is settled that there are profound privacy
24 concerns raised by the government's coming into
25 possession of an individual's DNA.

1 JUSTICE SCALIA: Mr. Shanmugam, I -- I
2 wouldn't have made the concession that you've made, that
3 this case is about reasonable expectation of privacy.
4 If there's no reasonable expectation of privacy, there's
5 no search.

6 But, here, there is a search. You have a
7 physical intrusion. You -- you pull a guy's cheek apart
8 and stick a -- a swab into his mouth. That's a search,
9 reasonable expectation of privacy or not.

10 MR. SHANMUGAM: Well -- Justice Scalia, I
11 didn't think I was conceding anything, but if I --

12 JUSTICE SCALIA: Well, I thought you did.

13 MR. SHANMUGAM: If I was -- let me just be
14 clear. We don't think that this Court should be
15 engaging in balancing here. Indeed, that is really our
16 principal submission to this Court.

17 JUSTICE ALITO: Well, do you think the
18 intrusion is worse when you just take a swab and you go
19 inside somebody's cheek, as opposed to rolling
20 fingerprints? Which is the greater intrusion?

21 MR. SHANMUGAM: Well, we think that it is
22 settled that intrusions into the body constitute a
23 search for Fourth Amendment purposes.

24 JUSTICE ALITO: Which is --

25 MR. SHANMUGAM: I suppose that the argument

1 could be made, Justice Alito, that there is a similar
2 trespass on the person and, therefore, a search when
3 fingerprints are collected. I would note,
4 parenthetically, that, in the first half an hour of this
5 argument, we heard no explanation, either by the State
6 or by the Federal government, as to their theory as to
7 why fingerprinting is constitutional.

8 Now, we --

9 JUSTICE ALITO: Well, the thrust of a lot of
10 what we -- we have been presented with in the briefs and
11 what we have heard this morning -- and, by the way, I
12 think this is perhaps the most important criminal
13 procedure case that this Court has heard in decades.

14 The -- the attorney for the State began by
15 listing a number of crimes just in Maryland that had
16 been solved using this. So this is what is at stake:
17 Lots of murders, lots of rapes that can be -- that can
18 be solved using this new technology that involves a very
19 minimal intrusion on personal privacy.

20 But why isn't this the fingerprinting of the
21 21st century? What is the difference? If it was
22 permissible and it's been -- it's been assumed to be so
23 for decades, that it is permissible to fingerprint
24 anybody who's booked, why is it not permissible to take
25 a DNA sample from anybody who is arrested?

1 MR. SHANMUGAM: Justice Alito, we think that
2 fingerprinting is distinguishable on three grounds.
3 First of all, as a practical matter, an individual's DNA
4 contains far more information and far more personal
5 information than an individual's fingerprints. But, as
6 a doctrinal matter, we think that fingerprinting is
7 distinguishable --

8 JUSTICE ALITO: Well, as to -- as to the
9 first, in our cases involving searches for -- where a
10 urine sample is taken to determine drug use, the urine
11 can be analyzed for all sorts of things besides the
12 presence of drugs, and the Court has said, in those
13 cases, we are only going to consider that -- we are
14 considering that this is a reasonable search with
15 respect to the determination of whether the person has
16 taken drugs, not all the other information --

17 MR. SHANMUGAM: But that is because --

18 JUSTICE ALITO: -- that might be obtained
19 from it.

20 MR. SHANMUGAM: But that is because,
21 Justice Alito, in those cases, cases like Skinner and
22 Von Raab and Vernonia, there was a special need, apart
23 from the ordinary interests in law enforcement. And,
24 here, it is clear that the primary purpose of the
25 Maryland statute and, indeed, the similar statutes on

1 the Federal and State levels, was the ordinary interest
2 in crime control, to solve unsolved crimes.

3 And that is why those special needs cases
4 are distinguishable. And I think that's why the State,
5 essentially, disavows any reliance on the Special Needs
6 Doctrine --

7 JUSTICE KAGAN: What are your other two
8 distinctions?

9 MR. SHANMUGAM: With regard to
10 fingerprinting, we think that, notwithstanding the
11 physical intrusion involved with taking an individual's
12 fingers and putting them on the pad, that the better
13 view is that fingerprinting is not a search, and, to the
14 extent that this Court has addressed the question, it
15 has suggested that fingerprinting is not a search
16 because an individual has no expectation of privacy in
17 their fingerprints because their fingers are constantly
18 exposed --

19 JUSTICE BREYER: I would like a complete
20 answer to what Justice Alito and Justice Kagan both were
21 asking, I think. I mean, to summarize that, if I look,
22 in terms of intrusion, I am not talking legally, I am
23 talking practically. It doesn't seem to me -- I can
24 argue that it is certainly a much lesser intrusion than
25 fingerprints. You have to stand there, have the thing

1 rolled; your -- stick out your tongue. I mean, it's
2 hard to say it's more, for me, I'm not saying for
3 others.

4 Accuracy, it's much more accurate, and that
5 doesn't just help the defendant. There is a whole brief
6 here filed by the victims that have case after case,
7 where people spent 5 years in prison, wrongly, and where
8 this system and the CODIS helped victims avoid being
9 arrested and sent to jail when they were innocent, so it
10 works both ways.

11 So, one, it's no more intrusive; two, it is
12 much more accurate. And three and four and five, how
13 it's different and worse in practice, is what I would
14 ask you to summarize.

15 MR. SHANMUGAM: Sure. Well --

16 JUSTICE BREYER: And, by the way, when you
17 talk about what information you could get out of it,
18 there is a brief filed by leading scientists in the
19 field, and I came away from the brief thinking there
20 isn't much more information because fingerprints can be
21 abused, too.

22 Of course, you can learn loads from
23 fingerprints. Photos, try photos; my God, you could
24 learn a lot, who he was, who -- you know, so all these
25 things could be abused. But I came away from that

1 brief, frankly, to think, well, in terms of the
2 possibility of abuse, it's there, but these other
3 things, photos, too.

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

5 JUSTICE BREYER: Okay. So, now, you tell
6 me, in light of that hostile question --

7 (Laughter.)

8 JUSTICE BREYER: -- I would like you -- I
9 would like you to tell me, okay, it's different from
10 fingerprints and worse because of one, two, three, and I
11 will write it down, and I'll remember it.

12 JUSTICE SCALIA: He gave us one and two. I
13 have been waiting for three. Will you drop the shoe?

14 (Laughter.)

15 MR. SHANMUGAM: Let me -- I will gladly get
16 to three with regard to fingerprinting, and then I would
17 like to say a word about balancing, in the event that
18 the Court reaches it. Obviously, we don't think that
19 balancing is appropriate here because we don't think
20 that the Special Needs Doctrine is applicable, and we
21 don't think that Samson should be extended to arrestees.

22 But, with regard to fingerprinting, the
23 other reason why we think fingerprinting is different,
24 above and beyond the fact that we think the better view
25 is that fingerprinting is not a search, is because

1 fingerprinting, as it is currently practiced, does serve
2 a special need.

3 The primary purpose of fingerprinting is to
4 identify an individual who is being taken into the
5 criminal justice system.

6 JUSTICE KAGAN: So, Mr. Shanmugam, that
7 seems to me a real distinction in this case, as it's
8 been litigated. I take what the government is saying is
9 something like, give us 5 years, and those won't look
10 very different.

11 In other words, we will be able to do, in 5
12 years' time, exactly what we can do with fingerprinting,
13 except it will be, as Justice Breyer says, more
14 accurate. So we are just about 5 years ahead of that,
15 so give us a break.

16 MR. SHANMUGAM: And my response to that
17 would be that, under the Special Needs Doctrine, what is
18 relevant is not how a system could conceivably operate;
19 what is relevant is the primary purpose behind the
20 program at issue.

21 So, if the government were to come back in 5
22 years' time with a DNA testing program, the primary
23 purpose of which was pretrial supervision or
24 identification, one of these other purposes that is
25 being offered, then, sure, the analysis would be

1 different.

2 That is simply a consequence of the fact
3 that this Special Needs Doctrine, unlike the rest of the
4 Fourth Amendment, looks to purpose, namely, the purpose
5 of the program at issue.

6 JUSTICE KENNEDY: A person -- a person has
7 been arrested for a felony and is in custody, do the
8 police -- does the justice system have an interest in
9 knowing whether that person committed other crimes?

10 MR. SHANMUGAM: The justice system always
11 has an interest in law enforcement and solving crimes,
12 and we certainly don't dispute that proposition. But
13 what we do dispute is Mr. Dreeben's principal submission
14 to this Court, which is that simply because law
15 enforcement can do certain things to arrestees, it can
16 do others.

17 The primary thing is --

18 JUSTICE KENNEDY: My question is whether or
19 not the police, who have John Doe in custody for a
20 felony, have an interest in knowing, at the outset or
21 within a few weeks' time, whether or not that person has
22 committed other crimes?

23 MR. SHANMUGAM: The difference between an
24 arrestee and an ordinary citizen, Justice Kennedy, is
25 that, as to an arrestee, the police have probable cause

1 to believe that the arrestee committed a particular
2 offense.

3 JUSTICE KENNEDY: But they also have a
4 reason for keeping him in custody.

5 MR. SHANMUGAM: Related --

6 JUSTICE KENNEDY: And my -- my question is,
7 do they have an interest -- a legitimate interest in
8 knowing if that person has committed other crimes?

9 MR. SHANMUGAM: They have that interest,
10 but, if they want to investigate other crimes, they have
11 to do what they would have to do as to an ordinary
12 citizen. They have to have a warrant or some level of
13 individualized suspicion.

14 CHIEF JUSTICE ROBERTS: There are two
15 different -- two different interests. One is we want to
16 solve unsolved crimes; and the other is we want to be
17 sure -- we have someone in our custody, and we want to
18 be sure, before he is released back into the community,
19 that he isn't a person who has committed five violent
20 crimes before that.

21 Now, your brief says, well, the only
22 interest here is the law enforcement interest. And I
23 found that persuasive because of the concern that it's
24 going to take months to get the DNA back anyway, so they
25 are going to have to release him or not before they know

1 it.

2 But if we are in a position where it now
3 takes 90 minutes -- or will soon take 90 minutes to get
4 the information back, I think that's entirely
5 different because, there, you can find out whether --
6 it's just tied in with the bail situation, do you want
7 to release him or not?

8 MR. SHANMUGAM: The touchstone of the
9 analysis, under the Special Needs Doctrine, is what was
10 the primary purpose of the program at issue. And there
11 is no evidence that pretrial supervision was a purpose
12 of any of these.

13 CHIEF JUSTICE ROBERTS: Well, that's
14 because -- that's because we are not yet at a situation
15 where it takes 90 minutes. Sure, it's not going to do
16 you any good if it's taking 4 months or whatever it took
17 in this case.

18 But, if it's at the point where it's 90
19 minutes, it would be critical to make that
20 determination.

21 MR. SHANMUGAM: Well, Mr. Chief Justice, as
22 I said to Justice Kagan, the constitutional analysis may
23 very well change at later point. But I think it's
24 important to underscore that neither the State of
25 Maryland nor the Federal government identifies a single

1 instance in which a pretrial supervision decision in
2 their jurisdictions was altered as a result of the DNA
3 test.

4 CHIEF JUSTICE ROBERTS: Well, let's put it
5 this way. Let's -- let's say the judge or the
6 magistrate is going to make a bail determination and he
7 says, well, it's important to me to know whether you are
8 going to commit another crime.

9 So we are not saying you have to give a DNA
10 sample, but it will enter into my calculation if you
11 refuse to do it.

12 MR. SHANMUGAM: Well, outside the
13 programmatic context, ordinary Fourth Amendment rules
14 would apply. And ordinary --

15 CHIEF JUSTICE ROBERTS: Well, what does that
16 mean? Is that okay or not?

17 MR. SHANMUGAM: Well, I think, in that
18 circumstance, where there is no individualized
19 suspicion, a search cannot occur. And an
20 arrestee stands --

21 CHIEF JUSTICE ROBERTS: Well, we do it --
22 doesn't that sound just like a Breathalyzer? You are
23 pulled over, they say, we want you to take a
24 Breathalyzer test. They say, you don't have to, but, if
25 you don't, your license is suspended for 6 months or

1 whatever.

2 Why isn't that the same thing.

3 MR. SHANMUGAM: Well -- you know, I will say
4 that the one thing that is slightly different about your
5 hypothetical, Mr. Chief Justice, is that the analysis
6 might be somewhat different where what you are talking
7 about is a condition of release. I think you would
8 trigger the Unconstitutional Conditions Doctrine and the
9 analysis might operate somewhat separately -- somewhat
10 differently.

11 But, just to conclude with regard to my
12 answer with Justice Kennedy and then to get back to the
13 rest of Justice Breyer's question, Justice Kennedy, with
14 regard to arrestees, the intrusions on privacy that are
15 permissible are all intrusions that relate to the
16 arrest.

17 So to take the two principal examples, the
18 Search Incident to Arrest Doctrine, which you mentioned,
19 and searches associated with an individual's continued
20 detention, so the strip searching example, those
21 doctrines have discrete justifications that limit their
22 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. It will permit only --

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.

12 And, if it's found, as an identity matter,
13 that this person has a criminal record or that they
14 are -- is suspected of serious crimes, that is a
15 mandatory ground for reconsideration of bail. And you
16 say there is no 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.

23 That is the ordinary interest in law
24 enforcement, and when the government is indicating --

25 JUSTICE GINSBURG: I thought

1 fingerprinting -- Mr. Shanmugam, I thought
2 fingerprinting was used to determine whether they -- the
3 person has a record. We have this person, and now, we
4 check the fingerprints to find out if he has a prior
5 record, that's different from to find out if he has
6 committed a crime that we don't know about.

7 But -- but are fingerprints used to
8 determine whether the person has a prior record?

9 MR. SHANMUGAM: Fingerprints taken upon
10 booking are primarily used for the purpose of
11 identification, and, by identification, I would include
12 determining whether the individual had a prior criminal
13 record because, as IAFIS is currently structured, that
14 is information that is returned once there is a hit for
15 that initial search.

16 Now --

17 JUSTICE ALITO: What was the purpose of
18 fingerprinting before it was possible to make
19 fingerprint comparisons by computer?

20 MR. SHANMUGAM: Well, I think fingerprinting
21 really has, from the outset, served the purpose of
22 identification because fingerprinting really came into
23 being approximately 100 years ago because, in large
24 urban areas, officers could no longer identify
25 individuals on sight.

1 Now, to be sure, fingerprinting does serve a
2 law enforcement purpose as well. As Mr. Dreeben
3 indicated, there is a latent fingerprint database that
4 roughly corresponds to --

5 JUSTICE ALITO: Well, I would assume that,
6 before it was possible to do computer searches, the way
7 in which fingerprinting established identification, what
8 it did in that respect was to identify the person
9 arrested on this occasion, so that, if the person was
10 arrested again, then the police would know that it was
11 the same person.

12 There was no way of -- no practicable way of
13 taking the fingerprints of somebody who was booked and
14 determining whether that person -- you didn't have
15 anything to compare it to. And they certainly -- you
16 couldn't do it manually.

17 MR. SHANMUGAM: That is true. But, again,
18 the purpose of fingerprinting, as it developed over
19 time, was identification in the sense that, as
20 fingerprints were being collected, individuals could
21 proceed to be identified based on prior --

22 JUSTICE SOTOMAYOR: Can we go back to --

23 JUSTICE ALITO: Yes, so you know that, on
24 day one, you have arrested -- you've arrested Mr. X, and
25 then, a year later, you arrest somebody else, and you

1 know it's Mr. X again. And DNA can do exactly the same
2 thing, except more accurately.

3 MR. SHANMUGAM: But I think it's important
4 to realize, Justice Alito, that at least, as the DNA
5 system is currently constituted, when an arrestee's
6 profile is prepared, it is compared against the offender
7 and arrestee indices, not the forensic index.

8 And, indeed, as we understand it -- and I
9 think Mr. Dreeben's discussion of this is probably
10 consistent with this, at least on the Federal level, it
11 is not permissible to take that profile and search it
12 against the offender and arrestee indices.

13 Now, that very well may occur in certain
14 States. We don't have any reason to believe that that
15 is what takes place in Maryland. But, again, this is
16 really what distinguishes the way in
17 which fingerprinting is --

18 JUSTICE BREYER: I think I can totally lose
19 this because -- because I have a confusion that you can
20 clear up. There is something to what you say. I see
21 what you are saying. But what does this word
22 "identification" mean? It's used for identification.
23 We have a person, he's been arrested.

24 He writes his name down, Mr. Smith. Maybe
25 he's lying. We have his picture. Well, his picture's

1 pretty good. If he turns up in a bar somewhere in the
2 future, we can look, see, and that's awfully good.

3 And, now, you say, well, what is
4 fingerprinting doing that photos aren't doing, in terms
5 of identification? What does it do, in terms of just
6 identification?

7 MR. SHANMUGAM: Sure.

8 JUSTICE BREYER: What does it do?

9 MR. SHANMUGAM: We think it means
10 determining or confirming the identity of an individual.

11 JUSTICE BREYER: What does that mean,
12 confirming his identity? We have -- you mean what?
13 What exactly?

14 MR. SHANMUGAM: Confirming, for instance, in
15 this case, that the individual in the government's
16 custody was Alonzo King.

17 JUSTICE BREYER: Oh, really? I mean, do you
18 think the fingerprints -- where do you go to find out if
19 he's Alonzo King? A lot of people have never had their
20 fingerprints taken before.

21 MR. SHANMUGAM: Well, but 73 million people
22 are in the criminal offender --

23 JUSTICE BREYER: That's what it's for? To
24 determine what his name really is?

25 MR. SHANMUGAM: And his criminal -- and, to

1 be sure, his adjudicated criminal history, which can
2 also be --

3 JUSTICE BREYER: Ah. You want to determine
4 what his name really is, plus his adjudicated criminal
5 history, and, here, we have the DNA, which I guess might
6 or might not help determine what his name really is,
7 and, with criminal history, it does about the same. And
8 also fingerprints are sometimes used to -- for unsolved
9 crimes, and they are sometimes used for unsolved crimes,
10 but your point really is more for unsolved crimes.

11 Have I got it.

12 MR. SHANMUGAM: Justice Breyer, no, I think,
13 with respect, you haven't. With regard to DNA testing,
14 a DNA profile -- at least as the Federal system is
15 configured -- is compared against the forensic index.
16 That is the index of samples from unsolved crimes. And
17 so that is really in contradistinction to how the
18 fingerprint database works.

19 JUSTICE SOTOMAYOR: Counsel, I -- I am
20 really worried about the question you haven't satisfied
21 me with, which is I agree completely that, today, it's
22 used primarily and almost exclusively for purposes of
23 solving other crimes.

24 But let's -- is this -- the question that I
25 think one of my colleagues asked, is that only because

1 technology hasn't moved fast enough?

2 You said we have to look at the
3 constitutional principles 5 years from now, when they
4 will use it to pull up a guy's criminal history, not
5 unsolved crimes, but criminal history. Get to that day.

6 MR. SHANMUGAM: Sure. Well,
7 Justice Sotomayor --

8 JUSTICE SOTOMAYOR: Tell me what the -- tell
9 me what the -- why you would then say that would still
10 be unconstitutional?

11 MR. SHANMUGAM: Justice Sotomayor, assuming
12 that this Court does not accept the proposition that
13 arrestees are somehow subject to a lessened expectation
14 of privacy, the only other --

15 JUSTICE SOTOMAYOR: Right. Let's assume we
16 go under a normal Fourth Amendment, you need probable
17 cause to search.

18 MR. SHANMUGAM: Right. And the only other
19 potentially applicable exception to the principle that
20 warrantless, suspicionless searches are unconstitutional
21 is the special needs exception, and that exception looks
22 to the primary purpose of the program at issue.

23 And the mere fact that DNA testing could be
24 used for other purposes wouldn't necessarily be
25 dispositive of the inquiry. If the primary purpose of

1 DNA testing is still to investigate unsolved crimes, the
2 program would still not qualify under the Special Needs
3 Doctrine.

4 JUSTICE KAGAN: But, Mr. Shanmugam, just
5 suppose -- I mean, I guess the question is would this be
6 unconstitutional? It's not the world we are living in
7 now, but let me -- 10 years from now, the government
8 says, we are really switching over to a fingerprint
9 system -- to a DNA system, and what that system is going
10 to allow us to do is it's going to allow us to identify,
11 and it's going to allow us to bring up the old criminal
12 history, and it's going to allow us to see whether there
13 are also unsolved crimes that we can tag to this person
14 and discover that he's really, really dangerous.

15 All right? And so the government puts that
16 system into effect. Is it constitutional?

17 MR. SHANMUGAM: I think that it could be,
18 and that would simply be because you would have a system
19 where DNA testing is essentially being used as
20 fingerprinting is being used today. But, again, I don't
21 think --

22 JUSTICE SOTOMAYOR: I was interested in a
23 broader thought process, actually. Do you mind giving
24 it to me?

25 MR. SHANMUGAM: Well -- well --

1 JUSTICE SOTOMAYOR: Which is, there is
2 something inherently dangerous about DNA collection that
3 is not the same as fingerprinting.

4 MR. SHANMUGAM: Well, there is, and that
5 gets me back, finally, to the rest of Justice Breyer's
6 question from a few minutes ago because Justice Breyer
7 had kind of asked how the analysis should work, in the
8 event that the Court were to proceed to balancing.

9 And so I just want to say a word about the
10 relevant privacy interests and the relevant governmental
11 interests and to explain why we think that the relevant
12 privacy interests outweigh those governmental interests.

13 On the privacy side of the ledger, we
14 certainly believe that there are profound privacy
15 concerns associated with the government's collection of
16 an individual's DNA. And, leaving aside the question of
17 how much personal information is contained in the 13
18 loci -- and we certainly think that there is significant
19 personal information, even as to those loci -- I don't
20 think there can be any dispute that, when you evaluate
21 the entirety of an individual's DNA, there is a great
22 deal of personal information contained there. And, in
23 our view, that has to be taken into account when
24 engaging in balancing.

25 Now, the government's response to that is

1 essentially the "just trust us" defense; namely, that
2 the government is not looking at all that information,
3 it is only looking at a certain subset of that
4 information. But that has never been how this Court has
5 analyzed privacy interests, at least outside the special
6 needs context.

7 Probably the closest analog is this Court's
8 decision in *Tyler v. United States*, where the Court said
9 that it was of no moment that the heat-sensing device
10 that was at issue in that case did not detect any
11 information about the intimate details of activities
12 within the home.

13 CHIEF JUSTICE ROBERTS: You -- you disclose
14 all of this intimate private information when you take a
15 drink of water and leave -- leave the glass behind.

16 MR. SHANMUGAM: But, Mr. Chief Justice, as I
17 said at the outset, we believe that there might still
18 be -- indeed, we think the better view under this
19 Court's cases is that there would still be a Fourth
20 Amendment search there.

21 The only difference would be that you don't
22 have the intrusion into the body that makes the question
23 of whether or not there is a search here an easy one.

24 Now, I want to say just a word about the
25 governmental --

1 JUSTICE ALITO: What if someone has a bloody
2 shirt and throws it away in the trash -- in a public
3 trash can along the street, you are saying that the
4 police can't analyze that without a search warrant?

5 MR. SHANMUGAM: The argument would be that
6 the subsequent analysis of the DNA, nevertheless, still
7 constitutes a search. And the most significant decision
8 on this issue, to date, is the Fourth Circuit's decision
9 in United States v. Davis, which I would encourage you
10 to look at, if you are interested in this issue, because
11 it holds that the extraction of the DNA from an item
12 that was lawfully in the government's custody still
13 constitutes a search.

14 Let me say just a word, though, about the
15 governmental side of the balance here because I think
16 this is important. Ms. Winfree started with the
17 statistics about the efficacy of DNA testing of
18 arrestees, but our submission is, simply, that, when you
19 look at the relevant subset of cases, namely individuals
20 who have been arrested, but who are not subsequently
21 convicted of the offense of arrest, the law enforcement
22 value of DNA testing is relatively modest.

23 My understanding is that --

24 JUSTICE ALITO: But your client was
25 convicted of the offense of arrest.

1 MR. SHANMUGAM: That is correct.

2 JUSTICE ALITO: And it was a serious
3 offense, punishable by up to 10 years imprisonment.

4 MR. SHANMUGAM: Well, my client --

5 JUSTICE ALITO: Isn't that correct? And he
6 was sentenced to 4 years.

7 MR. SHANMUGAM: That is -- my client was
8 convicted of the crime of arrest, to be sure. But,
9 under the Maryland statute, that crime was not a serious
10 enough crime to qualify for DNA collection at that
11 point.

12 JUSTICE ALITO: For Fourth Amendment
13 purposes -- for Fourth Amendment purposes, do you think
14 that it is -- that it is permissible to take a DNA
15 sample from someone who is convicted of an offense that
16 would qualify as a felony under common law?

17 MR. SHANMUGAM: We think that it would be
18 permissible to collect DNA from any individual who has
19 been convicted and is subjected to the continued
20 supervision of the State. And that is simply because
21 those individuals have a lessened expectation of
22 privacy.

23 But just to get on the table --

24 JUSTICE GINSBURG: When they're no longer in
25 the custody of the State, does the government have to

1 destroy it? They served their time, and their
2 privileges have been restored.

3 MR. SHANMUGAM: We don't -- we don't think,
4 in that circumstance, Justice Ginsburg, that the
5 government would have to destroy the DNA sample. But
6 we --

7 JUSTICE KENNEDY: Does a felon who's been
8 arrested have a reduced expectation of privacy at the
9 time of arrest?

10 MR. SHANMUGAM: I'm sorry? A felon who has
11 been --

12 JUSTICE KENNEDY: Does a felon -- does a
13 person who has been arrested for a felony have a reduced
14 expectation of privacy at the time of his arrest?

15 MR. SHANMUGAM: I would not say that that
16 person has a reduced expectation of privacy. What I
17 would say is that there are certain intrusions on
18 privacy, some of which are quite substantial, that are
19 permissible because there are justifications unique to
20 the arrest.

21 So, in Florence, this Court permitted the
22 strip search of an individual who is being admitted into
23 the general jail population, based on the special need
24 of ensuring prison safety and preventing contraband from
25 being introduced into the prison.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Ms. Winfree, you have 3 minutes remaining.

3 REBUTTAL ARGUMENT OF KATHERINE WINFREE

4 ON BEHALF OF THE PETITIONER

5 MS. WINFREE: On the question of rapid DNA,
6 the FBI estimates that we're about 18 to 24 months away
7 from that world, and I would cite the National District
8 Attorneys Association's amicus brief on page 20 where it
9 discusses the -- that this is not science fiction. So
10 we are very, very close to that.

11 And I wanted to just address a couple of the
12 questions that arose during Respondent's presentation.
13 Justice Kennedy, the State does have a compelling need
14 and a compelling interest in knowing who is in its
15 custody, and arrestees do not have a legitimate
16 expectation of privacy in their identity.

17 We have a legitimate and compelling need to
18 identify suspects and to aid in solving crimes.

19 And our -- and our definition of what
20 identification is, is somewhat broader than
21 Respondent's. It's not just what his name is and what
22 his face is and what his fingerprints show. It is that
23 CODIS DNA profile, those 26 numbers, so that -- in our
24 view, that's a broader definition of -- of identity.

25 And I wanted also, just finally, to address

1 Justice Alito's question. This is the fingerprinting of
2 the 21st century, but it's better. Typically, DNA
3 evidence is used to identify rapes and murderers.
4 Fingerprints typically do not solve those kinds of
5 crimes.

6 And, if the primary purpose of
7 fingerprinting is just to identify, it also is used --
8 fingerprinting, now, is used -- the prints are compared
9 against the latent database in IAFIS, and they are used
10 to solve crimes. But they typically don't solve the
11 kind of crimes that we are talking about here, and it
12 wouldn't have been solved in Mr. -- in Mr. King's case.

13 CHIEF JUSTICE ROBERTS: How can I base a
14 decision today on what you tell me is going to happen in
15 2 years? You say, in 2 years, we will have this rapid
16 DNA available, but we don't now.

17 Don't I have to base a decision on what we
18 have today?

19 MS. WINFREE: Well, that's really only one
20 component of our argument, Mr. Chief Justice, that,
21 certainly, with respect to a bail determination, we will
22 be able to make it more rapidly at the time that that
23 rapid DNA comes into effect. But --

24 JUSTICE SCALIA: Yes, but, if we believe
25 that the purpose of it has much to do with whether it's

1 legitimate or not, you can't demonstrate that the --
2 that the purpose is immediate identification of the
3 people coming into custody, you just can't demonstrate
4 that now. Maybe you can in 2 years.

5 The purpose now is -- is the purpose you
6 began your presentation with, to catch the bad guys,
7 which is a good thing. But -- you know, the Fourth
8 Amendment sometimes stands in the way.

9 MS. WINFREE: It has a corollary purpose,
10 Justice Scalia. What we are suggesting and arguing is
11 that solving crimes, to be sure, is the key component,
12 but in solving crimes and connecting an arrestee to a
13 crime that's unsolved informs a judge's determination
14 about whether to release that individual.

15 And, as Mr. Dreeben said, bail modifications
16 can happen; they do happen all the time. And, in
17 Maryland, it's going to have -- it's going to be
18 happening before rapid DNA. Right now, we are able to
19 make that determination in a period between 11 and
20 17 days.

21 So we are not asking you to base your
22 decision on the futuristic world, which is really only 2
23 years out, with rapid DNA anyway. But we can make those
24 bail determinations now, and, in fact, they are
25 important for where we house prisoners and -- and how we

1 supervise them in custody.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The case is submitted.

4 (Whereupon, at 12:11 p.m., the case in the
5 above-entitled matter was submitted.)

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