CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF

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CHAPTER ONE

INSERT after NOTE (6) on p. 34:

(7)(a) In *Florida v. Jardines*, 569 U.S. ____, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013), the question was "whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of a home is a 'search' within the meaning of the Fourth Amendment." Based on "an unverified tip" about in-home marijuana growing, detectives took a trained canine to Jardines's front porch. The dog alerted, indicating the presence of narcotics. Marijuana plants were found during a search of the home pursuant to a warrant issued on the basis of what had been learned from the dog sniff. A 5–4 majority of the Court concluded that the initial investigation with the dog was a Fourth Amendment search.

Relying on the analysis in *Jones*, Justice Scalia observed that *Katz* had "add[ed] to the baseline" of the Fourth Amendment which provides protection when "'the Government obtains information by physically intruding' on persons, houses, papers, or effects." Based on the baseline "principle," *Jardines* was "a straightforward" case. The officers "gathered . . . information by physically entering and occupying" the curtilage of the home "to engage in conduct not explicitly or implicitly permitted by the homeowner." Their intrusion into that "constitutionally protected area" was "unlicensed,"—that is, Jardines had not "given his leave (even implicitly) for them to do" what they did.

Ordinarily, an "implicit license" permits a visitor "to approach [a] home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." On the other hand, "[t]here is no customary invitation" to bring "a trained police dog to explore the area around the home in hopes of discovering incriminating evidence"—that is, "to engage in canine forensic investigation." The "scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose." The "behavior" in this case—the "use of the dog" to sniff for drugs, unlike a knock on the front door, was not "routine." Justice Scalia conceded that an officer does not conduct "a Fourth Amendment search" by "approach[ing a] home in order to speak with the occupant, *because all are invited to do that*." The fact that the officer has the "'purpose of discovering information'" while engaged in such "permitted conduct" does not alter that conclusion. Bringing a drug-sniffing dog to the door, however, is different because the "background social norms that invite a visitor to the front door do not invite him there to conduct a search."

In sum, the resolution of the threshold issue in *Jardines* "depend[ed] upon whether the officers had an implied license to enter the porch, which in turn depend[ed] upon the purpose for which they entered." Because "their behavior objectively reveal[ed] a purpose to conduct a search, which is not what anyone would think he had a license to do[,]" it was subject to Fourth Amendment regulation.

Having concluded that the *Jones* standard for whether a search had occurred was satisfied, the Court did not "need [to] decide whether the . . . investigation of [the] home violated [the homeowner's] expectation of privacy under *Katz*." It was "enough" that "officers learned what they learned only by physically intruding on [the] property to gather evidence."

In a separate concurrence, three members of the majority, Justices Kagan, Ginsburg, and Sotomayor, agreed that the officers' "activity" was a search because it was "a trespass." In their view, however, even without the physical intrusion, the use of the dog to detect narcotics in the home would have constituted a search because it was "an invasion of privacy" that met the *Katz* standard.

Justice Alito authored a dissent joined by Chief Justice Roberts, Justice Kennedy, and Justice Breyer. According to the dissenters, neither "trespass law" nor "the reasonable-expectations-of-privacy test" of *Katz* supported the conclusion that the officers conducted a search. The majority's reasoning was flawed because its "interpretation of the scope of the [officers'] license" to approach the house was "unfounded." The dissenters conceded that a license to approach a home, "has certain spatial and temporal limits." In their view, the acknowledgment that officers may knock on a door "to obtain evidence" shows that "gathering evidence . . . is a lawful activity that falls within the scope" of that license. The Court had provided "no meaningful" distinction between "the 'objective purpose'" of a "'knock and talk'" by the officers and the "'objective purpose'" of officers who bring a drug-sniffing canine to a front door. Consequently, "the Court's 'objective purpose' argument [could not] stand." Because the officers in *Jardines* stayed on "the customary path" to the front door, "did not approach in the middle of the night," and "remained . . . for only a short period," they did not "exceed the scope of the license to approach [the] front door."

Justice Alito pointed out that the majority's holding did not govern situations where "a dog alerts while on a public sidewalk or street or in the corridor of a building to which the dog and handler have been lawfully admitted." The concurrers' privacy-based analysis, however, "would have a much wider reach" and would deem dog sniffs of homes to be searches in the absence of physical intrusions into protected spaces. In the dissent's view, this analysis was misguided because "occupants of a dwelling" do not have "a reasonable expectation of privacy in odors that emanate from the dwelling and reach spots where members of the public may lawfully stand." There was no reason to "draw a line between odors that can be smelled by humans and those that are detectible only by dogs."

(b) Two years after *Jardines*, a unanimous Court, in a per curiam opinion, relied solely upon the *Jones* physical intrusion doctrine to resolve another interesting threshold question. In *Grady v. North Carolina*, 575 U.S. ___, 135 S.Ct. 1368, 191 L.Ed.2d 459 (2015), a man who had been convicted of sex offenses and had served his sentence was ordered to appear for a hearing to determine whether he should be subjected to satellite-

based monitoring as a recidivist sex offender. He argued that the monitoring program—which would force him to wear tracking devices at all times—would violate his Fourth Amendment right to be free from unreasonable searches and seizures. The North Carolina courts rejected his claim, concluding essentially that there was no search involved. The Supreme Court reversed.

According to the Justices, *Jones* and *Jardines* held that where "'the Government obtains information by physically intruding on a constitutionally protected area, . . . a search'" occurs. Consequently, a state conducts a search when it "attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." It did not matter that the monitoring program was "civil in nature." Precedent made it clear that "the government's purpose in collecting information does not control whether the method . . . constitutes a search." Moreover, both the name of the monitoring program ("satellite-based monitoring") and the text of the statute authorizing the monitoring, (which specified that the "program shall use a system that provides . . . [t]ime-correlated and continuous tracking of the geographic location of the subject" and "reporting of [the] subject's violations of . . . schedule or location requirements") belied the state's contention that there was no evidence that it was "acting to obtain information." The program was "plainly designed to obtain information," and because "it [did] so by physically intruding on a subject's body, it effect[ed] a Fourth Amendment search."

CHAPTER TWO

INSERT after NOTE (5) on p. 87:

(6) The issue in *Florida v. Harris*, 568 U.S. ____, 133 S.Ct. 1050, 185 L.Ed.2d 61 (2013), was "how a court should determine if the 'alert' of a drug-detection dog . . . provides probable cause to search." The Florida Supreme Court had concluded that "to demonstrate a dog's reliability" the "'State must present . . . the dog's training and certification records, an explanation of the meaning of the particular training and certification, field performance records (including any unverified alerts), and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability.'" Florida had "stressed the need for 'evidence of the dog's performance history,' including records" of alerts that did not result in the discovery of drugs. According to a unanimous Supreme Court, these demands were "inconsistent with the 'flexible, common-sense standard' of probable cause" and Florida's approach was the "antithesis of [the] totality-of-the-circumstances analysis" prescribed in *Gates* and other opinions.

The Court reasoned that it had "consistently . . . rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." *Gates* had abandoned an "inflexible checklist" method for determining the "reliability" of "human informants." A checklist approach was equally inappropriate for assessments of a canine's "reliability." Although records of a dog's performance in the field "may sometimes be relevant," Florida's treatment of those records "as the gold standard in evidence" was misguided because "in most cases they have relatively limited import." A "better measure of a dog's reliability" is his performance "in controlled testing environments." In fact, a canine's "satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert." "If a bona fide organization has certified a dog after testing his reliability in a controlled setting," or, even without "formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs, a court can presume (subject to . . . conflicting evidence . . .) that the dog's alert provides probable cause to search." Of course, a defendant "must have an opportunity to challenge . . . evidence of a dog's reliability" in general or in his or her particular case.

In sum, when a probable cause determination depends on a dog's alert to the presence of contraband, a court should "evaluate . . . all the circumstances," avoiding "inflexible . . . evidentiary requirements." Ultimately, "[t]he question . . . is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test."

CHAPTER THREE

INSERT after NOTE (4) on p. 135:

(5) In a highly controversial 2013 ruling in *Maryland v. King*, 569 U.S. ____, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013), a bare five-Justice majority held that "[w]hen officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment." The procedure was deemed a reasonable search in the absence of either a warrant or any individualized suspicion about the person tested.

The majority reached this conclusion by balancing the intrusiveness of the testing procedure against the interests it served. The search of the human body involved in a "buccal swab" of the arrestee's cheek to obtain a DNA sample was characterized as "negligible," "minimal," and "brief." Moreover, the privacy intrusion occasioned by the analysis of the sample was limited by the fact that the analysis conducted could not reveal genetic information and that the relevant statute allowed the collection and storage only of records relating to identifying individuals. The majority asserted that DNA testing of this sort serves "significant state interests"—"identifying [the arrestee] not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody." According to the majority, "the interest served by the Maryland DNA Collection Act" was "well established: the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody." It was "beyond dispute that 'probable cause provides legal justification'" not only to arrest a person, but also "'for a brief period of detention to take the administrative steps incident to arrest.'" When officers have probable cause "to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving . . . interests" that are sufficiently weighty to render the limited intrusion occasioned by DNA testing reasonable.

It bears mention that the Court's holding was limited to DNA testing of individuals arrested and held for *serious* offenses. At one point in his reasoning, Justice Kennedy stressed the significance of the fact that an arrestee subjected to the procedure was "already in valid police custody for a serious offense supported by probable cause." The majority, however, did not specify what constituted a serious offense. Maryland authorized the DNA testing only for those arrested for the commission or attempted commission of crimes of violence—"murder, rape, first-degree assault, kidnaping, arson, sexual assault, and a variety of other serious crimes"—or for burglaries or attempted burglaries.

In a dissent joined by three other Justices, Justice Scalia pointedly challenged the majority's conclusion that the DNA testing at issue promoted "identification" of arrestees.

Instead, it served "'crime detection'" purposes, not "'special needs,'" and contended that the Fourth Amendment did not permit suspicionless searches that serve such investigatory purposes. Those interested in a more complete understanding of the majority's and dissent's reasoning can find edited versions of the *King* opinions in Chapter 5, subsection [B].

CHAPTER FOUR

INSERT after NOTE (4) on p. 210:

RILEY v. CALIFORNIA
United States Supreme Court
573 U.S. ____, ____S.Ct. ____, ____ L.Ed.2d____ (2014)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

These two cases raise a common question: whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.

I

A

In the first case, petitioner David Riley was stopped by a police officer for driving with expired registration tags. In the course of the stop, the officer also learned that Riley's license had been suspended. The officer impounded Riley's car, pursuant to department policy, and another officer conducted an inventory search of the car. Riley was arrested for possession of concealed and loaded firearms when that search turned up two handguns under the car's hood. An officer searched Riley incident to the arrest and found items associated with the "Bloods" street gang. He also seized a cell phone from Riley's pants pocket. According to Riley's uncontradicted assertion, the phone was a "smart phone," a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity. The officer accessed information on the phone and noticed that some words (presumably in text messages or a contacts list) were preceded by the letters "CK"—a label that, he believed, stood for "Crip Killers," a slang term for members of the Bloods gang.

At the police station about two hours after the arrest, a detective specializing in gangs further examined the contents of the phone. The detective . . . [discovered gang-related videos and some] photographs of Riley standing in front of a car [that officers] suspected had been involved in a shooting a few weeks earlier.

Riley was ultimately charged, in connection with that earlier shooting, with firing at an occupied vehicle, assault with a semiautomatic firearm, and attempted murder. The State alleged that Riley had committed those crimes for the benefit of a criminal street gang, an aggravating factor that carries an enhanced sentence. Prior to trial, Riley moved to suppress all evidence that the police had obtained from his cell phone. He contended that the searches of his phone violated the Fourth Amendment, because they had been performed without a

warrant and were not otherwise justified by exigent circumstances. The trial court rejected that argument. At Riley's trial, police officers testified about the photographs and videos found on the phone, and some of the photographs were admitted into evidence. Riley was convicted on all three counts and received an enhanced sentence of 15 years to life in prison.

The California Court of Appeal affirmed. . . . .

The California Supreme Court denied Riley's petition for review and we granted certiorari.

B

In the second case, a police officer performing routine surveillance observed respondent Brima Wurie make an apparent drug sale from a car. Officers subsequently arrested Wurie and took him to the police station. At the station, the officers seized two cell phones from Wurie's person. The one at issue here was a "flip phone," a kind of phone that is flipped open for use and that generally has a smaller range of features than a smart phone. Five to ten minutes after arriving at the station, the officers noticed that the phone was repeatedly receiving calls from a source identified as "my house" on the phone's external screen. A few minutes later, they opened the phone and saw a photograph of a woman and a baby set as the phone's wallpaper. They pressed one button on the phone to access its call log, then another button to determine the phone number associated with the "my house" label. They next used an online phone directory to trace that phone number to an apartment building. When the officers went to the building, they saw Wurie's name on a mailbox and observed through a window a woman who resembled the woman in the photograph on Wurie's phone. They secured the apartment while obtaining a search warrant and, upon later executing the warrant, found and seized 215 grams of crack cocaine, marijuana, drug paraphernalia, a firearm and ammunition, and cash.

Wurie was charged with distributing crack cocaine, possessing crack cocaine with intent to distribute, and being a felon in possession of a firearm and ammunition. He moved to suppress the evidence obtained from the search of the apartment, arguing that it was the fruit of an unconstitutional search of his cell phone. The District Court denied the motion. Wurie was convicted on all three counts and sentenced to 262 months in prison.

A divided panel of the First Circuit reversed the denial of Wurie's motion to suppress and vacated Wurie's convictions for possession with intent to distribute and possession of a firearm as a felon. . . . .

We granted certiorari.

II

. . . .

. . . "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006). Our cases have determined that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 653 (1995). . . . . In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. See *Kentucky* v. *King*, 563 U. S. ___, ___ (2011) (slip op., at 5–6).

The two cases before us concern the reasonableness of a warrantless search incident to a lawful arrest. In 1914, this Court first acknowledged in dictum "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." *Weeks* v. *United States*, 232 U. S. 383, 392. Since that time, it has been well accepted that such a search constitutes an exception to the warrant requirement. Indeed, the label "exception" is something of a misnomer in this context, as warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant. See 3 W. LaFave, Search and Seizure §5.2(b), p. 132, and n. 15 (5th ed. 2012).

Although the existence of the exception for such searches has been recognized for a century, its scope has been debated for nearly as long. See *Arizona* v. *Gant*, 556 U. S. 332, 350 (2009) (noting the exception's "checkered history"). That debate has focused on the extent to which officers may search property found on or near the arrestee. Three related precedents set forth the rules governing such searches:

[The Court then reviewed and summarized *Chimel*, *Robinson*, and *Gant*.]

. . . .

III

These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. A smart phone of the sort taken from Riley was unheard of ten years ago; a significant majority of American adults now own such phones. Even less sophisticated phones like Wurie's, which have already faded in popularity since Wurie was arrested in 2007, have been around for less than 15 years. Both phones are based on technology nearly inconceivable just a few decades ago, when *Chimel* and *Robinson* were decided. Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming* v. *Houghton*, 526 U. S. 295, 300 (1999). Such a balancing of interests supported the search incident to arrest exception in *Robinson*, and a mechanical application of *Robinson* might well support the

warrantless searches at issue here.

But while *Robinson*'s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, *Robinson* concluded that the two risks identified in *Chimel*—harm to officers and destruction of evidence—are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, *Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.

We therefore decline to extend *Robinson* to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search.

A

We first consider each *Chimel* concern in turn. In doing so, we do not overlook *Robinson*'s admonition that searches of a person incident to arrest, "while based upon the need to disarm and to discover evidence," are reasonable regardless of "the probability in a particular arrest situation that weapons or evidence would in fact be found." 414 U. S., at 235. Rather than requiring the "case-by-case adjudication" that *Robinson* rejected, *ibid.*, we ask instead whether application of the search incident to arrest doctrine to this particular category of effects would "untether the rule from the justifications underlying the *Chimel* exception," *Gant*, *supra*, at 343.

1

Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one. Perhaps the same might have been said of the cigarette pack seized from Robinson's pocket. Once an officer gained control of the pack, it was unlikely that Robinson could have accessed the pack's contents. But unknown physical objects may always pose risks, no matter how slight, during the tense atmosphere of a custodial arrest. The officer in *Robinson* testified that he could not identify the objects in the cigarette pack but knew they were not cigarettes. Given that, a further search was a reasonable protective measure. No such unknowns exist with respect to digital data. . . . .

The United States and California both suggest that a search of cell phone data might

help ensure officer safety in more indirect ways, for example by alerting officers that confederates of the arrestee are headed to the scene. There is undoubtedly a strong government interest in warning officers about such possibilities, but neither the United States nor California offers evidence to suggest that their concerns are based on actual experience. The proposed consideration would also represent a broadening of *Chimel*'s concern that an *arrestee himself* might grab a weapon and use it against an officer "to resist arrest or effect his escape." 395 U. S., at 763. And any such threats from outside the arrest scene do not "lurk[ ] in all custodial arrests." *Chadwick*, 433 U. S., at 14–15. Accordingly, the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board. To the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances.

2

The United States and California focus primarily on the second *Chimel* rationale: preventing the destruction of evidence. Both Riley and Wurie concede that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant. See Brief for Petitioner in No. 13–132, p. 20; Brief for Respondent in No. 13–212, p. 41. That is a sensible concession. See *Illinois* v. *McArthur*, 531 U. S. 326, 331–333 (2001); *Chadwick*, *supra*, at 13, and n. 8. And once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.

The United States and California argue that information on a cell phone may nevertheless be vulnerable to two types of evidence destruction unique to digital data—remote wiping and data encryption. Remote wiping occurs when a phone, connected to a wireless network, receives a signal that erases stored data. This can happen when a third party sends a remote signal or when a phone is preprogrammed to delete data upon entering or leaving certain geographic areas (so-called "geofencing"). Encryption is a security feature that some modern cell phones use in addition to password protection. When such phones lock, data becomes protected by sophisticated encryption that renders a phone all but "unbreakable" unless police know the password.

As an initial matter, these broader concerns about the loss of evidence are distinct from *Chimel*'s focus on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach. With respect to remote wiping, the Government's primary concern turns on the actions of third parties who are not present at the scene of arrest. And data encryption is even further afield. There, the Government focuses on the ordinary operation of a phone's security features, apart from *any* active attempt by a defendant or his associates to conceal or destroy evidence upon arrest.

We have also been given little reason to believe that either problem is prevalent. The briefing reveals only a couple of anecdotal examples of remote wiping triggered by an arrest.

Similarly, the opportunities for officers to search a password-protected phone before data becomes encrypted are quite limited. Law enforcement officers are very unlikely to come upon such a phone in an unlocked state because most phones lock at the touch of a button or, as a default, after some very short period of inactivity. This may explain why the encryption argument was not made until the merits stage in this Court, and has never been considered by the Courts of Appeals.

Moreover, in situations in which an arrest might trigger a remote-wipe attempt or an officer discovers an unlocked phone, it is not clear that the ability to conduct a warrantless search would make much of a difference. The need to effect the arrest, secure the scene, and tend to other pressing matters means that law enforcement officers may well not be able to turn their attention to a cell phone right away. See Tr. of Oral Arg. in No. 13–132, at 50; see also Brief for United States as *Amicus Curiae* in No. 13–132, at 19. Cell phone data would be vulnerable to remote wiping from the time an individual anticipates arrest to the time any eventual search of the phone is completed, which might be at the station house hours later. Likewise, an officer who seizes a phone in an unlocked state might not be able to begin his search in the short time remaining before the phone locks and data becomes encrypted.

In any event, as to remote wiping, law enforcement is not without specific means to address the threat. Remote wiping can be fully prevented by disconnecting a phone from the network. There are at least two simple ways to do this: First, law enforcement officers can turn the phone off or remove its battery. Second, if they are concerned about encryption or other potential problems, they can leave a phone powered on and place it in an enclosure that isolates the phone from radio waves. . . . .

To the extent that law enforcement still has specific concerns about the potential loss of evidence in a particular case, there remain more targeted ways to address those concerns. If "the police are truly confronted with a 'now or never' situation,"—for example, circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent circumstances to search the phone immediately. *Missouri* v. *McNeely*, 569 U. S. ___, ___ (2013) (slip op., at 10) (quoting *Roaden* v. *Kentucky*, 413 U. S. 496, 505 (1973); some internal quotation marks omitted). Or, if officers happen to seize a phone in an unlocked state, they may be able to disable a phone's automatic-lock feature in order to prevent the phone from locking and encrypting data. . . . .

B

The search incident to arrest exception rests not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody. . . . .

The fact that an arrestee has diminished privacy interests does not mean that the

Fourth Amendment falls out of the picture entirely. Not every search "is acceptable solely because a person is in custody." *Maryland* v. *King*, 569 U. S. ___, ___ (2013) (slip op., at 26). To the contrary, when "privacy-related concerns are weighty enough" a "search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." *Ibid.* . . . .

Robinson is the only decision from this Court applying *Chimel* to a search of the contents of an item found on an arrestee's person. . . . . Lower courts applying *Robinson* and *Chimel*, however, have approved searches of a variety of personal items carried by an arrestee. See, *e.g., United States* v. *Carrion*, 809 F. 2d 1120, 1123, 1128 (CA5 1987) (billfold and address book); *United States* v. *Watson*, 669 F. 2d 1374, 1383–1384 (CA11 1982) (wallet); *United States* v. *Lee*, 501 F. 2d 890, 892 (CADC 1974) (purse).

The United States asserts that a search of all data stored on a cell phone is "materially indistinguishable" from searches of these sorts of physical items. That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

1

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers. One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk of the sort held to require a search warrant in *Chadwick*, *supra*, rather than a container the size of the cigarette package in *Robinson*.

But the possible intrusion on privacy is not physically limited in the same way when it comes to cell phones. The current top-selling smart phone has a standard capacity of 16 gigabytes (and is available with up to 64 gigabytes). Sixteen gigabytes translates to millions of pages of text, thousands of pictures, or hundreds of videos. Cell phones couple that capacity with the ability to store many different types of information: Even the most basic

phones that sell for less than $20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on. We expect that the gulf between physical practicability and digital capacity will only continue to widen in the future.

The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

Finally, there is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception. According to one poll, nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower. A decade ago police officers searching an arrestee might have occasionally stumbled across a highly personal item such as a diary. But those discoveries were likely to be few and far between. Today, by contrast, it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate. Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case.

Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building.

Mobile application software on a cell phone, or "apps," offer a range of tools for managing detailed information about all aspects of a person's life. There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps

for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life. There are popular apps for buying or selling just about anything, and the records of such transactions may be accessible on the phone indefinitely. There are over a million apps available in each of the two major app stores; the phrase "there's an app for that" is now part of the popular lexicon. The average smart phone user has installed 33 apps, which together can form a revealing montage of the user's life.

. . . . [A] cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.

2

To further complicate the scope of the privacy interests at stake, the data a user views on many modern cell phones may not in fact be stored on the device itself. Treating a cell phone as a container whose contents may be searched incident to an arrest is a bit strained as an initial matter. But the analogy crumbles entirely when a cell phone is used to access data located elsewhere, at the tap of a screen. That is what cell phones, with increasing frequency, are designed to do by taking advantage of "cloud computing." Cloud computing is the capacity of Internet-connected devices to display data stored on remote servers rather than on the device itself. . . . .

The United States concedes that the search incident to arrest exception may not be stretched to cover a search of files accessed remotely—that is, a search of files stored in the cloud. Such a search would be like finding a key in a suspect's pocket and arguing that it allowed law enforcement to unlock and search a house. But officers searching a phone's data would not typically know whether the information they are viewing was stored locally at the time of the arrest or has been pulled from the cloud.

. . . . The possibility that a search might extend well beyond papers and effects in the physical proximity of an arrestee is yet another reason that the privacy interests here dwarf those in *Robinson*.

C

Apart from their arguments for a direct extension of *Robinson*, the United States and California offer various fallback options for permitting warrantless cell phone searches under certain circumstances. Each of the proposals is flawed and contravenes our general preference to provide clear guidance to law enforcement through categorical rules. . . . .

The United States first proposes that the *Gant* standard be imported from the vehicle context, allowing a warrantless search of an arrestee's cell phone whenever it is reasonable to believe that the phone contains evidence of the crime of arrest. But *Gant* relied on

"circumstances unique to the vehicle context" to endorse a search solely for the purpose of gathering evidence. 556 U. S., at 343. JUSTICE SCALIA's *Thornton* opinion, on which *Gant* was based, explained that those unique circumstances are "a reduced expectation of privacy" and "heightened law enforcement needs" when it comes to motor vehicles. 541 U. S., at 631; see also *Wyoming* v. *Houghton*, 526 U. S., at 303–304. For reasons that we have explained, cell phone searches bear neither of those characteristics.

At any rate, a *Gant* standard would prove no practical limit at all when it comes to cell phone searches. In the vehicle context, *Gant* generally protects against searches for evidence of past crimes. See 3 W. LaFave, Search and Seizure §7.1(d), at 709, and n. 191. In the cell phone context, however, it is reasonable to expect that incriminating information will be found on a phone regardless of when the crime occurred. Similarly, in the vehicle context *Gant* restricts broad searches resulting from minor crimes such as traffic violations. See *id.,* §7.1(d), at 713, and n. 204. That would not necessarily be true for cell phones. It would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone. Even an individual pulled over for something as basic as speeding might well have locational data dispositive of guilt on his phone. An individual pulled over for reckless driving might have evidence on the phone that shows whether he was texting while driving. The sources of potential pertinent information are virtually unlimited, so applying the *Gant* standard to cell phones would in effect give "police officers unbridled discretion to rummage at will among a person's private effects." 556 U. S., at 345.

The United States also proposes a rule that would restrict the scope of a cell phone search to those areas of the phone where an officer reasonably believes that information relevant to the crime, the arrestee's identity, or officer safety will be discovered. This approach would again impose few meaningful constraints on officers. The proposed categories would sweep in a great deal of information, and officers would not always be able to discern in advance what information would be found where.

We also reject the United States' final suggestion that officers should always be able to search a phone's call log, as they did in Wurie's case. . . . . There is no dispute here that the officers engaged in a search of Wurie's cell phone. Moreover, call logs typically contain more than just phone numbers; they include any identifying information that an individual might add, such as the label "my house" in Wurie's case.

. . . .

IV

We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost. Our

holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. Our cases have historically recognized that the warrant requirement is "an important working part of our machinery of government," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge* v. *New Hampshire*, 403 U. S. 443, 481 (1971). Recent technological advances similar to those discussed here have, in addition, made the process of obtaining a warrant itself more efficient.

Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone. "One well-recognized exception applies when '"the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *Kentucky* v. *King*, 563 U. S., at ___ (slip op., at 6) (quoting *Mincey* v. *Arizona,* 437 U. S. 385, 394 (1978)). . . . .

. . . . The critical point is that, unlike the search incident to arrest exception, the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case.

* * *

Our cases have recognized that the Fourth Amendment was the founding generation's response to the reviled "general warrants" and "writs of assistance" of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity. Opposition to such searches was in fact one of the driving forces behind the Revolution itself. . . . .

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life," *Boyd*, [*v. United States*, 116 U. S. 616, 630 (1886)]. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

We reverse the judgment of the California Court of Appeal in No. 13–132 and remand the case for further proceedings not inconsistent with this opinion. We affirm the judgment of the First Circuit in No. 13–212.

It is so ordered.

[JUSTICE ALITO's opinion, concurring in part and concurring in the judgment, has been omitted.]

NOTE

In *Birchfield v. North Dakota*, 579 U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d __ (2016), the Justices again addressed the scope of the authority to search a person incident to a lawful arrest. A majority concluded that "incident to a lawful arrest for drunk driving" it is reasonable to administer "a breath test, but not a blood test" for evidence of intoxication. The Court reached this conclusion based on the balancing approach employed in *Riley*. According to the *Birchfield* majority, both breath and blood tests constitute searches. Breath tests are reasonable incident to arrests because the state interest in preventing drunk driving outweighs the intrusion on the individual. "The impact of breath tests on privacy is slight, and the need for [blood alcohol concentration] testing is great." Blood tests, however, are unreasonable incident to arrests because they are "significantly more intrusive," and, "in light of the availability of the less invasive alternative of a breath test," the state's interest in and need for a blood test do not outweigh that intrusion. Blood tests are permissible only if officers secure a search warrant or another exception to the warrant rule---the exigent circumstances exception, for example---applies. The Justices also concluded that a warrantless blood draw could not be justified on the basis of a motorist's "implied consent." In their view, "motorists may [not] be deemed to have consented" to "an intrusive blood test" on the basis of "a decision to drive on public roads."

Because breath tests are constitutional incident to lawful drunk driving arrests, it is permissible to impose criminal penalties for refusing to submit to such tests. On the other hand, the unconstitutionality of blood tests incident to arrest means that jurisdictions may not impose criminal penalties for refusing those tests.

Justices Sotomayor and Ginsburg expressed the view that neither blood nor breath tests were reasonable incident to lawful arrests. Justice Thomas asserted that the majority's search incident to arrest analysis was misguided, and that, as a "*per se* rule," both breath and blood tests of "driver[s] suspected of drunk driving are constitutional under the exigent-circumstances exception to the warrant requirement."

INSERT after NOTE (3) on p. 245:

(4) The Court provided further insights into the exigent circumstances exception and its operation in a particular context in *Missouri v. McNeely*, 569 U.S. ____, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). After arresting McNeely for driving under the influence, an officer, without obtaining a search warrant, took him to a hospital where his blood was drawn. Subsequent laboratory testing established that his blood alcohol content "was well above the legal limit." Lower courts had split over "the question whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations." The Supreme Court rejected a categorical rule that there was sufficient exigency to justify warrantless blood draws in every drunk-driving case.

The Justices acknowledged that one type of exigency was the need "to prevent the imminent destruction of evidence." In that situation, as in other varieties of exigent circumstances, a warrantless search "is potentially reasonable because" of a "'compelling need for official action and no time to secure a warrant.'" In general, the determination of "whether a law enforcement officer faced an emergency that justified acting without a warrant" must be based on "the totality of circumstances." Without the "established justification" provided by a warrant, the Fourth Amendment reasonableness requirement "demands" evaluation of "each case of alleged exigency based 'on its own facts and circumstances.'" Put simply, the "general exigency exception . . . naturally calls for a case-specific inquiry."

The State conceded that a case-specific, totality approach was ordinarily required, but argued that the "inherently evanescent" nature of blood alcohol content evidence justified "a *per se* rule for blood testing in drunk-driving cases." The contention was that "so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable . . . to obtain [a] blood sample without a warrant." The Court was unpersuaded, opining that in cases "where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." The categorical rule proposed entailed "'considerable overgeneralization.'" Moreover, this context was "different in [two] critical respects from other destruction-of-evidence cases." First, unlike other evidence destruction scenarios that involve a "suspect [with] control over easily disposable evidence," blood alcohol evidence destruction is the result of "natural[] dissipat[ion] over time in a gradual and relatively predictable manner." In addition, because an officer "must typically transport . . . a suspect to a medical facility and obtain assistance" from a medically trained person, "some delay . . . is inevitable regardless of whether . . . officers are required to obtain a warrant." Consequently, there are "situation[s] in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can . . . secure a warrant while the suspect is being transported to a medical facility by another officer." In such situations, there is "no plausible justification for an exception to the warrant requirement."

"In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, . . . it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of circumstances."

In a separate opinion, Chief Justice Roberts, Justice Breyer, and Justice Alito agreed that a categorical approach was unacceptable. However, to provide more guidance for officers, they proposed a more "straightforward [approach]: If there is time to secure a warrant *before blood can be drawn* the police must seek one. If an officer could reasonably conclude that there is not sufficient time to seek and receive a warrant, or he applies for one but does not receive a response *before blood can be drawn*, a warrantless blood draw may ensue." (Emphasis added.)

Justice Thomas alone agreed that a *per se* rule of exigency justified warrantless blood draws in all drunk-driving investigations.

[Those wishing to read edited versions of the *McNeely* opinions can find them in Chapter 5, subsection [C].]

INSERT after NOTE 4 on p. 346:

(5) The Court's opinion and ruling in *Fernandez v. California*, 571 U.S. ___, 134 S.Ct. 1126, 188 L.Ed.2d 25 (2014), provide powerful evidence that the qualification upon third-party consent authority announced in *Randolph* is exceedingly narrow.

Fernandez, who was physically present in his apartment, objected to a police entry. Based on suspicion that he had assaulted a woman who also lived in the apartment, officers arrested Fernandez and took him to the police station for booking. Approximately one hour after the arrest, one officer returned to the apartment, informed the woman of Fernandez's arrest, and obtained her consent to a search of the apartment. During the search, the officer found evidence that incriminated Fernandez. California courts rejected Fernandez's contention that the search had violated his Fourth Amendment rights. A six-Justice majority agreed, holding that despite Fernandez's objection to a search of the apartment and his removal by the police, the consent given by the woman—a third-party with authority to consent—rendered the search reasonable.

According to the majority, "consent by one resident of jointly occupied premises is generally sufficient to justify a warrantless search." In *Randolph*, the Court did "recognize[] a narrow exception to this rule," holding "that '*a physically present inhabitant's* express refusal of consent to a police search [of his home] is dispositive as to him, regardless of the consent of a fellow occupant.' (emphasis added)." The *Randolph* opinion, however, "went to great lengths to make clear that its holding was limited to situations in which the objecting occupant is present."

Although Fernandez "was not present when [his co-occupant] consented," he offered two reasons why *Randolph* controlled in his case. He first claimed "that his absence should not matter since he was absent only because the police had taken him away." He also argued that "it was sufficient that he [had] objected to the search while he was still present." According to the majority, "[n]either of these arguments [was] sound."

Randolph did "suggest[] in dictum that consent by one occupant might not be sufficient if 'there is evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection.'" The Court did "not believe that th[is] statement should be read to suggest that improper motive may invalidate objectively justified removal." It was "best understood not to require an inquiry into the subjective intent of officers who detain or arrest a potential objector but instead to refer to situations in which the removal of a potential objector is not objectively reasonable." Under the "test . . . of objective reasonableness," Fernandez's "argument collapse[d]" because he did "not contest . . . that the police had reasonable grounds for removing him from the apartment" or "the existence of probable cause" for his arrest. The majority held "that an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason."

According to the Court, Fernandez's second contention—"that his objection . . . remained effective until he changed his mind and withdrew his objection"—was "inconsistent with *Randolph*'s reasoning in at least two important ways." It could not "be squared with the 'widely shared social expectations' or 'customary social usage' upon which the *Randolph* holding was based." In addition, the proposed principle "would create the very sort of practical complications that *Randolph* sought to avoid. The *Randolph* Court" adopted "a 'formalis[tic]' rule . . . in the interests of 'simple clarity' and administrability." Fernandez's suggested rule "would produce a plethora of practical problems." If an objection "last[ed] until it is withdrawn by the objector," it could unreasonably bar one co-occupant from consenting to a home search for years. If the putative bar that arose instead "last[ed] for a 'reasonable' time," the question of "what interval of time would be reasonable in this context" would arise. Moreover, "the procedure needed to register a continuing objection" would have to be specified. Finally, there would be "the question of the particular law enforcement officers who would be bound by an objection." By taking *Randolph* "at its word—that it applies only when the objector is standing in the door saying 'stay out' when officers propose to make a consent search—all of these problems disappear."

In the majority's view, in situations other than those governed by the *Randolph* exception, "the lawful occupant of a house . . . should have the right to invite police to enter the dwelling and conduct a search. Any other rule would trample on the rights of the occupant who is willing to consent" and "would . . . show disrespect for [the] independence" of the consenting occupant.

A dissent authored by Justice Ginsburg, and joined by Justices Sotomayor and Kagan, asserted that the ruling in *Randolph* dictated a conclusion that Fernandez's objection rendered the third-party consent search unreasonable as to him. The dissent accused the majority of "shrink[ing] to petite size our holding in" *Randolph* and of demonstrating "disregard for the warrant requirement."

CHAPTER FIVE

INSERT after NOTE (2) on p. 443:

(2a) In *Navarette v. California*, 572 U.S. ___, 134 S.Ct. 1683, ___L. Ed. 2d ___ (2014), an anonymous 911 caller reported that she had been run off the road by a pickup truck. The caller specified the area where the event occurred and the color, model, and license plate number of the truck. Soon thereafter, an officer spotted the truck. After following the truck for five minutes and witnessing no traffic violations or suspicious driving, the officer pulled the truck over. As he approached, he smelled marijuana. A subsequent search of the truck bed led to the discovery of thirty pounds of marijuana.

In an opinion authored by Justice Thomas, a five-Justice majority acknowledged that "'an anonymous tip *alone* seldom demonstrates the informant's basis of knowledge or veracity[,]'" but observed that "under appropriate circumstances, an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion.'" The majority concluded that in this case "the stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the driver was intoxicated."

The first question was "whether the 911 call was sufficiently reliable to credit the allegation that [the] truck 'ran the [caller] off the roadway.'" The Court concluded that the call did bear "adequate indicia of reliability for the officer to credit the caller's account." First, by reporting being "run off the road by a specific vehicle . . . the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge len[t] significant support to the tip's reliability." The necessary implication was "that the informant [knew] the other car was driven dangerously."

In addition, there was "reason to think that the 911 caller . . . was telling the truth." The caller apparently made the call "soon after she was run off the road." Both the fact that the report was "contemporaneous" with the caller's observations and the fact that it pertained to a "'startling event'" and was made while "'under the stress of excitement'" were "considerations" which the law of evidence recognizes as supportive "of the caller's veracity." Moreover, "the caller's use of the 911 emergency system" was an "indicator of veracity." The 911 system's "features that allow for identifying and tracing callers . . . provide . . . safeguards against making false reports with immunity." As a result, "a reasonable officer could conclude that a false tipster would think twice before using [the 911] system."

The Court noted that to justify a stop, "[e]ven a reliable tip" must "create[] reasonable suspicion that 'criminal activity may be afoot.'" Consequently, the second question was "whether the 911 caller's report . . . created reasonable suspicion of an ongoing crime." In this case, "the behavior alleged," from the viewpoint of a reasonable officer, gave rise to a "'reasonable suspicion' of drunk driving." The anonymous "911 caller . . . reported

more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: running another car off the highway." This was "conduct" indicative of "drunk driving" and not simply "isolated . . . recklessness" because it suggested "lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues." In sum, the "alleged conduct was a significant indicator of drunk driving."

The fact that the officer did not observe "additional suspicious conduct" did not "dispel the reasonable suspicion." It was not "surprising that . . . a marked police car would inspire more careful driving for a time." Although "[e]xtended observation . . . might eventually dispel a reasonable suspicion of intoxication, . . . the 5-minute" observation here did not. In addition, once the officer had a reasonable suspicion, he was not obligated to take the "'less intrusive'" step of following the truck for a longer time. Such a requirement here would be "particularly inappropriate . . . because allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences."

The majority conceded that, like *Alabama v. White*, the facts of *Navarette* presented "a 'close case.'" Nonetheless, the indicia of reliability were "stronger than those in *J.L.*" and were "sufficient to provide the officer with reasonable suspicion" that the truck's driver "had run another vehicle off the road." For this reason, it was "reasonable . . . to execute a traffic stop."

Justice Scalia wrote a blistering dissent that was joined by Justices Ginsburg, Sotomayor, and Kagan. He predicted that law enforcers would realize the implications of the majority opinion—that "[s]o long as [a] caller identifies where [a] car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop." This did not comport with his "concept . . . of a people secure from unreasonable searches and seizures."

According to Justice Scalia, the police here "knew nothing about the tipster" and "had no reason to credit [her] charge," but had "many reasons to doubt it." It did not matter that the caller "'claimed eyewitness knowledge,'" because "[t]he issue [was] not how she claimed to know, but whether what she claimed to know was true." In his view, it was "unlikely that the law of evidence would deem the mystery caller in this case 'especially trustworthy.'" Moreover, the caller's use of the 911 system did not support her veracity, because "[t]here is no reason to believe that [an] average anonymous 911 tipster is aware that 911 callers are readily identifiable."

Additionally, the caller's report "neither assert[ed] that the driver was drunk nor even raise[d] the *likelihood* that the driver was drunk." A "reasonable suspicion of a *discrete instance* of irregular or hazardous driving" did not "generate[] a reasonable suspicion of *ongoing intoxicated driving*." The majority "ha[d] no grounds for its unsupported assertion that the tipster's report in this case gave rise to a *reasonable suspicion* of drunken driving." To stop the truck, "the officer[] . . . not only had to assume without basis the accuracy of the

anonymous accusation but also had to posit an unlikely reason (drunkenness) for the accused behavior."

Moreover, at the time of the stop, the officer "had very good reason . . . to know that" the driver "was not" drunk. After he followed the truck for five minutes and saw no traffic offense or other indication of drunk driving, any suggestion of drunk driving "was affirmatively undermined." What he saw "strongly suggest[ed] that the suspected crime was *not* occurring." The majority's belief that a drunk driver can determine whether he "drives drunkenly" was not consistent with Justice Scalia's "understand[ing of] the influence of alcohol."

The dissenters accused the majority of "serv[ing] up a freedom-destroying cocktail consisting of two parts patent falsity: (1) that anonymous 911 reports of traffic violations are reliable so long as they correctly identify a car and its location, and (2) that a single instance of careless or reckless driving necessarily supports a reasonable suspicion of drunkenness." In their view, the ruling in *Navarette* meant that "all of us on the road, and not just drug dealers, are at risk of having our freedom of movement curtailed on suspicion of drunkenness, based upon a phone tip, true or false, of a single instance of careless driving."

INSERT after NOTE (7) on p. 446:

(8) In *Heien v. North Carolina*, 574 U.S. ____, 135 S.Ct. 530, ____ L.Ed.2d ____ (2014), the Justices considered "whether reasonable suspicion can rest on a mistaken understanding of the scope of a legal prohibition." An officer had stopped a vehicle that had only one functioning brake light because he believed this was a violation of the law. In a consented to search of the vehicle, the officer found cocaine. The North Carolina Court of Appeals interpreted the state vehicle code to require only one working brake light. Consequently, the operation of Heien's vehicle "with only one working brake light was not actually a violation of North Carolina law." The North Carolina Supreme Court did not disagree with this interpretation of the code or with the conclusion that Heien was not violating the law, but decided that because the officer's "mistaken understanding of the vehicle code was reasonable, the stop was valid."

In an opinion authored by Chief Justice Roberts, an eight-Justice majority sustained that ruling. According to the majority, "the Fourth Amendment allows for some mistakes" by "government officials" because that provision only requires reasonableness and "[t]o be reasonable is not to be perfect." The Court had already "recognized that searches and seizures based on mistakes of fact can be reasonable." The Justices believed that reasonable mistakes of law were "no less compatible with the concept of reasonable suspicion" than equivalent mistakes of fact. When it turns out that the facts are not what they were thought to be or the law is not as it was thought to be, "the result is the same: the facts are outside the scope of the law. There is no reason . . . why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law." The majority stressed that "[t]he Fourth Amendment tolerates only *reasonable* mistakes, and [that] those mistakes—whether of fact or of law—must be *objectively* reasonable." For that reason, the Court's decision would "not discourage officers from learning the law."

In *Heien*, ambiguities in the state's vehicle code meant that it was, in fact, "objectively reasonable for an officer in . . . [the] position" of the officer who stopped Heien's vehicle "to think that Heien's faulty . . . brake light was a violation of . . . law. And because the mistake of law was reasonable, there was reasonable suspicion justifying the stop."

Justice Sotomayor alone dissented. In her view, "determining whether a search or seizure is reasonable requires evaluating an officer's understanding of the facts against the actual state of the law." Consequently, the Court should "hold that an officer's mistake of law, no matter how reasonable, cannot support the individualized suspicion necessary to justify a seizure under the Fourth Amendment."

INSERT after note (4) on p. 468:

(5) In *Rodriguez v. United States*, 575 U.S. ___, ___S.Ct. ___, ___L.Ed.2d ___ (2015), a six-Justice majority held "that a police stop exceeding the time needed to handle the matter for which the stop was made violated the Constitution's shield against unreasonable seizures." More specifically, the Court ruled that a "seizure justified only by a police-observed traffic violation . . . 'become[s] unlawful it if is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." (Quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)).

An officer stopped a car driven by Rodriguez after seeing it "veer slowly onto the shoulder of" the highway for "seconds and then jerk back onto the road." After Rodriguez said "that he has swerved to avoid a pothole," the officer took his "license, registration, and proof of insurance," ran "a records check on" him, then asked the passenger in the car for his license, ran a records check on him as well, "and called for a second officer." He then began to write "a warning ticket for Rodriguez for driving on the shoulder," and returned to the vehicle to issue the ticket and return the mens' documents. After he completed the traffic stop's objectives, the officer "asked for permission to walk his dog around Rodriguez's vehicle. Rodriguez said no." The officer told him to turn the car off, get out, and stand in front of the patrol car to await the second officer's arrival. Minutes later, the second officer arrived. The first officer "retrieved his dog and led him twice" around the vehicle. The "dog alerted to the presence of drugs" during the second time around—"seven or eight minutes" after issuance of the warning ticket. "A search of the vehicle revealed a large bag of methamphetamine." The trial court denied Rodriguez's motion to suppress the drugs, and the court of appeals affirmed.

In an opinion authored by Justice Ginsburg and joined by Chief Justice Roberts and Justices Scalia, Breyer, Sotomayor, and Kagan, the majority reasoned that, "[l]ike a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation . . ., and attend to related safety concerns." The stop may "'last no longer than is necessary to effectuate th[at] purpose,'" and "[a]uthority for the seizure . . . ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." The Court acknowledged that "unrelated investigations" are tolerable when they do "not lengthen the roadside detention," but noted that an officer may not conduct unrelated checks . . . in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded" for a detention.

The mission of a traffic includes "determining whether to issue a traffic ticket" and "'ordinary inquiries incident to'" the stop. Those inquiries "[t]ypically . . . involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobiles's registration and proof of insurance"—all of which serve to "ensur[e] that vehicles on the road are operated safely and responsibly." In contrast, a "dog sniff" is "aimed at 'detect[ing] evidence of ordinary criminal wrongdoing'" and lacks

a "close connection to roadway safety." For that reason, it "is not fairly characterized as part of the officer's traffic mission."

In response to one of the dissents, the majority pointedly observed that "[t]he critical question . . . is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff 'prolongs'—*i.e.*, adds time to—'the stop.'" Because the dog sniff in this case did prolong the traffic stop, if "reasonable suspicion of criminal activity [did not] justif[y] detaining Rodriguez beyond completion of the traffic stop infraction investigation"—a question that was "open for . . . consideration on remand"—that detention was unreasonable.

Justices Kennedy, Thomas, and Alito dissented.

INSERT between NOTES (1) and (2) on p. 494:

(1a) In *Buie*, Justice White briefly discussed two important prior decisions. He rejected the State's contention that *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 587, 69 L.Ed.2d 340 (1981), supported suspicionless protective sweeps of homes, deeming *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), "more analogous." In *Ybarra*, the Court had held that it was unreasonable for officers to frisk patrons who were present in a bar during the execution of a valid warrant to search the bar for narcotics. The patrons could not be frisked merely because they were present in the place the warrant authorized the officers to search. Instead, officers needed the individualized reasonable suspicion ordinarily required to justify a *Terry* frisk.

Summers, on the other hand, had concluded that officers could reasonably *detain* an occupant of a home during the execution of a valid search warrant for narcotics even in the absence of additional, individualized suspicion pertaining to the occupant. Interests in the safety of the searching officers, in facilitating the efficient completion of the search of the home, and in preventing flight by the occupant justified a detention during the time the search was being conducted. In *Bailey v. United States*, 568 U.S. ____, 133 S.Ct. 1031, 185 L.Ed.2d 19 (2013), the Court concluded that these interests did not apply "with the same or similar force to the detention of recent occupants beyond the immediate vicinity of the premises to be searched." Consequently, the Court overturned a lower court ruling that officers could detain an occupant who was beyond the immediate vicinity of the searched premises if he was seen leaving the premises shortly before the search and the detention was "'effected *as soon as reasonably practicable.*'" According to the *Bailey* majority, to detain an occupant who was beyond the immediate vicinity of the home to be searched, officers need individualized reasonable suspicion of criminal activity. The Court declined to specify the area that constitutes "the immediate vicinity" of premises, observing that in making that determination courts should consider "the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors."

INSERT before subsection [4]on p. 568:

[3A] DNA Testing

MARYLAND v. KING
United States Supreme Court
569 U.S. ____, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013)

JUSTICE KENNEDY delivered the opinion of the Court.

. . . .

I

When [Alonzo] King was arrested on April 10, 2009, for menacing a group of people with a shotgun and charged in state court with both first- and second-degree assault, he was processed for detention in custody at the Wicomico County Central Booking facility. Booking personnel used a cheek swab to take [a] DNA sample from him pursuant to provisions of the Maryland DNA Collection Act (or Act).

On July 13, 2009, King's DNA record was uploaded to the Maryland DNA database, and three weeks later, on August 4, 2009, his DNA profile was matched to the DNA sample collected in the unsolved 2003 rape case. Once the DNA was matched to King, detectives presented the forensic evidence to a grand jury, which indicted him for the rape. Detectives obtained a search warrant and took a second sample of DNA from King, which again matched the evidence from the rape. He moved to suppress the DNA match on the grounds that Maryland's DNA collection law violated the Fourth Amendment. The Circuit Court Judge upheld the statute as constitutional. King pleaded not guilty to the rape charges but was convicted and sentenced to life in prison without the possibility of parole.

In a divided opinion, the Maryland Court of Appeals struck down the portions of the Act authorizing collection of DNA from felony arrestees as unconstitutional. The majority concluded that a DNA swab was an unreasonable search in violation of the Fourth Amendment . . . .

Both federal and state courts have reached differing conclusions as to whether the Fourth Amendment prohibits the collection and analysis of a DNA sample from persons arrested, but not yet convicted, on felony charges. . . . .

II

The advent of DNA technology is one of the most significant scientific advancements of our era. The full potential for use of genetic markers in medicine and science is still being explored, but the utility of DNA identification in the criminal justice system is already undisputed. Since the first use of forensic DNA analysis to catch a rapist and murderer in England in 1986, see J. Butler, Fundamentals of Forensic DNA Typing 5 (2009) (hereinafter Butler), law enforcement, the defense bar, and the courts have acknowledged DNA testing's "unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices." *District Attorney's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 55, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009).

A

The current standard for forensic DNA testing relies on an analysis of the chromosomes located within the nucleus of all human cells. "The DNA material in chromosomes is composed of 'coding' and 'noncoding' regions. The coding regions are known as *genes* and contain the information necessary for a cell to make proteins. . . . Non-protein-coding regions . . . are not related directly to making proteins, [and] have been referred to as 'junk' DNA." Butler 25. The adjective "junk" may mislead the layperson, for in fact this is the DNA region used with near certainty to identify a person. The term apparently is intended to indicate that this particular noncoding region, while useful and even dispositive for purposes like identity, does not show more far-reaching and complex characteristics like genetic traits.

Many of the patterns found in DNA are shared among all people, so forensic analysis focuses on "repeated DNA sequences scattered throughout the human genome," known as "short tandem repeats" (STRs). *Id.,* at 147–148. The alternative possibilities for the size and frequency of these STRs at any given point along a strand of DNA are known as "alleles," *id.,* at 25; and multiple alleles are analyzed in order to ensure that a DNA profile matches only one individual. Future refinements may improve present technology, but even now STR analysis makes it "possible to determine whether a biological tissue matches a suspect with near certainty." *Osborne, supra,* at 62, 129 S.Ct. 2308.

The Act authorizes Maryland law enforcement authorities to collect DNA samples from "an individual who is charged with . . . a crime of violence or an attempt to commit a crime of violence; or . . . burglary or an attempt to commit burglary." Md. Pub. Saf. Code Ann. § 2–504(a)(3)(I) (Lexis 2011). Maryland law defines a crime of violence to include murder, rape, first-degree assault, kidnaping, arson, sexual assault, and a variety of other serious crimes. Md. Crim. Law Code Ann. § 14–101 (Lexis 2012). Once taken, a DNA sample may not be processed or placed in a database before the individual is arraigned (unless the individual consents). Md. Pub. Saf. Code Ann. § 2–504(d)(1) (Lexis 2011). It is at this point that a judicial officer ensures that there is probable cause to detain the arrestee on a qualifying serious offense. If "all qualifying criminal charges are determined to be unsupported by probable cause . . . the DNA sample shall be immediately destroyed." §

2–504(d)(2)(I). DNA samples are also destroyed if "a criminal action begun against the individual . . . does not result in a conviction," "the conviction is finally reversed or vacated and no new trial is permitted," or "the individual is granted an unconditional pardon." § 2–511(a)(1).

The Act also limits the information added to a DNA database and how it may be used. Specifically, "[o]nly DNA records that directly relate to the identification of individuals shall be collected and stored." § 2–505(b)(1). No purpose other than identification is permissible: "A person may not willfully test a DNA sample for information that does not relate to the identification of individuals as specified in this subtitle." § 2–512(c). Tests for familial matches are also prohibited. See § 2–506(d). The officers involved in taking and analyzing respondent's DNA sample complied with the Act in all respects.

Respondent's DNA was collected in this case using a common procedure known as a "buccal swab." "Buccal cell collection involves wiping a small piece of filter paper or a cotton swab similar to a Q-tip against the inside cheek of an individual's mouth to collect some skin cells." Butler 86. The procedure is quick and painless. . . . .

B

Respondent's identification as the rapist resulted in part through the operation of a national project to standardize collection and storage of DNA profiles. Authorized by Congress and supervised by the Federal Bureau of Investigation, the Combined DNA Index System (CODIS) connects DNA laboratories at the local, state, and national level. Since its authorization in 1994, the CODIS system has grown to include all 50 States and a number of federal agencies. CODIS collects DNA profiles provided by local laboratories taken from arrestees, convicted offenders, and forensic evidence found at crime scenes. To participate in CODIS, a local laboratory must sign a memorandum of understanding agreeing to adhere to quality standards and submit to audits to evaluate compliance with the federal standards for scientifically rigorous DNA testing. Butler 270.

One of the most significant aspects of CODIS is the standardization of the points of comparison in DNA analysis. The CODIS database is based on 13 loci at which the STR alleles are noted and compared. These loci make possible extreme accuracy in matching individual samples, with a "random match probability of approximately 1 in 100 trillion (assuming unrelated individuals)." *Ibid*. The CODIS loci are from the non-protein coding junk regions of DNA, and "are not known to have any association with a genetic disease or any other genetic predisposition. Thus, the information in the database is only useful for human identity testing." *Id.,* at 279. STR information is recorded only as a "string of numbers"; and the DNA identification is accompanied only by information denoting the laboratory and the analyst responsible for the submission. *Id.,* at 270. In short, CODIS sets uniform national standards for DNA matching and then facilitates connections between local

law enforcement agencies who can share more specific information about matched STR profiles.

All 50 States require the collection of DNA from felony convicts, and respondent does not dispute the validity of that practice. Twenty-eight States and the Federal Government have adopted laws similar to the Maryland Act authorizing the collection of DNA from some or all arrestees. Although those statutes vary in their particulars, such as what charges require a DNA sample, their similarity means that this case implicates more than the specific Maryland law. At issue is a standard, expanding technology already in widespread use throughout the Nation.

III

A

. . . . [U]sing a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search. Virtually any "intrusio[n] into the human body," *Schmerber v. California,* 384 U.S. 757, 770, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), will work an invasion of "'cherished personal security' that is subject to constitutional scrutiny," *Cupp v. Murphy,* 412 U.S. 291, 295, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973) (quoting *Terry v. Ohio,* 392 U.S. 1, 24–25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). . . . .

A buccal swab is a far more gentle process than a venipuncture to draw blood. It involves but a light touch on the inside of the cheek; and although it can be deemed a search within the body of the arrestee, it requires no "surgical intrusions beneath the skin." *Winston* [*v. Lee*], 470 U.S. [753], 760, 105 S.Ct. 1611 [(1985)]. The fact than an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines that term.

B

. . . . In giving content to the inquiry whether an intrusion is reasonable, the Court has preferred "some quantum of individualized suspicion . . . [as] a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States v. Martinez–Fuerte,* 428 U.S. 543, 560–561, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (citation and footnote omitted).

In some circumstances, such as "[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *Illinois v. McArthur,* 531 U.S. 326, 330, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001). . . . . The need for a warrant is perhaps least when the search involves no discretion that could properly be limited by the "interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer." *Treasury Employees v. Von Raab,* 489 U.S. 656, 667, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989).

. . . . The Maryland DNA Collection Act provides that, in order to obtain a DNA sample, all arrestees charged with serious crimes must furnish the sample on a buccal swab applied, as noted, to the inside of the cheeks. The arrestee is already in valid police custody for a serious offense supported by probable cause. The DNA collection is not subject to the judgment of officers whose perspective might be "colored by their primary involvement in 'the often competitive enterprise of ferreting out crime.'" *Terry, supra,* at 12, 88 S.Ct. 1868 (quoting *Johnson v. United States,* 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948)). . . . . Here, the search effected by the buccal swab of respondent falls within the category of cases this Court has analyzed by reference to the proposition that the "touchstone of the Fourth Amendment is reasonableness, not individualized suspicion." *Samson* [*v. California*, 547 U.S. 843], 855, n. 4, 126 S.Ct. 2193 [(2006)].

. . . . To say that no warrant is required is merely to acknowledge that "rather than employing a *per se* rule of unreasonableness, we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." *McArthur, supra,* at 331, 121 S.Ct. 946. This application of "traditional standards of reasonableness" requires a court to weigh "the promotion of legitimate governmental interests" against "the degree to which [the search] intrudes upon an individual's privacy." *Wyoming v. Houghton,* 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999). . . . .

IV
A

The legitimate government interest served by the Maryland DNA Collection Act is one that is well established: the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody. It is beyond dispute that "probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein v. Pugh,* 420 U.S. 103, 113–114, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). Also uncontested is the "right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested." *Weeks v. United States,* 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 652 (1914) . . . . [I]ndividual suspicion is not necessary, because "[t]he constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search." *Michigan v. DeFillippo,* 443 U.S. 31, 35, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979).

The "routine administrative procedure[s] at a police station house incident to booking and jailing the suspect" derive from different origins and have different constitutional justifications than, say, the search of a place, *Illinois v. Lafayette,* 462 U.S. 640, 643, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983); for the search of a place not incident to an arrest depends on the "fair probability that contraband or evidence of a crime will be found in a particular place," *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The interests are further different when an individual is formally processed into police custody.

Then "the law is in the act of subjecting the body of the accused to its physical dominion." *People v. Chiagles,* 237 N.Y. 193, 197, 142 N.E. 583, 584 (1923) (Cardozo, J.). When probable cause exists to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving those interests.

First, "[i]n every criminal case, it is known and must be known who has been arrested and who is being tried." *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty*., 542 U.S. 177, 191, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004). An individual's identity is more than just his name or Social Security number, and the government's interest in identification goes beyond ensuring that the proper name is typed on the indictment. Identity has never been considered limited to the name on the arrestee's birth certificate. In fact, a name is of little value compared to the real interest in identification at stake when an individual is brought into custody. . . . .

A suspect's criminal history is a critical part of his identity that officers should know when processing him for detention. It is a common occurrence that "[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals. Hours after the Oklahoma City bombing, Timothy McVeigh was stopped by a state trooper who noticed he was driving without a license plate. Police stopped serial killer Joel Rifkin for the same reason. One of the terrorists involved in the September 11 attacks was stopped and ticketed for speeding just two days before hijacking Flight 93." *Id.,* at ——, 132 S.Ct., at 1520 (citations omitted). Police already seek this crucial identifying information. They use routine and accepted means as varied as comparing the suspect's booking photograph to sketch artists' depictions of persons of interest, showing his mugshot to potential witnesses, and of course making a computerized comparison of the arrestee's fingerprints against electronic databases of known criminals and unsolved crimes. In this respect the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides.

The task of identification necessarily entails searching public and police records based on the identifying information provided by the arrestee to see what is already known about him. The DNA collected from arrestees is an irrefutable identification of the person from whom it was taken. Like a fingerprint, the 13 CODIS loci are not themselves evidence of any particular crime, in the way that a drug test can by itself be evidence of illegal narcotics use. A DNA profile is useful to the police because it gives them a form of identification to search the records already in their valid possession. . . . . DNA is another metric of identification used to connect the arrestee with his or her public persona, as reflected in records of his or her actions that are available to the police. . . . . Finding occurrences of the arrestee's CODIS profile in outstanding cases is consistent with . . . common practice. It uses a different form of identification than a name or fingerprint, but its function is the same.

Second, law enforcement officers bear a responsibility for ensuring that the custody of an arrestee does not create inordinate "risks for facility staff, for the existing detainee

population, and for a new detainee." *Florence* [*v. Board of Chosen Freeholders of County of Burlington*, 566 U.S.] ——, 132 S.Ct., at 1518 [(2012)]. DNA identification can provide untainted information to those charged with detaining suspects and detaining the property of any felon. For these purposes officers must know the type of person whom they are detaining, and DNA allows them to make critical choices about how to proceed. . . . .

Third, looking forward to future stages of criminal prosecution, "the Government has a substantial interest in ensuring that persons accused of crimes are available for trials." *Bell v. Wolfish,* 441 U.S. 520, 534, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). A person who is arrested for one offense but knows that he has yet to answer for some past crime may be more inclined to flee the instant charges, lest continued contact with the criminal justice system expose one or more other serious offenses. For example, a defendant who had committed a prior sexual assault might be inclined to flee on a burglary charge, knowing that in every State a DNA sample would be taken from him after his conviction on the burglary charge that would tie him to the more serious charge of rape. In addition to subverting the administration of justice with respect to the crime of arrest, this ties back to the interest in safety; for a detainee who absconds from custody presents a risk to law enforcement officers, other detainees, victims of previous crimes, witnesses, and society at large.

Fourth, an arrestee's past conduct is essential to an assessment of the danger he poses to the public, and this will inform a court's determination whether the individual should be released on bail. "The government's interest in preventing crime by arrestees is both legitimate and compelling." *United States v. Salerno,* 481 U.S. 739, 749, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). DNA identification of a suspect in a violent crime provides critical information to the police and judicial officials in making a determination of the arrestee's future dangerousness. . . . .

This interest is not speculative. In considering laws to require collecting DNA from arrestees, government agencies around the Nation found evidence of numerous cases in which felony arrestees would have been identified as violent through DNA identification matching them to previous crimes but who later committed additional crimes because such identification was not used to detain them.

Present capabilities make it possible to complete a DNA identification that provides information essential to determining whether a detained suspect can be released pending trial. . . . .

. . . .

Finally, in the interests of justice, the identification of an arrestee as the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned for the same offense. "[P]rompt [DNA] testing . . . would speed up apprehension of criminals before they commit additional crimes, and prevent the grotesque detention of . . . innocent people." J. Dwyer, P. Neufeld, & B. Scheck, Actual Innocence 245 (2000).

Because proper processing of arrestees is so important and has consequences for every stage of the criminal process, the Court has recognized that the "governmental interests underlying a station-house search of the arrestee's person and possessions may in some circumstances be even greater than those supporting a search immediately following arrest." *Lafayette,* 462 U.S., at 645, 103 S.Ct. 2605. Thus, the Court has been reluctant to circumscribe the authority of the police to conduct reasonable booking searches. . . . .

B

DNA identification represents an important advance in the techniques used by law enforcement to serve legitimate police concerns for as long as there have been arrests, concerns the courts have acknowledged and approved for more than a century. Law enforcement agencies routinely have used scientific advancements in their standard procedures for the identification of arrestees. . . . .

. . . .

Perhaps the most direct historical analogue to the DNA technology used to identify respondent is the familiar practice of fingerprinting arrestees. From the advent of this technique, courts had no trouble determining that fingerprinting was a natural part of "the administrative steps incident to arrest." *County of Riverside v. McLaughlin,* 500 U.S. 44, 58, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). . . . .

DNA identification is an advanced technique superior to fingerprinting in many ways, so much so that to insist on fingerprints as the norm would make little sense to either the forensic expert or a layperson. The additional intrusion upon the arrestee's privacy beyond that associated with fingerprinting is not significant, see Part V, *infra,* and DNA is a markedly more accurate form of identifying arrestees. A suspect who has changed his facial features to evade photographic identification or even one who has undertaken the more arduous task of altering his fingerprints cannot escape the revealing power of his DNA.

The respondent's primary objection to this analogy is that DNA identification is not as fast as fingerprinting, and so it should not be considered to be the 21st-century equivalent. But rapid analysis of fingerprints is itself of recent vintage. . . . . The question of how long it takes to process identifying information obtained from a valid search goes only to the efficacy of the search for its purpose of prompt identification, not the constitutionality of the search. Given the importance of DNA in the identification of police records pertaining to arrestees and the need to refine and confirm that identity for its important bearing on the decision to continue release on bail or to impose of new conditions, DNA serves an essential purpose despite the existence of delays such as the one that occurred in this case. Even so, the delay in processing DNA from arrestees is being reduced to a substantial degree by rapid technical advances. . . . . By identifying not only who the arrestee is but also what other available records disclose about his past to show who he is, the police can ensure that they have the proper person under arrest and that they have made the necessary arrangements for

his custody; and, just as important, they can also prevent suspicion against or prosecution of the innocent.

In sum, there can be little reason to question "the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution." 3 W. LaFave, Search and Seizure § 5.3(c), p. 216 (5th ed. 2012). To that end, courts have confirmed that the Fourth Amendment allows police to take certain routine "administrative steps incident to arrest—*i.e.,* . . . book[ing], photograph[ing], and fingerprint[ing]." *McLaughlin,* 500 U.S., at 58, 111 S.Ct. 1661. DNA identification of arrestees, of the type approved by the Maryland statute here at issue, is "no more than an extension of methods of identification long used in dealing with persons under arrest." *Kelly,* 55 F.2d, at 69. In the balance of reasonableness required by the Fourth Amendment, therefore, the Court must give great weight both to the significant government interest at stake in the identification of arrestees and to the unmatched potential of DNA identification to serve that interest.

V
A

By comparison to this substantial government interest and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is a minimal one. True, a significant government interest does not alone suffice to justify a search. The government interest must outweigh the degree to which the search invades an individual's legitimate expectations of privacy. In considering those expectations in this case, however, the necessary predicate of a valid arrest for a serious offense is fundamental. . . . . "[T]he legitimacy of certain privacy expectations vis-á-vis the State may depend upon the individual's legal relationship with the State." *Vernonia School Dist. 47J,* 515 U.S., at 654, 115 S.Ct. 2386.

. . . .

The expectations of privacy of an individual taken into police custody "necessarily [are] of a diminished scope." *Bell,* 441 U.S., at 557, 99 S.Ct. 1861. "[B]oth the person and the property in his immediate possession may be searched at the station house." *United States v. Edwards,* 415 U.S. 800, 803, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974). A search of the detainee's person when he is booked into custody may "'involve a relatively extensive exploration,'" *Robinson,* 414 U.S., at 227, 94 S.Ct. 467, including "requir[ing] at least some detainees to lift their genitals or cough in a squatting position," *Florence,* 566 U.S., at ——, 132 S.Ct., at 1520.

In this critical respect, the search here at issue differs from the sort of programmatic searches of either the public at large or a particular class of regulated but otherwise law-abiding citizens that the Court has previously labeled as "'special needs'" searches.

Chandler v. Miller, 520 U.S. 305, 314, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). . . . . Once an individual has been arrested on probable cause for a dangerous offense that may require detention before trial . . . his or her expectations of privacy and freedom from police scrutiny are reduced. DNA identification like that at issue here thus does not require consideration of any unique needs that would be required to justify searching the average citizen. The special needs cases, though in full accord with the result reached here, do not have a direct bearing on the issues presented in this case, because unlike the search of a citizen who has not been suspected of a wrong, a detainee has a reduced expectation of privacy.

The reasonableness inquiry here considers two other circumstances in which the Court has held that particularized suspicion is not categorically required: "diminished expectations of privacy [and] minimal intrusions." *McArthur,* 531 U.S., at 330, 121 S.Ct. 946. This is not to suggest that any search is acceptable solely because a person is in custody. . . . .

Here, by contrast to the approved standard procedures incident to any arrest detailed above, a buccal swab involves an even more brief and still minimal intrusion. A gentle rub along the inside of the cheek does not break the skin, and it "involves virtually no risk, trauma, or pain." *Schmerber,* 384 U.S., at 771, 86 S.Ct. 1826. "A crucial factor in analyzing the magnitude of the intrusion . . . is the extent to which the procedure may threaten the safety or health of the individual," *Winston, supra,* at 761, 105 S.Ct. 1611, and nothing suggests that a buccal swab poses any physical danger whatsoever. A brief intrusion of an arrestee's person is subject to the Fourth Amendment, but a swab of this nature does not increase the indignity already attendant to normal incidents of arrest.

B

In addition the processing of respondent's DNA sample's 13 CODIS loci did not intrude on respondent's privacy in a way that would make his DNA identification unconstitutional.

First, as already noted, the CODIS loci come from noncoding parts of the DNA that do not reveal the genetic traits of the arrestee. . . . .

And even if non-coding alleles could provide some information, they are not in fact tested for that end. It is undisputed that law enforcement officers analyze DNA for the sole purpose of generating a unique identifying number against which future samples may be matched. . . . .

Finally, the Act provides statutory protections that guard against further invasion of privacy. As noted above, the Act requires that "[o]nly DNA records that directly relate to the identification of individuals shall be collected and stored." Md. Pub. Saf. Code Ann. § 2–505(b)(1). . . . . In light of the scientific and statutory safeguards, once respondent's DNA was lawfully collected the STR analysis of respondent's DNA pursuant to CODIS

procedures did not amount to a significant invasion of privacy that would render the DNA identification impermissible under the Fourth Amendment.

* * *

In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

The judgment of the Court of Appeals of Maryland is reversed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment. Whenever this Court has allowed a suspicionless search, it has insisted upon a justifying motive apart from the investigation of crime.

It is obvious that no such noninvestigative motive exists in this case. The Court's assertion that DNA is being taken, not to solve crimes, but to *identify* those in the State's custody, taxes the credulity of the credulous. And the Court's comparison of Maryland's DNA searches to other techniques, such as fingerprinting, can seem apt only to those who know no more than today's opinion has chosen to tell them about how those DNA searches actually work.

I
A

At the time of the Founding, Americans despised the British use of so-called "general warrants"—warrants not grounded upon a sworn oath of a specific infraction by a particular individual, and thus not limited in scope and application. . . . .

. . . .

. . . . [T]he Fourth Amendment's Warrant Clause forbids a warrant to "issue" except "upon probable cause," and requires that it be "particula[r]" (which is to say, *individualized*) to "the place to be searched, and the persons or things to be seized." And we have held that, even when a warrant is not constitutionally necessary, the Fourth Amendment's general prohibition of "unreasonable" searches imports the same requirement of individualized suspicion. See *Chandler v. Miller,* 520 U.S. 305, 308, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997).

Although there is a "closely guarded category of constitutionally permissible suspicionless searches," *id.,* at 309, 117 S.Ct. 1295, that has never included searches designed to serve "the normal need for law enforcement," *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 619, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (internal quotation marks omitted). Even the common name for suspicionless searches—"special needs" searches—itself reflects that they must be justified, *always,* by concerns "other than crime detection." *Chandler, supra,* at 313–314, 117 S.Ct. 1295. . . . .

So while the Court is correct to note that there are instances in which we have permitted searches without individualized suspicion, "[i]n none of these cases . . . did we indicate approval of a [search] whose primary purpose was to detect evidence of ordinary criminal wrongdoing." *Indianapolis v. Edmond,* 531 U.S. 32, 38, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). That limitation is crucial. It is only when a governmental purpose aside from crime-solving is at stake that we engage in the free-form "reasonableness" inquiry that the Court indulges at length today. To put it another way, both the legitimacy of the Court's method and the correctness of its outcome hinge entirely on the truth of a single proposition: that the primary purpose of these DNA searches is something other than simply discovering evidence of criminal wrongdoing. As I detail below, that proposition is wrong.

B

The Court alludes at several points to the fact that King was an arrestee, and arrestees may be validly searched incident to their arrest. But the Court does not really *rest* on this principle, and for good reason: The objects of a search incident to arrest must be either (1) weapons or evidence that might easily be destroyed, or (2) evidence relevant to the crime of arrest. See *Arizona v. Gant,* 556 U.S. 332, 343–344, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009); *Thornton v. United States,* 541 U.S. 615, 632, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) (SCALIA, J., concurring in judgment). Neither is the object of the search at issue here.

. . . .

. . . . No matter the degree of invasiveness, suspicionless searches are *never* allowed if their principal end is ordinary crime-solving. A search incident to arrest either serves other

ends (such as officer safety, in a search for weapons) or is not suspicionless (as when there is reason to believe the arrestee possesses evidence relevant to the crime of arrest).

Sensing (correctly) that it needs more, the Court elaborates at length the ways that the search here served the special purpose of "identifying" King.[1] But that seems to me quite wrong—unless what one means by "identifying" someone is "searching for evidence that he has committed crimes unrelated to the crime of his arrest." At points the Court does appear to use "identifying" in that peculiar sense—claiming, for example, that knowing "an arrestee's past conduct is essential to an assessment of the danger he poses." *Ante,* at ——. If identifying someone means finding out what unsolved crimes he has committed, then identification is indistinguishable from the ordinary law-enforcement aims that have never been thought to justify a suspicionless search. . . . . I will therefore assume that the Court means that the DNA search at issue here was useful to "identify" King in the normal sense of that word—in the sense that would identify the author of Introduction to the Principles of Morals and Legislation as Jeremy Bentham.

1

The portion of the Court's opinion that explains the identification rationale is strangely silent on the actual workings of the DNA search at issue here. To know those facts is to be instantly disabused of the notion that what happened had anything to do with identifying King.

King was arrested on April 10, 2009, on charges unrelated to the case before us. That same day, April 10, the police searched him and seized the DNA evidence at issue here. What happened next? Reading the Court's opinion, particularly its insistence that the search was necessary to know "who [had] been arrested," *ante,* at ——, one might guess that King's DNA was swiftly processed and his identity thereby confirmed—perhaps against some master database of known DNA profiles, as is done for fingerprints. After all, was not the suspicionless search here crucial to avoid "inordinate risks for facility staff" or to "existing detainee population," *ante,* at ——? Surely, then—*surely*—the State of Maryland got cracking on those grave risks immediately, by rushing to identify King with his DNA as soon as possible.

Nothing could be further from the truth. Maryland officials did not even begin the process of testing King's DNA that day. Or, actually, the next day. Or the day after that.

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1. The Court's insistence that our special-needs cases "do not have a direct bearing on the issues presented in this case" is perplexing. Why spill so much ink on the special need of identification if a special need is not required? Why not just come out and say that any suspicionless search of an arrestee is allowed if it will be useful to solve crimes? The Court does not say that because most Members of the Court do not believe it. So whatever the Court's major premise—the opinion does not really contain what you would call a rule of decision—the *minor* premise is "this search was used to identify King." The incorrectness of that minor premise will therefore suffice to demonstrate the error in the Court's result.

And that was for a simple reason: Maryland law forbids them to do so. A "DNA sample collected from an individual charged with a crime . . . *may not* be tested or placed in the statewide DNA data base system prior to the first scheduled arraignment date." Md. Pub. Saf. Code Ann. § 2–504(d)(1) (Lexis 2011) (emphasis added). And King's first appearance in court was not until three days after his arrest. . . . .

This places in a rather different light the Court's solemn declaration that the search here was necessary so that King could be identified at "every stage of the criminal process." *Ante,* at ——. . . . . The truth, known to Maryland and increasingly to the reader: this search had nothing to do with establishing King's identity.

It gets worse. King's DNA sample was not received by the Maryland State Police's Forensic Sciences Division until April 23, 2009—two weeks after his arrest. It sat in that office, ripening in a storage area, until the custodians got around to mailing it to a lab for testing on June 25, 2009—two months after it was received, and nearly *three* since King's arrest. After it was mailed, the data from the lab tests were not available for several more weeks, until July 13, 2009, which is when the test results were entered into Maryland's DNA database, *together with information identifying the person from whom the sample was taken*. Meanwhile, bail had been set, King had engaged in discovery, and he had requested a speedy trial—presumably not a trial of John Doe. It was not until August 4, 2009—four months after King's arrest—that the forwarded sample transmitted (*without* identifying information) from the Maryland DNA database to the Federal Bureau of Investigation's national database was matched with a sample taken from the scene of an unrelated crime years earlier.

A more specific description of exactly what happened at this point illustrates why, by definition, King could not have been *identified* by this match. The FBI's DNA database (known as CODIS) consists of two distinct collections. FBI, CODIS and NDIS Fact Sheet. One of them, the one to which King's DNA was submitted, consists of DNA samples taken from known convicts or arrestees. I will refer to this as the "Convict and Arrestee Collection." The other collection consists of samples taken from crime scenes; I will refer to this as the "Unsolved Crimes Collection." The Convict and Arrestee Collection stores "no names or other personal identifiers of the offenders, arrestees, or detainees." *Ibid.* Rather, it contains only the DNA profile itself, the name of the agency that submitted it, the laboratory personnel who analyzed it, and an identification number for the specimen. *Ibid.* This is because the submitting state laboratories are expected *already* to know the identities of the convicts and arrestees from whom samples are taken. (And, of course, they do.)

Moreover, the CODIS system works by checking to see whether any of the samples in the Unsolved Crimes Collection match any of the samples in the Convict and Arrestee Collection. *Ibid.* That is sensible, if what one wants to do is solve those cold cases, but note what it requires: that the identity of the people whose DNA has been entered in the Convict

and Arrestee Collection *already be known*.[2] If one wanted to identify someone in custody using his DNA, the logical thing to do would be to compare that DNA against the Convict and Arrestee Collection: to search, in other words, the collection that could be used (by checking back with the submitting state agency) to identify people, rather than the collection of evidence from unsolved crimes, whose perpetrators are by definition unknown. But that is not what was done. And that is because this search had nothing to do with identification.

In fact, if anything was "identified" at the moment that the DNA database returned a match, it was not King—his identity was already known. . . . . King was not identified by his association with the sample; rather, the sample was identified by its association with King. . . . . King was who he was, and volumes of his biography could not make him any more or any less King. No minimally competent speaker of English would say, upon noticing a known arrestee's similarity "to a wanted poster of a previously unidentified suspect," *ante,* at ——, that the *arrestee* had thereby been identified. It was the previously unidentified suspect who had been identified—just as, here, it was the previously unidentified rapist.

2

That taking DNA samples from arrestees has nothing to do with identifying them is confirmed not just by actual practice (which the Court ignores) but by the enabling statute itself (which the Court also ignores). The Maryland Act . . . lists five purposes for which DNA samples may be tested. By this point, it will not surprise the reader to learn that the Court's imagined purpose is not among them.

Instead, the law provides that DNA samples are collected and tested, as a matter of Maryland law, "as part of an official investigation into a crime." § 2–505(a)(2). . . . .

. . . .

So, to review: DNA testing does not even begin until after arraignment and bail decisions are already made. The samples sit in storage for months, and take weeks to test. When they are tested, they are checked against the Unsolved Crimes Collection—rather than the Convict and Arrestee Collection, which could be used to identify them. The Act forbids the Court's purpose (identification), but prescribes as its purpose what our suspicionless-search cases forbid ("official investigation into a crime"). Against all of that, it is safe to say that if the Court's identification theory is not wrong, there is no such thing as error.

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2. By the way, this procedure has nothing to do with exonerating the wrongfully convicted, as the Court soothingly promises. See *ante,* at ——. The FBI CODIS database includes DNA from *unsolved* crimes. I know of no indication (and the Court cites none) that it also includes DNA from all—or even any—crimes whose perpetrators have already been convicted.

II

The Court also attempts to bolster its identification theory with a series of inapposite analogies.

. . . .

It is on the fingerprinting of arrestees . . . that the Court relies most heavily. *Ante,* at ——— – ———. The Court does not actually say whether it believes that taking a person's fingerprints is a Fourth Amendment search, and our cases provide no ready answer to that question. Even assuming so, however, law enforcement's post-arrest use of fingerprints could not be more different from its post-arrest use of DNA. Fingerprints of arrestees are taken primarily to identify them (though that process sometimes solves crimes); the DNA of arrestees is taken to solve crimes (and nothing else). . . . .

The Court asserts that the taking of fingerprints was "constitutional for generations prior to the introduction" of the FBI's rapid computer-matching system. *Ante,* at ———. This bold statement is bereft of citation to authority because there is none for it. The "great expansion in fingerprinting came before the modern era of Fourth Amendment jurisprudence," and so we were never asked to decide the legitimacy of the practice. *United States v. Kincade,* 379 F.3d 813, 874 (C.A.9 2004) (Kozinski, J., dissenting). As fingerprint databases expanded from convicted criminals, to arrestees, to civil servants, to immigrants, to everyone with a driver's license, Americans simply "became accustomed to having our fingerprints on file in some government database." *Ibid.* But it is wrong to suggest that this was uncontroversial at the time, or that this Court blessed universal fingerprinting for "generations" before it was possible to use it effectively for identification.

. . . .

The Court also accepts uncritically the Government's representation at oral argument that it is developing devices that will be able to test DNA in mere minutes. At most, this demonstrates that it may one day be possible to design a program that uses DNA for a purpose other than crime-solving—not that Maryland has in fact designed such a program today. And that is the main point, which the Court's discussion of the brave new world of instant DNA analysis should not obscure. The issue before us is not whether DNA can *some day* be used for identification; nor even whether it can *today* be used for identification; but whether it *was used for identification here.*

Today, it can fairly be said that fingerprints really are used to identify people—so well, in fact, that there would be no need for the expense of a separate, wholly redundant DNA confirmation of the same information. What DNA adds—what makes it a valuable weapon in the law-enforcement arsenal—is the ability to solve unsolved crimes, by matching old crime-scene evidence against the profiles of people whose identities are already known. That is what was going on when King's DNA was taken, and we should not disguise the fact.

Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches. The Fourth Amendment must prevail.

* * *

The Court disguises the vast (and scary) scope of its holding by promising a limitation it cannot deliver. The Court repeatedly says that DNA testing, and entry into a national DNA registry, will not befall thee and me, dear reader, but only those arrested for "serious offense[s]." *Ante,* at ——; see also *ante,* at ——, ——, ——, ——, ——, ——, —— (repeatedly limiting the analysis to "serious offenses"). I cannot imagine what principle could possibly justify this limitation, and the Court does not attempt to suggest any. If one believes that DNA will "identify" someone arrested for assault, he must believe that it will "identify" someone arrested for a traffic offense. This Court does not base its judgments on senseless distinctions. At the end of the day, *logic will out.* When there comes before us the taking of DNA from an arrestee for a traffic violation, the Court will predictably (and quite rightly) say, "We can find no significant difference between this case and *King*." Make no mistake about it: As an entirely predictable consequence of today's decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason.

The most regrettable aspect of the suspicionless search that occurred here is that it proved to be quite unnecessary. All parties concede that it would have been entirely permissible, as far as the Fourth Amendment is concerned, for Maryland to take a sample of King's DNA as a consequence of his conviction for second-degree assault. So the ironic result of the Court's error is this: The only arrestees to whom the outcome here will ever make a difference are those who *have been acquitted* of the crime of arrest (so that their DNA could not have been taken upon conviction). In other words, this Act manages to burden uniquely the sole group for whom the Fourth Amendment's protections ought to be most jealously guarded: people who are innocent of the State's accusations.

Today's judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane (surely the Transportation Security Administration needs to know the "identity" of the flying public), applies for a driver's license, or attends a public school. Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.

I therefore dissent, and hope that today's incursion upon the Fourth Amendment . . . will some day be repudiated.

INSERT after *Schmerber v. California* on p. 594:

MISSOURI v. McNEELY
United States Supreme Court
569 U.S. ____, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013)

JUSTICE SOYOMAYOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, and IV, and an opinion with respect to Parts II–C and III, in which JUSTICE SCALIA, JUSTICE GINSBURG, and JUSTICE KAGAN join.

. . . .

I

While on highway patrol at approximately 2:08 a.m., a Missouri police officer stopped Tyler McNeely's truck after observing it exceed the posted speed limit and repeatedly cross the centerline. The officer noticed several signs that McNeely was intoxicated, including McNeely's bloodshot eyes, his slurred speech, and the smell of alcohol on his breath. McNeely acknowledged to the officer that he had consumed "a couple of beers" at a bar, and he appeared unsteady on his feet when he exited the truck. After McNeely performed poorly on a battery of field-sobriety tests and declined to use a portable breath-test device to measure his blood alcohol concentration (BAC), the officer placed him under arrest.

The officer began to transport McNeely to the station house. But when McNeely indicated that he would again refuse to provide a breath sample, the officer changed course and took McNeely to a nearby hospital for blood testing. The officer did not attempt to secure a warrant. Upon arrival at the hospital, the officer asked McNeely whether he would consent to a blood test. Reading from a standard implied consent form, the officer explained to McNeely that under state law refusal to submit voluntarily to the test would lead to the immediate revocation of his driver's license for one year and could be used against him in a future prosecution. See Mo. Ann. Stat. §§ 577.020.1, 577.041 (West 2011). McNeely nonetheless refused. The officer then directed a hospital lab technician to take a blood sample, and the sample was secured at approximately 2:35 a.m. Subsequent laboratory testing measured McNeely's BAC at 0.154 percent, which was well above the legal limit of 0.08 percent. See § 577.012.1.

McNeely was charged with driving while intoxicated (DWI), in violation of § 577.010. He moved to suppress the results of the blood test, arguing in relevant part that, under the circumstances, taking his blood for chemical testing without first obtaining a search warrant violated his rights under the Fourth Amendment. The trial court agreed. . . . .

The Missouri Supreme Court affirmed. 358 S.W.3d 65 (2012) (*per curiam*). . . . .

We granted certiorari to resolve a split of authority on the question whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations. See 567 U.S. ——, 133 S.Ct. 98, 183 L.Ed.2d 737 (2012). We now affirm.

II

A

. . . . Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception. See, *e.g., United States v. Robinson,* 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). That principle applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's "most personal and deep-rooted expectations of privacy." *Winston v. Lee,* 470 U.S. 753, 760, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985).

We first considered the Fourth Amendment restrictions on such searches in *Schmerber* [*v. California*, 384 U.S. 757], where, as in this case, a blood sample was drawn from a defendant suspected of driving while under the influence of alcohol. 384 U.S., at 758, 86 S.Ct. 1826. Noting that "[s]earch warrants are ordinarily required for searches of dwellings," we reasoned that "absent an emergency, no less could be required where intrusions into the human body are concerned," even when the search was conducted following a lawful arrest. *Id.,* at 770, 86 S.Ct. 1826. We explained that the importance of requiring authorization by a "'neutral and detached magistrate'" before allowing a law enforcement officer to "invade another's body in search of evidence of guilt is indisputable and great." *Ibid.* (quoting *Johnson v. United States,* 333 U.S. 10, 13–14, 68 S.Ct. 367, 92 L.Ed. 436 (1948)).

As noted, the warrant requirement is subject to exceptions. "One well-recognized exception," and the one at issue in this case, "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King,* 563 U.S. ——, ——, 131 S.Ct. 1849, 1856, 179 L.Ed.2d 865 (2011) (internal quotation marks and brackets omitted). A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search . . . . [W]e have . . . recognized that in some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence. See *Cupp v. Murphy,* 412 U.S. 291, 296, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973); *Ker v. California,* 374 U.S. 23, 40–41, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963) (plurality opinion). . . . [A] warrantless search is potentially reasonable because "there is compelling need for official action and no time to secure a warrant." *Tyler,* 436 U.S., at 509, 98 S.Ct. 1942.

To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances. We apply this

"finely tuned approach" to Fourth Amendment reasonableness in this context because the police action at issue lacks "the traditional justification that . . . a warrant . . . provides." *Atwater v. Lago Vista,* 532 U.S. 318, 347, n. 16, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001). Absent that established justification, "the fact-specific nature of the reasonableness inquiry," *Ohio v. Robinette,* 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996), demands that we evaluate each case of alleged exigency based "on its own facts and circumstances." *Go–Bart Importing Co. v. United States,* 282 U.S. 344, 357, 51 S.Ct. 153, 75 L.Ed. 374 (1931).

Our decision in *Schmerber* applied this totality of the circumstances approach. In that case, the petitioner had suffered injuries in an automobile accident and was taken to the hospital. 384 U.S., at 758, 86 S.Ct. 1826. While he was there receiving treatment, a police officer arrested the petitioner for driving while under the influence of alcohol and ordered a blood test over his objection. *Id.,* at 758–759, 86 S.Ct. 1826. After explaining that the warrant requirement applied generally to searches that intrude into the human body, we concluded that the warrantless blood test "in the present case" was nonetheless permissible because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" *Id.,* at 770, 86 S.Ct. 1826 (quoting *Preston v. United States,* 376 U.S. 364, 367, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964)).

In support of that conclusion, we observed that evidence could have been lost because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." 384 U.S., at 770, 86 S.Ct. 1826. We added that "[p]articularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." *Id.,* at 770–771, 86 S.Ct. 1826. "Given these special facts," we found that it was appropriate for the police to act without a warrant. *Id.,* at 771, 86 S.Ct. 1826. We further held that the blood test at issue was a reasonable way to recover the evidence because it was highly effective, "involve[d] virtually no risk, trauma, or pain," and was conducted in a reasonable fashion "by a physician in a hospital environment according to accepted medical practices." *Ibid.* And in conclusion, we noted that our judgment that there had been no Fourth Amendment violation was strictly based "on the facts of the present record." *Id.,* at 772, 86 S.Ct. 1826.

Thus, our analysis in *Schmerber* fits comfortably within our case law applying the exigent circumstances exception. In finding the warrantless blood test reasonable in *Schmerber,* we considered all of the facts and circumstances of the particular case and carefully based our holding on those specific facts.

B

The State properly recognizes that the reasonableness of a warrantless search under the exigency exception to the warrant requirement must be evaluated based on the totality

of the circumstances. But the State nevertheless seeks a *per se* rule for blood testing in drunk-driving cases. The State contends that whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because BAC evidence is inherently evanescent. As a result, the State claims that so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain the blood sample without a warrant.

It is true that as a result of the human body's natural metabolic processes, the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated. Testimony before the trial court in this case indicated that the percentage of alcohol in an individual's blood typically decreases by approximately 0.015 percent to 0.02 percent per hour once the alcohol has been fully absorbed. More precise calculations of the rate at which alcohol dissipates depend on various individual characteristics (such as weight, gender, and alcohol tolerance) and the circumstances in which the alcohol was consumed. Regardless of the exact elimination rate, it is sufficient for our purposes to note that because an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results. This fact was essential to our holding in *Schmerber,* as we recognized that, under the circumstances, further delay in order to secure a warrant after the time spent investigating the scene of the accident and transporting the injured suspect to the hospital to receive treatment would have threatened the destruction of evidence. 384 U.S., at 770–771, 86 S.Ct. 1826.

But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its *amici*. In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts, . . . not to accept the "considerable overgeneralization" that a *per se* rule would reflect. *Richards,* 520 U.S., at 393, 117 S.Ct. 1416.

The context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a "'now or never'" situation. *Roaden v. Kentucky,* 413 U.S. 496, 505, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973). In contrast to, for example, circumstances in which the suspect has control over easily disposable evidence, BAC evidence from a drunk-driving suspect naturally dissipates over time in a gradual and relatively predictable manner. Moreover, because a police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test, some delay between the time of the arrest or accident and the time of the test is inevitable

regardless of whether police officers are required to obtain a warrant. This reality undermines the force of the State's contention . . . that we should recognize a categorical exception to the warrant requirement because BAC evidence "is actively being destroyed with every minute that passes." Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.

The State's proposed *per se* rule also fails to account for advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple. The Federal Rules of Criminal Procedure were amended in 1977 to permit federal magistrate judges to issue a warrant based on sworn testimony communicated by telephone. As amended, the law now allows a federal magistrate judge to consider "information communicated by telephone or other reliable electronic means." Fed. Rule Crim. Proc. 4.1. States have also innovated. Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing. And in addition to technology-based developments, jurisdictions have found other ways to streamline the warrant process, such as by using standard-form warrant applications for drunk-driving investigations.

We by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process. Warrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review. Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record, such as preparing a duplicate warrant before calling the magistrate judge. See Fed. Rule Crim. Proc. 4.1(b)(3). And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest. But technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency. That is particularly so in this context, where BAC evidence is lost gradually and relatively predictably.[6]

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6. The dissent claims that a "50–state survey [is] irrelevant to the actual disposition of this case" because Missouri requires written warrant applications. *Post,* at 1578. But the *per se* exigency rule that the State seeks and the dissent embraces would apply nationally because it treats "the body's natural metabolization of alcohol" as a sufficient basis for a warrantless search everywhere and always. *Post,* at 1574. The technological innovations in warrant procedures that many States have adopted are accordingly relevant to show that the *per se* rule is overbroad.

Of course, there are important countervailing concerns. While experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation. For that reason, exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process. But adopting the State's *per se* approach would improperly ignore the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions "to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement." *State v. Rodriguez,* 2007 UT 15, ¶ 46, 156 P.3d 771, 779.

In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber,* it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

C

In an opinion concurring in part and dissenting in part, THE CHIEF JUSTICE agrees that the State's proposed *per se* rule is overbroad because "[f]or exigent circumstances to justify a warrantless search . . . there must . . . be 'no time to secure a warrant.'" *Post,* at 1572 (quoting *Tyler,* 436 U.S., at 509, 98 S.Ct. 1942). But THE CHIEF JUSTICE then goes on to suggest his own categorical rule under which a warrantless blood draw is permissible if the officer could not secure a warrant (or reasonably believed he could not secure a warrant) in the time it takes to transport the suspect to a hospital or similar facility and obtain medical assistance. *Post,* at 1572 – 1574. Although we agree that delay inherent to the blood-testing process is relevant to evaluating exigency, we decline to substitute THE CHIEF JUSTICE's modified *per se* rule for our traditional totality of the circumstances analysis.

For one thing, making exigency completely dependent on the window of time between an arrest and a blood test produces odd consequences. Under THE CHIEF JUSTICE's rule, if a police officer serendipitously stops a suspect near an emergency room, the officer may conduct a nonconsensual warrantless blood draw even if all agree that a warrant could be obtained with very little delay under the circumstances (perhaps with far less delay than an average ride to the hospital in the jurisdiction). The rule would also distort law enforcement incentives. As with the State's *per se* rule, THE CHIEF JUSTICE's rule might discourage efforts to expedite the warrant process because it categorically authorizes warrantless blood draws so long as it takes more time to secure a warrant than to obtain medical assistance. On the flip side, making the requirement of independent judicial oversight turn exclusively on the amount of time that elapses between an arrest and BAC testing could induce police departments and individual officers to minimize testing delay to the detriment of other values. THE CHIEF JUSTICE correctly observes that "[t]his case involves medical personnel drawing blood at a medical facility, not police officers doing so by the side of the road." *Post,* at 1572, n. 2. But THE CHIEF JUSTICE does not say that

roadside blood draws are necessarily unreasonable, and if we accepted THE CHIEF JUSTICE's approach, they would become a more attractive option for the police.

III

The remaining arguments advanced in support of a *per se* exigency rule are unpersuasive.

The State and several of its *amici,* including the United States, express concern that a case-by-case approach to exigency will not provide adequate guidance to law enforcement officers deciding whether to conduct a blood test of a drunk-driving suspect without a warrant. . . . . While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake. Moreover, a case-by-case approach is hardly unique within our Fourth Amendment jurisprudence. Numerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categorical rules, including in situations that are more likely to require police officers to make difficult split-second judgments. See, *e.g., Illinois v. Wardlow,* 528 U.S. 119, 123–125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) (whether an officer has reasonable suspicion to make an investigative stop and to pat down a suspect for weapons under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)); *Robinette,* 519 U.S., at 39–40, 117 S.Ct. 417 (whether valid consent has been given to search); *Tennessee v. Garner,* 471 U.S. 1, 8–9, 20, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (whether force used to effectuate a seizure, including deadly force, is reasonable). As in those contexts, we see no valid substitute for careful case-by-case evaluation of reasonableness here.

Next, the State and the United States contend that the privacy interest implicated by blood draws of drunk-driving suspects is relatively minimal. That is so, they claim, both because motorists have a diminished expectation of privacy and because our cases have repeatedly indicated that blood testing is commonplace in society and typically involves "virtually no risk, trauma, or pain." *Schmerber,* 384 U.S., at 771, 86 S.Ct. 1826. See also *post,* at 1575, and n. 1 (opinion of THOMAS, J.).

But the fact that people are "accorded less privacy in . . . automobiles because of th[e] compelling governmental need for regulation," *California v. Carney,* 471 U.S. 386, 392, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin. As to the nature of a blood test conducted in a medical setting by trained personnel, it is concededly less intrusive than other bodily invasions we have found unreasonable. See *Winston,* 470 U.S., at 759–766, 105 S.Ct. 1611 (surgery to remove a bullet); *Rochin v. California,* 342 U.S. 165, 172–174, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (induced vomiting to extract narcotics capsules ingested by a suspect violated the Due Process Clause). For that reason, we have held that medically drawn blood tests are reasonable in appropriate circumstances. We have never retreated,

however, from our recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests.

Finally, the State and its *amici* point to the compelling governmental interest in combating drunk driving and contend that prompt BAC testing, including through blood testing, is vital to pursuit of that interest. . . . .

"No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444, 451, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990). Certainly we do not. While some progress has been made, drunk driving continues to exact a terrible toll on our society.

But the general importance of the government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case. To the extent that the State and its *amici* contend that applying the traditional Fourth Amendment totality-of-the-circumstances analysis to determine whether an exigency justified a warrantless search will undermine the governmental interest in preventing and prosecuting drunk-driving offenses, we are not convinced.

As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.

It is also notable that a majority of States either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal (often limiting testing to cases involving an accident resulting in death or serious bodily injury) or prohibit nonconsensual blood tests altogether. Among these States, several lift restrictions on nonconsensual blood testing if law enforcement officers first obtain a search warrant or similar court order. We are aware of no evidence indicating that restrictions on nonconsensual blood testing have compromised drunk-driving enforcement efforts in the States that have them. . . . .

. . . . [W]ide-spread state restrictions on nonconsensual blood testing provide further support for our recognition that compelled blood draws implicate a significant privacy interest. They also strongly suggest that our ruling today will not "severely hamper effective law enforcement." *Garner,* 471 U.S., at 19, 105 S.Ct. 1694.

IV

. . . . The State did not argue that there were exigent circumstances in this particular case because a warrant could not have been obtained within a reasonable amount of time. . . . [T]he arresting officer did not identify any other factors that would suggest he faced an emergency or unusual delay in securing a warrant. . . . . He explained that he elected to forgo a warrant application in this case only because he believed it was not legally necessary to obtain a warrant. . . . [T]he trial court [in this case] concluded that there was no exigency . . . .

The Missouri Supreme Court . . . affirmed that judgment, holding first that the dissipation of alcohol did not establish a *per se* exigency, and second that the State could not otherwise satisfy its burden of establishing exigent circumstances. In petitioning for certiorari to this Court, the State . . . did not . . . contend that the warrantless blood test was reasonable regardless of whether the natural dissipation of alcohol in a suspect's blood categorically justifies dispensing with the warrant requirement.

. . . .

Although the Missouri Supreme Court referred to this case as "unquestionably a routine DWI case," 358 S.W.3d, at 74, the fact that a particular drunk-driving stop is "routine" in the sense that it does not involve "'special facts,'" *ibid.,* such as the need for the police to attend to a car accident, does not mean a warrant is required. Other factors present in an ordinary traffic stop, such as the procedures in place for obtaining a warrant or the availability of a magistrate judge, may affect whether the police can obtain a warrant in an expeditious way and therefore may establish an exigency that permits a warrantless search. The relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances in the case.

. . . [T]he arguments and the record do not provide the Court with an adequate analytic framework for a detailed discussion of all the relevant factors that can be taken into account in determining the reasonableness of acting without a warrant. It suffices to say that the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required. No doubt, given the large number of arrests for this offense in different jurisdictions nationwide, cases will arise when anticipated delays in obtaining a warrant will justify a blood test without judicial authorization, for in every case the law must be concerned that evidence is being destroyed. But that inquiry ought not to be pursued here where the question is not properly before this Court. . . . .

We hold that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.

The judgment of the Missouri Supreme Court is affirmed.

It is so ordered.

JUSTICE KENNEDY, concurring in part.

I join Parts I, II–A, II–B, and IV of the opinion for the Court.

For the reasons stated below this case does not call for the Court to consider in detail the issue discussed in Part II–C and the separate opinion by THE CHIEF JUSTICE.

. . . . The repeated insistence in Part III that every case be determined by its own circumstances is correct, of course, as a general proposition; yet it ought not to be interpreted to indicate this question is not susceptible of rules and guidelines that can give important, practical instruction to arresting officers, instruction that in any number of instances would allow a warrantless blood test in order to preserve the critical evidence.

. . . . [T]his Court, in due course, may find it appropriate and necessary to consider a case permitting it to provide more guidance than it undertakes to give today.

. . . .

CHIEF JUSTICE ROBERTS, with whom JUSTICE BREYER and JUSTICE ALITO join, concurring in part and dissenting in part.

A police officer reading this Court's opinion would have no idea—no idea—what the Fourth Amendment requires of him, once he decides to obtain a blood sample from a drunk driving suspect who has refused a breathalyzer test. I have no quarrel with the Court's "totality of the circumstances" approach as a general matter; that is what our cases require. But the circumstances in drunk driving cases are often typical, and the Court should be able to offer guidance on how police should handle cases like the one before us.

. . . .

I

. . . .

II

A

The reasonable belief that critical evidence is being destroyed gives rise to a compelling need for blood draws in cases like this one. Here, in fact, there is not simply a belief that any alcohol in the bloodstream will be destroyed; it is a biological certainty. Alcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour. Stripp, Forensic and Clinical Issues in Alcohol Analysis, in Forensic Chemistry Handbook 440 (L. Kobilinsky ed. 2012). Evidence is literally disappearing by the minute. That certainty makes this case an even stronger one than usual for application of the exigent circumstances exception.

And that evidence is important. A serious and deadly crime is at issue. . . . .

Evidence of a driver's blood alcohol concentration (BAC) is crucial to obtain convictions for such crimes. . . . . [W]hen drivers refuse breathalyzers, as McNeely did here, a blood draw becomes necessary to obtain that evidence.

The need to prevent the imminent destruction of BAC evidence is no less compelling because the incriminating alcohol dissipates over a limited period of time, rather than all at once. As noted, the concentration of alcohol can make a difference not only between guilt and innocence, but between different crimes and different degrees of punishment. The officer is unlikely to know precisely when the suspect consumed alcohol or how much; all he knows is that critical evidence is being steadily lost. . . . .

. . . .

. . . .There is a compelling need to search because alcohol—the nearly conclusive evidence of a serious crime—is dissipating from the bloodstream. . . . .

B

For exigent circumstances to justify a warrantless search, however, there must also be "no time to secure a warrant." *Tyler,* 436 U.S., at 509, 98 S.Ct. 1942. In this respect, obtaining a blood sample from a suspected drunk driver differs from other exigent circumstances cases.

Importantly, there is typically delay between the moment a drunk driver is stopped and the time his blood can be drawn. Drunk drivers often end up in an emergency room, but they are not usually pulled over in front of one. . . . . [W]hen police pull a person over on suspicion of drinking and driving, they cannot test his blood right away. There is a time-consuming obstacle to their search, in the form of a trip to the hospital and perhaps a wait to see a medical professional. . . . .

As noted, the fact that alcohol dissipates gradually from the bloodstream does not diminish the compelling need for a search—critical evidence is still disappearing. But the fact that the dissipation persists for some time means that the police—although they may not

be able to do anything about it right away—may still be able to respond to the ongoing destruction of evidence later on.

There might, therefore, be time to obtain a warrant in many cases. As the Court explains, police can often request warrants rather quickly these days. . . . . The police are presumably familiar with the mechanics and time involved in the warrant process in their particular jurisdiction.

III

A

In a case such as this, applying the exigent circumstances exception to the general warrant requirement of the Fourth Amendment seems straightforward: If there is time to secure a warrant before blood can be drawn, the police must seek one. If an officer could reasonably conclude that there is not sufficient time to seek and receive a warrant, or he applies for one but does not receive a response before blood can be drawn, a warrantless blood draw may ensue.

. . . . We have already held that forced blood draws can be constitutional—that such searches can be reasonable—but that does not change the fact that they are significant bodily intrusions. Requiring a warrant whenever practicable helps ensure that when blood draws occur, they are indeed justified.

. . . .

B

. . . . The question presented is whether a warrantless blood draw is permissible under the Fourth Amendment "based upon the natural dissipation of alcohol in the bloodstream." Pet. for Cert. I. The majority answers "It depends," and so do I. The difference is that the majority offers no additional guidance, merely instructing courts and police officers to consider the totality of the circumstances. I believe more meaningful guidance can be provided about how to handle the typical cases, and nothing about the question presented prohibits affording that guidance.

A plurality of the Court also expresses concern that my approach will discourage state and local efforts to expedite the warrant application process. See *ante,* at 1563. That is not plausible: Police and prosecutors need warrants in a wide variety of situations, and often need them quickly. They certainly would not prefer a slower process, just because that might obviate the need to ask for a warrant in the occasional drunk driving case in which a blood draw is necessary. The plurality's suggestion also overlooks the interest of law enforcement in the protection a warrant provides.

. . . . [T]he police should know how to act in recurring factual situations. Simply put, when a drunk driving suspect fails field sobriety tests and refuses a breathalyzer, whether a warrant is required for a blood draw should come down to whether there is time to secure one.

. . . .

JUSTICE THOMAS, dissenting.

This case requires the Court to decide whether the Fourth Amendment prohibits an officer from obtaining a blood sample without a warrant when there is probable cause to believe that a suspect has been driving under the influence of alcohol. Because the body's natural metabolization of alcohol inevitably destroys evidence of the crime, it constitutes an exigent circumstance. As a result, I would hold that a warrantless blood draw does not violate the Fourth Amendment.

I
A

. . . .

B

. . . . [*Schmerber*] held that dissipation of alcohol in the blood constitutes an exigency that allows a blood draw without a warrant.

. . . .

II

. . . .

. . . . The Court should not adopt a rule that requires police to guess whether they will be able to obtain a warrant before "too much" evidence is destroyed, for police lack reliable information concerning the relevant variables.

. . . .

. . . . As the majority correctly recognizes, "[w]arrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review." *Ante,* at 1562. During that time, evidence is destroyed, and police who have probable cause to believe a crime has been committed should not have to guess how long it will take to secure a warrant.

For the foregoing reasons, I respectfully dissent.

INSERT on p. 1091, after NOTE (4):

(5) In *Utah v. Strieff*, 579 U.S. ___, ___S. Ct. , ___L. Ed. 2d___(2016), by a 5-3 vote, the Justices held that the attenuation exception dictated the admission of evidence found after an officer illegally detained a man who had left a house under surveillance for suspected drug activity. After stopping the man, obtaining his name, and running a warrant check, the officer discovered "an outstanding arrest warrant for a traffic violation." He arrested the man and searched his person incident to the arrest, finding contraband. The majority observed that under "the attenuation doctrine" illegally acquired "[e]vidence is admissible when the connection between the unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance," then evaluated "the causal link" in this case by analyzing the "three factors articulated in *Brown v. Illinois*." Because the evidence was found "only minutes after the illegal stop," the "temporal proximity" factor "favor[ed] suppressing the evidence." The "intervening circumstances" factor, however, "strongly favor[ed]" attenuation. Between the stop and the obtainment of the evidence the officer discovered a valid arrest warrant that "predated" and "was entirely unconnected with the stop," a warrant that obligated him to arrest the man. The search that followed "was undisputedly lawful." In addition, the "'purpose and flagrancy of the official misconduct'" factor "also strongly favor[ed]" attenuation. Observing that deterrence is most needed when "misconduct . . . is purposeful and flagrant," the Court concluded that this case involved, at most, "an isolated instance of negligence . . . in connection with a bona fide investigation of a suspected drug house." Although the officer had mistakenly initiated a stop, "his conduct thereafter was lawful," and he had not conducted an entirely "suspicionless fishing expedition." Neither his "purpose nor the flagrancy of the violation [rose] to a level of misconduct to warrant suppression." In response to the concern that "the prevalence of outstanding arrest warrants in many jurisdictions" could induce the police to "engage in dragnet searches if the exclusionary rule is not applied," the majority observed that "[s]uch wanton conduct would expose police to civil liability" and that "evidence of a dragnet search . . . could" yield a "different" assessment of the "purpose and flagrancy" factor.

Justices Sotomayor, Kagan, and Ginsburg dissented. In their view, the majority's assessments of the intervening circumstance and purposeful and flagrant misconduct variables were misguided. According to Justice Kagan, the "majority's misapplication of *Brown*'s three-part inquiry create[d] unfortunate incentives for the police---indeed, practically invite[d] them to" seize individuals they wish to stop "for investigative reasons" when they do "not have . . . reasonable suspicion." By not applying the exclusionary rule, the Court "place[d] Fourth Amendment protections at risk."