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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C O N T E N T S

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 have 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.

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 for the whole --

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

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

17   the DNA profile, and getting the match back. That's

18   what we're 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 was 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 intact 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 understand -- there is a database which is

3 known offenders, and there is a database which is kind

4 of 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. It is a search incident to an

23   arrest.

24   MR. DREEBEN: You can certainly look at it

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

1   incident to arrest cases have been bottomed on different

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

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

4   view it as an incident to arrest in that sense because I

5   think that it is appropriately viewed as something that

6   the government has a compelling interest in doing once a

7   person has been arrested, and that is, knowing who that

8   person is, which includes knowing what the person has

9   done.

10   And DNA does that in a far more powerful way

11   than fingerprints has done --

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

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

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

15   firearms, they allow you to search for material that

16   relates to the crime for which the person has been

17   arrested.

18   But you can't search the person for other

19   stuff.

20   MR. DREEBEN: That's inaccurate,

21   Justice Scalia. A search incident to arrest allows a

22   full search of the person for any destructible

23   evidence because a person who has been arrested has a

24   tremendous incentive to destroy evidence.

25   And I just want to come back --

1   JUSTICE SCALIA: Well, wait. Evidence

2   relating to matters other than the crime of arrest?

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

4   person. The crime of arrest limitation appears only in

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

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

7   an individual can have their DNA taken once convicted.

8   Suppose we have the same individual who's

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

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

11   to have his DNA taken, but he also knows that he's

12   committed a string of rapes. And, if the government

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

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

15   those rapes.

16   So he has a tremendous incentive to flee.

17   The government has a tremendous need for this

18   information at the time of arrest to solve crimes,

19   exonerate the innocent, and give closure to victims.

20   Thank you.

21   CHIEF JUSTICE ROBERTS: Thank you,

22   Mr. Dreeben.

23   Mr. Shanmugam?

24   ORAL ARGUMENT OF KANNON K. SHANMUGAM

25   ON BEHALF OF THE RESPONDENT

1   MR. SHANMUGAM: Thank you, Mr. Chief

2   Justice, and may it please the Court:

3   Maryland searched my client without a

4   warrant, in order to investigate crimes for which there

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

6   suspicionless searches are presumptively

7   unconstitutional.

8   The State cites no --

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

10   with probable cause --

11   MR. SHANMUGAM: That is correct.

12   JUSTICE KENNEDY: -- and his -- and his

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

14   MR. SHANMUGAM: That is also correct.

15   JUSTICE KENNEDY: Were handcuffs put on him

16   during the transport process? Do you know?

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

18   indicates that.

19   JUSTICE KENNEDY: But they -- they could --

20   they could have been?

21   MR. SHANMUGAM: Yes.

22   JUSTICE KENNEDY: So his liberties were

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

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

25   search?

1   MR. SHANMUGAM: We're –

2   JUSTICE KENNEDY: They could look -- they

3   could look in his -- in his briefcase?

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

5   Justice Kennedy, we're not disputing the proposition

6   that certain intrusions on privacy are permissible as to

7   arrestees, but where we fundamentally disagree with the

8   State and the Federal Government is with regard to the

9   argument that this Court should take the rationale of

10   Samson v. California and essentially extend that

11   rationale to the point of arrest.

12   The government --

13   JUSTICE KENNEDY: I think -- I think there

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

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

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

17   MR. SHANMUGAM: That is correct. An agreed

18   condition of parole. That is -- that is 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 the

7   individual's --

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

9   MR. SHANMUGAM: -- the privacy interest.

10   CHIEF JUSTICE ROBERTS: My question was not

11   trying to get at whether it's a search or not. It's

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

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

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

15   have been.

16   MR. SHANMUGAM: I would say two things about

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

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

19   triggers the applicability of the Fourth Amendment here,

20   to be sure, but it is also a relevant intrusion for

21   Fourth Amendment purposes.

22   But, second, and perhaps more importantly,

23   there is a legitimate expectation of privacy in the

24   contents of an individual's DNA. And, to the extent

25   that this Court were to engage in balancing, we

1   certainly think that interest is -

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

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

4   whether there is a legitimate expectation of privacy in

5   a person's DNA?

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

7   answer to that question is yes, that an individual

8   has --

9   CHIEF JUSTICE ROBERTS: Well, I know, but

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

11   the question. And -- well I'd just be repeating my

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

13   privacy in something that the police can access without

14   you even knowing about it, without any voluntary or

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

16   leave behind a cigarette butt?

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

18   I've heard Mr. Dreeben to concede, as I think he must,

19   that an individual retains a legitimate expectation of

20   privacy in at least some of the information contained in

21   the individual's DNA.

22   And I suppose we can have a dispute about

23   what types of information would qualify. But I think it

24   really is settled that there are profound privacy

25   concerns raised by the government's coming into

1   possession of an individual's DNA.

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

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

4   this case is about reasonable expectation of privacy.

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

6   no search.

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

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

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

10 reasonable expectation of privacy or not.

11   MR. SHANMUGAM: Well -- Justice Scalia, I

12 didn't think I was conceding anything, but if I --

13   JUSTICE SCALIA: Well, I thought you did.

14   MR. SHANMUGAM: If I was -- let me just be

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

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

17 principal submission to this Court.

18   JUSTICE ALITO: Well, do you think the

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

20 inside somebody's cheek, as opposed to rolling

21 fingerprints? Which is the greater intrusion?

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

23 settled that intrusions into the body constitute a

24 search for Fourth Amendment purposes.

25   JUSTICE ALITO: Which is --

1   MR. SHANMUGAM: I suppose that the argument

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

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

4   fingerprints are collected. I would note,

5   parenthetically, that, in the first half an hour of this

6   argument, we heard no explanation, either by the State

7   or by the Federal government, as to their theory as to

8   why fingerprinting is constitutional.

9   Now, we --

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

11   what we -- we have been presented with in the briefs and

12   what we have heard this morning -- and, by the way, I

13   think this is perhaps the most important criminal

14   procedure case that this Court has heard in decades.

15   The -- the attorney for the State began by

16   listing a number of crimes just in Maryland that had

17   been solved using this. So this is what is at stake:

18   Lots of murders, lots of rapes that can be -- that can

19   be solved using this new technology that involves a very

20   minimal intrusion on personal privacy.

21   But why isn't this the fingerprinting of the

22   21st century? What is the difference? If it was

23   permissible and it's been -- it's been assumed to be so

24   for decades, that it is permissible to fingerprint

25   anybody who's booked, why is it not permissible to take

1   a DNA sample from anybody who is arrested?

2   MR. SHANMUGAM: Justice Alito, we think that

3   fingerprinting is distinguishable on three grounds.

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

5   contains far more information and far more personal

6   information than an individual's fingerprints. But, as

7   a doctrinal matter, we think that fingerprinting is

8   distinguishable --

9   JUSTICE ALITO: Well, as to -- as to the

10   first, in our cases involving searches for -- where a

11   urine sample is taken to determine drug use, the urine

12   can be analyzed for all sorts of things besides the

13   presence of drugs, and the Court has said, in those

14   cases, we are only going to consider that -- we are

15   considering that this is a reasonable search with

16   respect to the determination of whether the person has

17   taken drugs, not all the other information --

18   MR. SHANMUGAM: But that is because --

19   JUSTICE ALITO: -- that might be obtained

20   from it.

21   MR. SHANMUGAM: But that is because,

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

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

24   from the ordinary interests in law enforcement. And,

25   here, it is clear that the primary purpose of the

1   Maryland statute and, indeed, the similar statutes on

2   the Federal and State levels, was the ordinary interest

3   in crime control, to solve unsolved crimes.

4   And that is why those special needs cases

5   are distinguishable. And I think that that's why the

6   State, essentially, disavows any reliance on the Special

7   Needs Doctrine --

8   JUSTICE KAGAN: What are your other two

9   distinctions?

10   MR. SHANMUGAM: With regard to

11   fingerprinting, we think that, notwithstanding the

12   physical intrusion involved with taking an individual's

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

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

15   extent that this Court has addressed the question, it

16   has suggested that fingerprinting is not a search

17   because an individual has no expectation of privacy in

18   their fingerprints because their fingers are constantly

19   exposed --

20   JUSTICE BREYER: I would like a complete

21   answer to what Justice Alito and Justice Kagan both were

22   asking, I think. I mean, to summarize that, if I look,

23   in terms of intrusion, I am not talking legally, I am

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

25   argue that it is certainly a much lesser intrusion than

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

2   rolled; your -- stick out your tongue. I mean, it's

3   hard to say it's more, for me, I'm not saying for

4   others.

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

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

7   here filed by the victims that have case after case,

8   where people spent 5 years in prison, wrongly, and where

9   this system and the CODIS helped victims avoid being

10   arrested and sent to jail when they were innocent, so it

11   works both ways.

12   So, one, it's no more intrusive; two, it is

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

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

15   ask you to summarize.

16   MR. SHANMUGAM: Sure. Well --

17   JUSTICE BREYER: And, by the way, when you

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

19   there is a brief filed by leading scientists in the

20   field, and I came away from the brief thinking there

21   isn't much more information because fingerprints can be

22   abused, too.

23   Of course, you can learn loads from

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

25   learn a lot, who he was, who recognized -- you know, so

1   all these things could be abused. But I came away from

2   that brief, frankly, to think, well, in terms of the

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

4   things, photos, too.

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

6   JUSTICE BREYER: Okay. So, now, you tell

7   me, in light of that hostile question --

8   (Laughter.)

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

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

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

12   will write it down, and I'll remember it. I promise.

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

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

15   (Laughter.)

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

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

18   like to say a word about balancing, in the event that

19   the Court reaches it. Obviously, we don't think that

20   balancing is appropriate here because we don't think

21   that the Special Needs Doctrine is applicable, and we

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

23   But, with regard to fingerprinting, the

24   other reason why we think fingerprinting is different,

25   above and beyond the fact that we think the better view

1   is that fingerprinting is not a search, is because

2   fingerprinting, as it is currently practiced, does serve

3   a special need.

4   The primary purpose of fingerprinting is to

5   identify an individual who is being taken into the

6   criminal justice system.

7   JUSTICE KAGAN: So, Mr. Shanmugam, that

8   seems to me a real distinction in this case, as it's

9   been litigated. I take what the government is saying is

10   something like, give us 5 years, and those won't look

11   very different.

12   In other words, we will be able to do, in 5

13   years' time, exactly what we can do with fingerprinting,

14   except it will be, as Justice Breyer says, more

15   accurate. So we are just about 5 years ahead of that,

16   so give us a break.

17   MR. SHANMUGAM: And my response to that

18   would be that, under the Special Needs Doctrine, what is

19   relevant is not how a system could conceivably operate;

20   what is relevant is the primary purpose behind the

21   program at issue.

22   So, if the government were to come back in 5

23   years' time with a DNA testing program, the primary

24   purpose of which was pretrial supervision or

25   identification, one of these other purposes that is

1 being offered, then, sure, the analysis would be

2 different.

3   That is simply a consequence of the fact

4 that this Special Needs Doctrine, unlike the rest of the

5 Fourth Amendment, looks to purpose, namely, the purpose

6 of the program at issue.

7   JUSTICE KENNEDY: A person -- a person has

8 been arrested for a felony and is in custody, do the

9 police -- does the justice system have an interest in

10 knowing whether that person committed other crimes?

11   MR. SHANMUGAM: The justice system always

12 has an interest in law enforcement and solving crimes,

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

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

15 to this Court, which is that simply because law

16 enforcement can do certain things to arrestees, it can

17 do others.

18   The primary thing is --

19   JUSTICE KENNEDY: My question is whether or

20 not the police, who have John Doe in custody for a

21 felony, have an interest in knowing, at the outset or

22 within a few weeks' time, whether or not that person has

23 committed other crimes?

24   MR. SHANMUGAM: The difference between an

25 arrestee and an ordinary citizen, Justice Kennedy, is

1   that, as to an arrestee, the police have probable cause

2   to believe that the arrestee committed a particular

3   offense.

4   JUSTICE KENNEDY: But they also have a

5   reason for keeping him in custody.

6   MR. SHANMUGAM: Related --

7   JUSTICE KENNEDY: And my -- my question is,

8   do they have an interest -- a legitimate interest in

9   knowing if that person has committed other crimes?

10   MR. SHANMUGAM: They have that interest,

11   but, if they want to investigate other crimes, they have

12   to do what they would have to do as to an ordinary

13   citizen. They have to have a warrant or some level of

14   individualized suspicion.

15   CHIEF JUSTICE ROBERTS: There are two

16   different -- two different interests. One is we want to

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

18   sure -- we have someone in our custody, and we want to

19   be sure, before he is released back into the community,

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

21   crimes before that.

22   Now, your brief says, well, the only

23   interest here is the law enforcement interest. And I

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

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

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

2 it.

3   But if we are in a position where it now

4 takes 90 minutes -- or will soon take 90 minutes to get

5 the information back, I think that's entirely

6 different because, there, you can find out whether --

7 it's just tied in with the bail situation, do you want

8 to release him or not?

9   MR. SHANMUGAM: The touchstone of the

10 analysis, under the Special Needs Doctrine, is what was

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

12 is no evidence that pretrial supervision was a purpose

13 of any of these.

14   CHIEF JUSTICE ROBERTS: Well, that's

15 because -- that's because we are not yet at a situation

16 where it takes 90 minutes. Sure, it's not going to do

17 you any good if it's taking 4 months or whatever it took

18 in this case.

19   But, if it's at the point where it's 90

20 minutes, it would be critical to make that

21 determination.

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

23 I said to Justice Kagan, the constitutional analysis may

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

25 important to underscore that neither the State of

1   Maryland nor the Federal government identifies a single

2   instance in which a pretrial supervision decision in

3   their jurisdictions was altered as a result of the DNA

4   test.

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

6   this way. Let's -- let's say the judge or the

7   magistrate is going to make a bail determination and he

8   says, well, it's important to me to know whether you are

9   going to commit another crime.

10   So we are not saying you have to give a DNA

11 sample, but it will enter into my calculation if you

12 refuse to do it.

13   MR. SHANMUGAM: Well, outside the

14 programmatic context, ordinary Fourth Amendment rules

15 would apply. And ordinary --

16   CHIEF JUSTICE ROBERTS: Well, what does that

17 mean? Is that okay or not?

18   MR. SHANMUGAM: Well, I think, in that

19 circumstance, where there is no individualized

20 suspicion, a search cannot occur. And an

21 arrestee stands --

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

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

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

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

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

2   whatever.

3   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, Justice Kennedy, with

15 regard to arrestees, the intrusions on privacy that are

16 permissible are all intrusions that relate to the

17 arrest.

18   So to take the two principal examples, the

19 Search Incident to Arrest Doctrine, which you mentioned,

20 and searches associated with an individual's continued

21 detention, so the strip searching example, those

22 doctrines have discrete justifications that limit their

23 scope.

24   So the Search Incident to Arrest Doctrine

25 permits searches for officer safety, to prevent

1   destruction of evidence, and at least in the vehicular

2   context, to search for evidence related to the offense

3   of arrest.

4   Now, none of those rationales apply here,

5   and I would note, parenthetically, that in

6   Schmerber v. California, this Court suggested that the

7   Search Incident to Arrest Doctrine would not permit

8   searches into the body. It will permit only --

9   JUSTICE KENNEDY: But we are also talking

10   about identity. I assume that, in Maryland and in a

11   number of States, the time between release on bail and

12   return for trial is more than four months.

13   And, if it's found, as an identity matter,

14   that this person has a criminal record or that they

15   are -- suspected of serious crimes, that is a

16   mandatory ground for reconsideration of bail. And you

17   say there is no interest in that.

18   MR. SHANMUGAM: I am not disputing that the

19   government has an interest in knowing about prior

20   offenses that an individual has committed. What I am

21   simply saying is that the primary purpose of DNA

22   testing, unlike fingerprinting, is to investigate

23   unsolved crimes.

24   That is the ordinary interest in law

25   enforcement, and when the government is indicating --

1   JUSTICE GINSBURG: I thought

2   fingerprinting -- Mr. Shanmugam, I thought

3   fingerprinting was used to determine whether they -- the

4   person has a record. We have this person, and now, we

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

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

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

8   But -- but are fingerprints used to

9   determine whether the person has a prior record?

10   MR. SHANMUGAM: Fingerprints taken upon

11 booking are primarily used for the purpose of

12 identification, and, by identification, I would include

13 determining whether the individual had a prior criminal

14 record because, as IAFIS is currently structured, that

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

16 that initial search.

17   Now --

18   JUSTICE ALITO: What was the purpose of

19 fingerprinting before it was possible to make

20 fingerprint comparisons by computer?

21   MR. SHANMUGAM: Well, I think fingerprinting

22 really has, from the outset, served the purpose of

23 identification because fingerprinting really came into

24 being approximately 100 years ago because, in large

25 urban areas, officers could no longer identify

1   individuals on sight.

2   Now, to be sure, fingerprinting does serve a

3   law enforcement purpose as well. As Mr. Dreeben

4   indicated, there is a latent fingerprint database that

5   roughly corresponds to --

6   JUSTICE ALITO: Well, I would assume that,

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

8   in which fingerprinting established identification, what

9   it did in that respect was to identify the person

10   arrested on this occasion, so that, if the person was

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

12   the same person.

13   There was no way of -- no practicable way of

14   taking the fingerprints of somebody who was booked and

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

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

17   couldn't do it manually.

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

19   the purpose of fingerprinting, as it developed over

20   time, was identification in the sense that, as

21   fingerprints were being collected, individuals could

22   proceed to be identified based on prior --

23   JUSTICE SOTOMAYOR: Can we go back to --

24   JUSTICE ALITO: Yes, so you know that, on

25   day one, you have arrested -- you've arrested Mr. X, and

1   then, a year later, you arrest somebody else, and you

2   know it's Mr. X again. And DNA can do exactly the same

3   thing, except more accurately.

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

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

6   system is currently constituted, when an arrestee's

7   profile is prepared, it is compared against the offender

8   and arrestee indices, not the forensic index.

9   And, indeed, as we understand it -- and I

10 think Mr. Dreeben's discussion of this is probably

11 consistent with this, at least on the Federal level, it

12 is not permissible to take that profile and search it

13 against the offender and arrestee indices.

14   Now, that very well may occur in certain

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

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

17 really what distinguishes the way in

18 which fingerprinting is --

19   JUSTICE BREYER: I think I can totally lose

20 this because -- because I have a confusion that you can

21 clear up. There is something to what you say. I see

22 what you are saying. But what does this word

23 "identification" mean? It's used for identification.

24 We have a person, he's been arrested.

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

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

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

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

4   And, now, you say, well, what is

5 fingerprinting doing that photos aren't doing, in terms

6 of identification? What does it do, in terms of just

7 identification?

8   MR. SHANMUGAM: Sure.

9   JUSTICE BREYER: What does it do?

10   MR. SHANMUGAM: We think it means

11 determining or confirming the identity of an individual.

12   JUSTICE BREYER: What does that mean,

13 confirming his identity? We have -- you mean what?

14 What exactly?

15   MR. SHANMUGAM: Confirming, for instance, in

16 this case, that the individual in the government's

17 custody was Alonzo King.

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

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

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

21 fingerprints taken before.

22   MR. SHANMUGAM: Well, but 73 million people

23 are in the criminal offender --

24   JUSTICE BREYER: That's what it's for? To

25 determine what his name really is?

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

2   be sure, his adjudicated criminal history, which can

3   also be --

4   JUSTICE BREYER: Ah. You want to determine

5   what his name really is, plus his adjudicated criminal

6   history, and, here, we have the DNA, which I guess might

7   or might not help determine what his name really is,

8   and, with criminal history, it does about the same. And

9   also fingerprints are sometimes used to -- for unsolved

10   crimes, and they are sometimes used for unsolved crimes,

11   but your point really is more for unsolved crimes.

12   Have I got it.

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

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

15   a DNA profile -- at least as the Federal system is

16   configured -- is compared against the forensic index.

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

18   so that is really in contradistinction to how the

19   fingerprint database works.

20   JUSTICE SOTOMAYOR: Counsel, I -- I am

21   really worried about the question you haven't satisfied

22   me with, which is I agree completely that, today, it's

23   used primarily and almost exclusively for purposes of

24   solving other crimes.

25   But let's -- is this -- the question that I

1   think one of my colleagues asked, is that only because

2   technology hasn't moved fast enough?

3   You said we have to look at the

4   constitutional principles 5 years from now, when they

5   will use it to pull up a guy's criminal history, not

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

7   MR. SHANMUGAM: Sure. Well,

8   Justice Sotomayor --

9   JUSTICE SOTOMAYOR: Tell me what the -- tell

10   me what the -- why you would then say that would still

11   be unconstitutional?

12   MR. SHANMUGAM: Justice Sotomayor, assuming

13   that this Court does not accept the proposition that

14   arrestees are somehow subject to a lessened expectation

15   of privacy, the only other --

16   JUSTICE SOTOMAYOR: Right. Let's assume we

17   go under a normal Fourth Amendment, you need probable

18   cause to search.

19   MR. SHANMUGAM: Right. And the only other

20   potentially applicable exception to the principle that

21   warrantless, suspicionless searches are unconstitutional

22   is the special needs exception, and that exception looks

23   to the primary purpose of the program at issue.

24   And the mere fact that DNA testing could be

25   used for other purposes wouldn't necessarily be

1   dispositive of the inquiry. If the primary purpose of

2   DNA testing is still to investigate unsolved crimes, the

3   program would still not qualify under the Special Needs

4   Doctrine.

5   JUSTICE KAGAN: But, Mr. Shanmugam, just

6   suppose -- I mean, I guess the question is would this be

7   unconstitutional? It's not the world we are living in

8   now, but let me -- 10 years from now, the government

9   says, we are really switching over to a fingerprint

10   system -- to a DNA system, and what that system is going

11   to allow us to do is it's going to allow us to identify,

12   and it's going to allow us to bring up the old criminal

13   history, and it's going to allow us to see whether there

14   are also unsolved crimes that we can tag to this person

15   and discover that he's really, really dangerous.

16   All right? And so the government puts that

17   system into effect. Is it constitutional?

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

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

20   where DNA testing is essentially being used as

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

22   think --

23   JUSTICE SOTOMAYOR: I was interested in a

24   broader thought process, actually. Do you mind giving

25   it to me?

1   MR. SHANMUGAM: Well -- well –

2   JUSTICE SOTOMAYOR: Which is, there is

3   something inherently dangerous about DNA collection that

4   is not the same as fingerprinting.

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

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

7   question from a few minutes ago because Justice Breyer

8   had kind of asked how the analysis should work, in the

9   event that the Court were to proceed to balancing.

10   And so I just want to say a word about the

11   relevant privacy interests and the relevant governmental

12   interests and to explain why we think that the relevant

13   privacy interests outweigh those governmental interests.

14   On the privacy side of the ledger, we

15   certainly believe that there are profound privacy

16   concerns associated with the government's collection of

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

18   how much personal information is contained in the 13

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

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

21   think there can be any dispute that, when you evaluate

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

23   deal of personal information contained there. And, in

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

25   engaging in balancing.

1   Now, the government's response to that is

2   essentially the "just trust us" defense; namely, that

3   the government is not looking at all that information,

4   it is only looking at a certain subset of that

5   information. But that has never been how this Court has

6   analyzed privacy interests, at least outside the special

7   needs context.

8   Probably the closest analog is this Court's

9   decision in Kyllo v. United States, where the Court said

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

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

12   information about the intimate details of activities

13   within the home.

14   CHIEF JUSTICE ROBERTS: You -- you disclose

15   all of this intimate private information when you take a

16   drink of water and leave -- leave the glass behind.

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

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

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

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

21   Amendment search there.

22   The only difference would be that you don't

23   have the intrusion into the body that makes the question

24   of whether or not there is a search here an easy one.

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

1   governmental --

2   JUSTICE ALITO: What if someone has a bloody

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

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

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

6   MR. SHANMUGAM: The argument would be that

7   the subsequent analysis of the DNA, nevertheless, still

8   constitutes a search. And the most significant decision

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

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

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

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

13   that was lawfully in the government's custody still

14   constitutes a search.

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

16   governmental side of the balance here because I think

17   this is important. Ms. Winfree started with the

18   statistics about the efficacy of DNA testing of

19   arrestees, but our submission is, simply, that, when you

20   look at the relevant subset of cases, namely individuals

21   who have been arrested, but who are not subsequently

22   convicted of the offense of arrest, the law enforcement

23   value of DNA testing is relatively modest.

24   My understanding is that --

25   JUSTICE ALITO: But your client was

1   convicted of the offense of arrest.

2   MR. SHANMUGAM: That is correct.

3   JUSTICE ALITO: And it was a serious

4   offense, punishable by up to 10 years imprisonment.

5   MR. SHANMUGAM: Well, my client --

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

7   was sentenced to 4 years.

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

9   convicted of the crime of arrest, to be sure. But,

10   under the Maryland statute, that crime was not a serious

11   enough crime to qualify for DNA collection at that

12   point.

13   JUSTICE ALITO: For Fourth Amendment

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

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

16   sample from someone who is convicted of an offense that

17   would qualify as a felony under common law?

18   MR. SHANMUGAM: We think that it would be

19   permissible to collect DNA from any individual who has

20   been convicted and is subjected to the continued

21   supervision of the State. And that is simply because

22   those individuals have a lessened expectation of

23   privacy.

24   But just to get on the table --

25   JUSTICE GINSBURG: When they're no longer in

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

2   destroy it? They served their time, and their

3   privileges have been restored.

4   MR. SHANMUGAM: We don't -- we don't think,

5   in that circumstance, Justice Ginsburg, that the

6   government would have to destroy the DNA sample. But

7   we --

8   JUSTICE KENNEDY: Does a felon who's been

9   arrested have a reduced expectation of privacy at the

10   time of arrest?

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

12   been --

13   JUSTICE KENNEDY: Does a felon -- does a

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

15   expectation of privacy at the time of his arrest?

16   MR. SHANMUGAM: I would not say that that

17   person has a reduced expectation of privacy. What I

18   would say is that there are certain intrusions on

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

20   permissible because there are justifications unique to

21   the arrest.

22   So, in Florence, this Court permitted the

23   strip search of an individual who is being admitted into

24   the general jail population, based on the special need

25   of ensuring prison safety and preventing contraband from

1   being introduced into the prison.

2   CHIEF JUSTICE ROBERTS: Thank you, counsel.

3   Ms. Winfree, you have 3 minutes remaining.

4   REBUTTAL ARGUMENT OF KATHERINE WINFREE

5   ON BEHALF OF THE PETITIONER

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

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

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

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

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

11   we are very, very close to that.

12   And I wanted to just address a couple of the

13   questions that arose during Respondent's presentation.

14   Justice Kennedy, the State does have a compelling need

15   and a compelling interest in knowing who is in its

16   custody, and arrestees do not have a legitimate

17   expectation of privacy in their identity.

18   We have a legitimate and compelling need to

19   identify suspects and to aid in solving crimes.

20   And our -- and our definition of what

21   identification is, is somewhat broader than

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

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

24   CODIS DNA profile, those 26 numbers, so that -- in our

25   view, that's a broader definition of -- of identity.

1   And I wanted also, just finally, to address

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

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

4   evidence is used to identify rapes and murderers.

5   Fingerprints typically do not solve those kinds of

6   crimes.

7   And, if the primary purpose of

8   fingerprinting is just to identify, it also is used --

9   fingerprinting, now, is used -- the prints are compared

10   against the latent database in IAFIS, and they are used

11   to solve crimes. But they typically don't solve the

12   kind of crimes that we are talking about here, and it

13   wouldn't have been solved in Mr. -- in Mr. King's case.

14   CHIEF JUSTICE ROBERTS: How can I base a

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

16   2 years? You say, in 2 years, we will have this rapid

17   DNA available, but we don't now.

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

19   have today?

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

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

22   certainly, with respect to a bail determination, we will

23   be able to make it more rapidly at the time that that

24   rapid DNA comes into effect. But --

25   JUSTICE SCALIA: Yes, but, if we believe

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

2   legitimate or not, you can't demonstrate that the --

3   that the purpose is immediate identification of the

4   people coming into custody, you just can't demonstrate

5   that now. Maybe you can in 2 years.

6   The purpose now is -- is the purpose you

7   began your presentation with, to catch the bad guys,

8   which is a good thing. But -- you know, the Fourth

9   Amendment sometimes stands in the way.

10   MS. WINFREE: It has a corollary purpose,

11   Justice Scalia. What we are suggesting and arguing is

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

13   but in solving crimes and connecting an arrestee to a

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

15   about whether to release that individual.

16   And, as Mr. Dreeben said, bail modifications

17   can happen; they do happen all the time. And, in

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

19   happening before rapid DNA. Right now, we are able to

20   make that determination in a period between 11 and

21   17 days.

22   So we are not asking you to base your

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

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

25   bail determinations now, and, in fact, they are

1 important for where we house prisoners and -- and how we

2 supervise them in custody.

3 　　　　　　CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 　　　　　　The case is submitted.

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

6 above-entitled matter was submitted.)

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