UNITED STATES SUPREME COURT

Encino Motorcars, LLC v. Navarro  9th Cir. Employment Litigation 2995
Automotive service advisors are salesmen exempt from FLSA’s overtime-pay requirement (Thomas, J.)

Kisela v. Hughes  9th Cir. Civil Rights 3001
Police officer entitled to qualified immunity for shooting at disturbed woman holding knife (per curiam)

Stokeling v. United States  3008
Petition for writ of certiorari granted

Guardado v. Jones  Sup. Ct. of FL 3009
Petitions for writs of certiorari denied: summary disposition, with statements

SUPREME COURT OF CALIFORNIA

People v. Buza  C.A. 1st Criminal Law 3011
DNA Act does not violate federal or state constitution by mandating procurement of DNA samples from all adult felony arrestees (Kruger, J.)

CALIFORNIA COURTS OF APPEAL

EHM Productions, Inc. v. Starline Tours of Hollywood, Inc.  C.A. 2nd Dispute Resolution 3041
Successive petitions for confirmation of arbitration awards did not violate “one final judgment” rule (Chavez, J.)

People v. Johnson  C.A. 2nd Criminal Law 3045
Automobile exception to prohibition on warrantless searches gave officers probable cause to search vehicle (Perluss, P.J.)

People v. Samuels  C.A. 2nd Criminal Law 3050
Defendant not entitled to custody credits against term of mandatory supervision for incarceration on unrelated offense (Tangeman, J.)

People v. Chavez  C.A. 4th Criminal Law 3053
Circumstances of pretrial photographic identification not unduly suggestive (Nares, J.)

California Forms Books

- Business Litigation
- Employment Law
- Insurance Defense
- Medical Malpractice
- Products Liability

Download sample forms FREE at: http://at.law.com/books

TRIED. TRUSTED. TRUE.

Availability online, on CD, and in print.

The California Daily Opinion Service contains all opinions by:

- U.S. SUPREME COURT
- U.S. NINTH CIRCUIT COURT OF APPEALS AND BANKRUPTCY APPELLATE PANEL
- CALIFORNIA SUPREME COURT
- CALIFORNIA COURTS OF APPEAL (ALListricts)
- CALIFORNIA ATTORNEY GENERAL

All content in the California Daily Opinion Service is property of The Recorder and shall not be republished or photocopied without express written consent. Copyright 2018. ALM Media Properties, LLC. All rights reserved.

Before citing the California Daily Opinion Service, counsel should verify the continuing publication status of a case. Exhibits and appendices to opinions will be included whenever possible if they are reproducible and merit inclusion. While every effort is made to report accurately, minor errors may occur. To report errors, or for other inquiries, please contact: casesums@alm.com.
SUMMARY

Civil Rights

Police officer entitled to qualified immunity for shooting at disturbed woman holding knife (per curiam)

*Kisela v. Hughes*

U.S. Sup. Ct.; April 2, 2018; 17-467

The U.S. Supreme Court granted a petition for writ of certiorari. The court held that a police officer was entitled to qualified immunity for shooting a woman holding a knife, whom he believed posed a threat to someone standing nearby.

University of Arizona Police Department (UAPD) officers responded to a report of a person engaging in erratic behavior. When they arrived, they saw Amy Hughes carrying a large kitchen knife. She failed to drop the knife when ordered to do so, and began walking towards Sharon Chadwick, who was standing nearby. Unable to intervene due to a chain-link fence, UAPD Corporal Andrew Kisela fired four shots at Hughes, who suffered non-life-threatening injuries. All three officers later said that at the time of the shooting they subjectively believed Hughes to be a threat to Chadwick. Hughes sued Kisela under 42 U.S.C. §1983, alleging excessive force. The district court granted summary judgment in favor of Kisela.

The Court of Appeals for the Ninth Circuit reversed, holding that issues of fact, including the severity of the threat and the adequacy of warnings by the officers, precluded summary judgment.

The Supreme Court granted Kisela’s petition for writ of certiorari, holding that Kisela was entitled to qualified immunity. Kisela said he shot Hughes because he believed she was a threat to Chadwick. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. This was far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate Hughes’ Fourth Amendment rights. Further, Ninth Circuit precedent did not clearly establish that Kisela’s use of force was excessive. To the contrary, the decisions relied on by the Court of Appeals were clearly distinguishable, and none of them supported denying Kisela qualified immunity. The court reversed the judgment of the Court of Appeals and remanded for further proceedings. Justice Sotomayor, joined by Justice Ginsburg, dissented, finding that Kisela’s conduct in shooting Hughes without warning as she walked in a non-threatening manner towards Chadwick was not reasonable and did not clearly entitle him to qualified immunity. In holding otherwise, the majority sends an alarming signal to law enforcement officers and the public—telling officers that they can shoot first and think later, and telling the public that palpably unreasonable conduct will go unpunished.

Criminal Law

DNA Act does not violate federal or state constitution by mandating procurement of DNA samples from all adult felony arrestees (Kruger, J.)

*People v. Buza*

Cal.Sup.Ct.; April 2, 2018; S223698

The California Supreme Court reversed a court of appeal decision. The court held that the collection of DNA samples from all adult felony arrestees does not violate their rights under either the federal or the state constitution.

In 2004, California voters passed Proposition 69, known as the “DNA Fingerprint, Unsolved Crime and Innocence Protection Act,” to expand existing requirements for the collection of DNA identification information for law enforcement purposes. The DNA Act, at Penal Code §296.1(a), requires law enforcement officials to collect DNA samples, as well as fingerprints, from all persons who are arrested for or convicted of felony offenses. Mark Buza was later arrested for arson and related felonies and transported to jail. At booking, a jail official informed Buza that he was required to provide a DNA sample by swabbing the inside of his cheek. He refused. A jury later convicted him of both the arson-related felonies and the misdemeanor offense of refusing to provide a specimen required by the DNA Act.

The court of appeal reversed Buza’s misdemeanor refusal conviction, holding that the DNA Act violated Buza’s rights under the Fourth Amendment. While the case was pending on appeal, the United States Supreme Court addressed a similar issue in *Maryland v. King* (2013) 569 U.S. 435, and reached a different conclusion, holding that “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.” On remand, the court of appeal again reversed Buza’s misdemeanor refusal conviction, this time holding that the DNA Act violates the California Constitution’s prohibition on unreasonable searches and seizures.

The California Supreme Court reversed, holding that the statute’s DNA collection requirement is valid as applied to an individual who, like Buza, is validly arrested on “probable cause to hold for a serious offense” and who is required to swab his cheek as “part of a routine booking procedure” at county jail. Buza’s arrest for felony arson constituted such a serious offense. Under the circumstances presented here, the requirement that he consent to the taking of a cheek swab
was valid under both the federal and state Constitutions. Justice Liu, joined by Justices Cuéllar and Perluss, dissented, opining that Buza’s conviction under the DNA Act for refusing to provide his DNA at booking prior to any judicial determination of whether he was validly arrested violated the California Constitution. Justice Cuéllar, joined by Justices Liu and Perluss, also dissented, finding that the DNA Act violates the California Constitution by sanctioning the procurement of DNA samples from all adults arrested on felony charges, without regard to whether those individuals will ever be charged with a crime or, if charged, will ever be convicted. Kruger, J., joined by Cantil-Sakauye, C.J., and Chin and Corrigan, JJ.; Liu, J., dissenting, joined by Cuéllar and Perluss, sitting by assignment, JJ.; and Cuéllar, J., dissenting, joined by Liu and Perluss, JJ.

Criminal Law

Circumstances of pretrial photographic identification not unduly suggestive (Nares, J.)

*People v. Chavez*

C.A. 4th; March 28, 2018; D069533

The Fourth Appellate District affirmed judgments of conviction and remanded for correction. The court held that the circumstances of a victim’s pretrial identification of one of his alleged assailant were not unduly suggestive.

During a physical altercation involving two groups of men, Eddie Lopez was stabbed in the back and Josue Crook was shot and killed. Following the incident, detectives showed Lopez various photographs taken from surveillance footage around the time of the incident. Lopez recognized and/or identified many of the persons shown in the photographs, but said that none of them was the man he believed to have stabbed him. Lopez then described his assailant as “a fat, short guy in a red t-shirt and blue jeans.” One of the detectives left the room and returned with a photograph of Salvador Chavez, taken from the same surveillance footage. Lopez immediately recognized Chavez as the man he saw holding a knife moments before he was stabbed. In the photograph, Chavez was wearing a red t-shirt and blue jeans, and was holding something in his hand.

The trial court denied Johnson’s motion to suppress the search, finding that the officers’ observation of marijuana sitting in plain view on the front passenger seat gave them circumstances of Lopez’s pretrial identification of Chavez were not unduly suggestive. The photograph did not bear any markings or titles and the detectives did not make any statement either expressly or implicitly attempt to persuade Lopez to identify the subject of the photograph as his assailant. Further, even assuming arguendo that the procedure was unduly suggestive, Lopez’s identification was nonetheless reliable. Most importantly, the man wearing a red T-shirt and blue jeans depicted in the photograph was the only person shown in the surveillance camera video recording before or during the incident who was wearing that type of clothing.

Criminal Law

Automobile exception to prohibition on warrantless searches gave officers probable cause to search vehicle (Perluss, P.J.)

*People v. Johnson*

C.A. 2nd; March 29, 2018; B282810

The Second Appellate District affirmed a judgment of conviction. The court held that the automobile exception to the prohibition on warrantless searches gave officers probable cause to search a car which they had reason to believe contained both drugs and the cash proceeds of a drug transaction.

Police officers observed Corey Johnson engage in what appeared to be a drug transaction, taking a baggie of rock-like substances from his pocket, and exchanging one of them for cash. Before the officers could reach Johnson, however, he got into a car and drove away. When he returned a short while later, they arrested him, some two blocks from where he parked the car. A search of his person revealed neither drugs nor cash. The officers went to the car, where a search yielded both cash and drugs.

The trial court denied Johnson’s motion to suppress the search, finding that the officers’ observation of marijuana sitting in plain view on the front passenger seat gave them
probable cause to search the car. Johnson pleaded no contest to selling cocaine base and appealed.

The court of appeal affirmed, holding that the officers had probable cause to search the car, although not on the basis of the marijuana. Under the law in effect at the time of the search, the mere possession or transportation of marijuana for personal use was not a crime. Thus, the discovery of marijuana in Johnson’s car did not provide probable cause for a search. Because the car was located two blocks from where Johnson was arrested, the search could also not be justified as a search incident to arrest. However, the officers’ prior observation of the drug transaction, Johnson’s immediate departure thereafter in his car, and the officers’ subsequent discovery that neither the drugs nor the cash previously observed were still on Johnson’s person gave them reason to believe that he had stashed the drugs and the cash in his car. Because the officers found someone sitting in the driver’s seat of Johnson’s car, with the apparent ability to drive the car away, they had probable cause to search the car under the automobile exception to the general prohibition on warrantless searches.

The court held that a defendant’s incarceration for a subsequent offense did not entitle him to custody credits against the term of mandatory supervision for an unrelated offense (Tangeman, J.)

People v. Samuels

C.A. 2nd; March 28, 2018; B280619

The Second Appellate District affirmed a trial court order. The court held that a defendant’s incarceration for a subsequent offense did not entitle him to custody credits against a term of mandatory supervision for a prior and unrelated offense.

In March 2014, Kody Samuels pleaded no contest to the unlawful driving or taking of a vehicle. The trial court suspended execution of sentence and ordered five years of mandatory supervision. Over the next 14 months, Samuels repeatedly violated the terms of his supervision. He served several stints in custody. In May 2015, he pleaded no contest to possession of methamphetamine for sale and admitted violating the terms of his mandatory supervision. The trial court sentenced him to three years in county jail on the drug case. It released him from custody on the vehicle case, and reinstated mandatory supervision. Samuels was incarcerated from May 21, 2015, to May 5, 2016.

After his release, Samuels moved to correct the credit calculation in his vehicle case, claiming entitlement to work and conduct credits for the 351 days he spent in jail. The trial court denied the motion.

The court of appeal affirmed, holding that Samuels was not entitled to conduct credit against his mandatory supervision in the vehicle case for time spent in custody as the result of his drug offense. Under Penal Code §1170(h)(5)(B), a defendant, while under mandatory supervision, is “entitled to only actual time credit against the term of imprisonment” unless “in actual custody related to the sentence imposed by the court.” An incarcerated defendant thus may not accrue §4019 credits against a term of mandatory supervision unless the conduct resulting in the supervision was the “true and only unavoidable basis” for the incarceration. If the defendant’s status and performance on mandatory supervision were merely factors the court considered in its decision to impose custodial time in another case, the defendant is entitled to only actual time credits against the term of mandatory supervision. Such was the case here. That the trial court presumably considered Samuels’ performance on supervised release in sentencing him on the drug case did not make the vehicle case the “true and only unavoidable basis” for his incarceration.

Dispute Resolution

Successive petitions for confirmation of arbitration awards did not violate “one final judgment” rule (Chavez, J.)


C.A. 2nd; March 28, 2018; B281594

The Second Appellate District affirmed a judgment. The court held that there was no legal bar to an arbitration panel’s filing of successive awards, or to the prevailing party’s resulting filing of successive petitions to confirm those awards.

After EHM Productions, Inc. and Starline Tours of Hollywood, Inc. entered into a contract to do business together, they were both sued by a third party. When Starline refused to indemnify EHM, EHM filed a demand for arbitration, alleging breach of contract by Starline arising from its refusal to defend EHM in the underlying lawsuit. The arbitrator issued a “partial final award,” finding Starline obligated to defend EHM in the underlying lawsuit. The arbitrator ordered Starline to pay EHM’s past attorney fees and costs and reasonable fees and costs going forward. Starline appealed the award to the JAMS appellate panel, which affirmed the award in its entirety. The panel reserved the determination of EHM’s costs on appeal for further decision. On May 9, 2016, EHM petitioned to confirm the partial arbitration award. On May 12, while EHM’s petition was pending, the JAMS appellate panel issued its “Final Award on Appeal,” awarding EHM $41,429.92 in costs for the JAMS appeal. On July 27, the trial court granted EHM’s petition to confirm the partial arbi-
tration award. On August 22, EHM petitioned for confirmation of the May 12 cost award. The trial court granted that petition.

Starline appealed, arguing that EHM waived its right to obtain confirmation of the cost award by failing to present it for confirmation prior to the entry of the first judgment. The court of appeal affirmed, holding that the one final judgment rule did not preclude confirmation of the cost award. Starline cited no law supporting its position that the procedure undertaken in this case was error. To the contrary, *Hightower v. Superior Court* (2001) 86 Cal.App.4th 1415 supports the incremental award process used by the arbitrator in this matter, with the result that the cost award was the proper subject of a separate petition to confirm. While the most efficient means of obtaining confirmation might have been to amend the petition once the cost award was issued, *Hightower* does not require such action, and Starline cited no authority requiring amendment of a petition to confirm arbitration award under the circumstances of this case. Principles of waiver and estoppel also did not preclude confirmation of the cost award.

---

**Employment Litigation**

Automotive service advisors are salesmen exempt from FLSA’s overtime-pay requirement (Thomas, J.)

**Encino Motorcars, LLC v. Navarro**

U.S. Sup. Ct.; April 2, 2018; 16–1362

Respondents, current and former service advisors for petitioner Encino Motorcars, LLC, sued petitioner for back pay, alleging that petitioner violated the Fair Labor Standards Act (FLSA) by failing to pay them overtime. Petitioner moved to dismiss, arguing that service advisors are exempt from the FLSA’s overtime-pay requirement under 29 U.S.C. §213(b)(10) (A), which applies to “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements.” The District Court agreed and dismissed the suit. The Court of Appeals for the Ninth Circuit reversed. It found the statute ambiguous and the legislative history inconclusive, and it deferred to a 2011 Department of Labor rule that interpreted “salesman” to exclude service advisors. This Court vacated the Ninth Circuit’s judgment, holding that courts could not defer to the procedurally defective 2011 rule, *Encino Motorcars, LLC v. Navarro*, 579 U.S. ___, ___—___ (Encino I), but not deciding whether the exemption covers service advisors, *id.*, at ___. On remand, the Ninth Circuit again held that the exemption does not include service advisors.

Held: Because service advisors are “salesmen[en] … primarily engaged in … servicing automobiles,” they are exempt from the FLSA’s overtime-pay requirement. Pp. 5–11.

(a) A service advisor is obviously a “salesman.” The ordinary meaning of “salesman” is someone who sells goods or services, and service advisors “sell [customers] services for their vehicles,” *Encino I*, supra, at ___. P. 6.

(b) Service advisors are also “primarily engaged in … servicing automobiles.” “Servicing” can mean either “the action of maintaining or repairing a motor vehicle” or “[t]he action of providing a service.” 15 Oxford English Dictionary 39. Service advisors satisfy both definitions because they are integral to the servicing process. They “meet[en] customers; liste[n] to their concerns about their cars; suggest[en] repair and maintenance services; sell[en] new accessories or replacement parts; record service orders; follow[en] up with customers as the services are performed (for instance, if new problems are discovered); and explain the repair and maintenance work when customers return for their vehicles.” *Encino I*, supra, at ___. While service advisors do not spend most of their time physically repairing automobiles, neither do partsmen, who the parties agree are “primarily engaged in … servicing automobiles.” Pp. 6–7.

(c) The Ninth Circuit invoked the distributive canon—matching “salesman” with “selling” and “partsman [and] mechanic with “[servicing]”—to conclude that the exemption simply does not apply to “salesmen[en]… primarily engaged in … servicing automobiles.” But the word “or,” which connects all of the exemption’s nouns and gerunds, is “almost always disjunctive.” *United States v. Woods*, 571 U.S. 31, 45. Using “or” to join “selling” and “servicing” thus suggests that the exemption covers a salesman primarily engaged in either activity. Statutory context supports this reading. First, the distributive canon has the most force when one-to-one matching is present, but here, the statute would require matching some of three nouns with one of two gerunds. Second, the distributive canon has the most force when an ordinary, disjunctive reading is linguistically impossible. But here, “salesmen … primarily engaged in … servicing automobiles” is an apt description of a service advisor. Third, a narrow distributive phrasing is an unnatural fit here because the entire exemption bespeaks breadth, starting with “any” and using the disjunctive “or” three times. Pp. 7–9.

(d) The Ninth Circuit also invoked the principle that exemptions to the FLSA should be construed narrowly. But the Court rejects this principle as a guide to interpreting the FLSA. Because the FLSA gives no textual indication that its exemptions should be construed narrowly, they should be given a fair reading. P. 9.

(e) Finally, the Ninth Circuit’s reliance on two extraneous sources to support its interpretation—the 1966–1967 Occupational Outlook Handbook and the FLSA’s legislative history—is unavailing. Pp. 9–11.

845 F. 3d 925, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, ALITO, and GORSUCH, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.
The Fair Labor Standards Act (FLSA), 52 Stat. 1060, as amended, 29 U. S. C. §201 et seq., requires employers to pay overtime compensation to covered employees. The FLSA exempts from the overtime-pay requirement “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles” at a covered dealership. §213(b)(10)(A).

We granted certiorari to decide whether this exemption applies to service advisors—employees at car dealerships who consult with customers about their servicing needs and sell them servicing solutions. We conclude that service advisors are exempt.

I

A

Enacted in 1938, the FLSA requires employers to pay overtime to covered employees who work more than 40 hours in a week. 29 U. S. C. §207(a). But the FLSA exempts many categories of employees from this requirement. See §213. Employees at car dealerships have long been among those exempted.

Congress initially exempted all employees at car dealerships from the overtime-pay requirement. See Fair Labor Standards Amendments of 1961, §9, 75 Stat. 73. Congress then narrowed that exemption to cover “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft.” Fair Labor Standards Amendments of 1966, §209, 80 Stat. 836. In 1974, Congress enacted the version of the exemption at issue here. It provides that the FLSA’s overtime-pay requirement does not apply to “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers.” §213(b)(10)(A).


In 2011, however, the Department reversed course. It issued a rule that interpreted “salesman” to exclude service advisors. 76 Fed. Reg. 18832, 18859 (2011) (codified at 29 CFR §779.372(c)). That regulation prompted this litigation.

B

Petitioner Encino Motorcars, LLC, is a Mercedes-Benz dealership in California. Respondents are current and former service advisors for petitioner. Service advisors “interact with customers and sell them services for their vehicles.” Encino Motorcars, LLC v. Navarro, 579 U. S. ___ (2016) (Encino I) (slip op., at 2). They “meet customers; listen to their concerns about their cars; suggest repair and maintenance services; sell new accessories or replacement parts; record service orders; follow up with customers as the services are performed (for instance, if new problems are discovered); and explain the repair and maintenance work when customers return for their vehicles.” Ibid.


We granted certiorari and vacated the Ninth Circuit’s judgment. We explained that courts cannot defer to the 2011 rule because it is procedurally defective. See Encino I, 579 U. S.,
at ___–___ (slip op., at 8–12). Specifically, the regulation undermined significant reliance interests in the automobile industry by changing the treatment of service advisors without a sufficiently reasoned explanation. Id., at ___ (slip op., at 10). But we did not decide whether, without administrative deference, the exemption covers service advisors. Id., at ___ (slip op., at 12). We remanded that issue for the Ninth Circuit to address in the first instance. Ibid.

C

On remand, the Ninth Circuit again held that the exemption does not include service advisors. The Court of Appeals agreed that a service advisor is a “‘salesman’” in a “generic sense,” 845 F. 3d 925, 930 (2017), and is “‘primarily engaged in . . . servicing automobiles’” in a “general sense,” id., at 931. Nonetheless, it concluded that “Congress did not intend to exempt service advisors.” Id., at 929.

The Ninth Circuit began by noting that the Department’s 1966–1967 Occupational Outlook Handbook listed 12 job titles in the table of contents that could be found at a car dealership, including “automobile mechanics,” “automobile parts countermen,” “automobile salesmen,” and “automobile service advisors.” Id., at 930. Because the FLSA exemption listed three of these positions, but not service advisors, the Ninth Circuit concluded that service advisors are not exempt. Ibid. The Ninth Circuit also determined that service advisors are not primarily engaged in “servicing” automobiles, which it defined to mean “only those who are actually occupied in the repair and maintenance of cars.” Id., at 931. And the Ninth Circuit further concluded that the exemption does not cover salesmen who are primarily engaged in servicing. Id., at 933. In reaching this conclusion, the Ninth Circuit invoked the distributive canon. See A. Scalia & B. Garner, Reading Law 214 (2012) (“Distributive phrasing applies each expression to its appropriate referent”). It reasoned that “Congress intended the gerunds—selling and servicing—to be distributed to their appropriate subjects—salesman, partsman, and mechanic. A salesman sells; a partsman services; and a mechanic services.” Id., at 934. Finally, the Court of Appeals noted that its interpretation was supported by the principle that exemptions to the FLSA should be construed narrowly, not precisely that. As this Court previously explained, service advisors “sell [customers] services for their vehicles.” Encino I, 579 U. S., at ___ (slip op., at 2).

B

Service advisors are also “primarily engaged in . . . servicing automobiles.” §213(b)(10)(A). The word “servicing” in this context can mean either “the action of maintaining or repairing a motor vehicle” or “[t]he action of providing a service.” 15 Oxford English Dictionary, at 39; see also Random House Dictionary of the English Language 1262 (1966) (“a man who sells goods, services, etc.”). Service advisors do precisely that. As this Court previously explained, service advisors “sell [customers] services for their vehicles.” Encino I, supra, at ___ (slip op., at 2). If you ask the average customer who services his car, the primary, and perhaps only, person he is likely to identify is his service advisor.

True, service advisors do not spend most of their time physically repairing automobiles. But the statutory language is not so constrained. All agree that partsmen, for example, are “primarily engaged in . . . servicing automobiles.” Brief for Petitioner 40; Brief for Respondents 41–44. But partsmen, like service advisors, do not spend most of their time under the hood. Instead, they “obtain the vehicle parts . . . and provide those parts to the mechanics.” Encino I, supra, at ___ (slip op., at 2); see also 1 Dept. of Labor, Dictionary of Occupational Titles 33 (3d ed. 1965) (defining “partsman” to ultimate purchasers.” The parties also agree that a service advisor is not a “partsman” or “mechanic,” and that a service advisor is not “primarily engaged . . . in selling automobiles.” The question, then, is whether service advisors are “salesm[e]n . . . primarily engaged in . . . servicing automobiles.” We conclude that they are. Under the best reading of the text, service advisors are “salesm[e]n,” and they are “primarily engaged in . . . servicing automobiles.” The distributive canon, the practice of construing FLSA exemptions narrowly, and the legislative history do not persuade us otherwise.

A

A service advisor is obviously a “salesman.” The term “salesman” is not defined in the statute, so “we give the term its ordinary meaning.” Taniguchi v. Kan Pacific Saipan, Ltd., 566 U. S. 560, 566 (2012). The ordinary meaning of “salesman” is someone who sells goods or services. See 14 Oxford English Dictionary 391 (2d ed.1989) (“[a] man whose business it is to sell goods or conduct sales”); Random House Dictionary of the English Language 1262 (1966) (“a man who sells goods, services, etc.:”). Service advisors do precisely that. As this Court previously explained, service advisors “sell [customers] services for their vehicles.” Encino I, 579 U. S., at ___ (slip op., at 2).

II

The FLSA exempts from its overtime-pay requirement “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers.” §213(b)(10)(A). The parties agree that petitioner is a “nonmanufacturing establishment primarily engaged in the business of selling automobiles to ultimate purchasers.” The parties also agree that a service advisor is not a “partsman” or “mechanic,” and that a service advisor is not “primarily engaged . . . in selling automobiles.” The question, then, is whether service advisors are “salesm[e]n . . . primarily engaged in . . . servicing automobiles.” We conclude that they are. Under the best reading of the text, service advisors are “salesm[e]n,” and they are “primarily engaged in . . . servicing automobiles.” The distributive canon, the practice of construing FLSA exemptions narrowly, and the legislative history do not persuade us otherwise.
as someone who “[p]urchases, stores, and issues spare parts for automotive and industrial equipment”). In other words, the phrase “primarily engaged in . . . servicing automobiles” must include some individuals who do not physically repair automobiles themselves but who are integrally involved in the servicing process. That description applies to partsmen and service advisors alike.

C

The Ninth Circuit concluded that service advisors are not covered because the exemption simply does not apply to “salesman . . . primarily engaged in . . . servicing automobiles.” The Ninth Circuit invoked the distributive canon to reach this conclusion. Using that canon, it matched “salesman” with “selling” and “partsman [n] [and] mechanic” with “servicing.” We reject this reasoning.

The text of the exemption covers “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements.” §213(b)(10)(A). The exemption uses the word “or” to connect all of its nouns and gerunds, and “or” is “almost always disjunctive.” United States v. Woods, 571 U.S. 31, 45 (2013). Thus, the use of “or” to join “selling” and “servicing” suggests that the exemption covers a salesman primarily engaged in either activity.

Unsurprisingly, statutory context can overcome the ordinary, disjunctive meaning of “or.” The distributive canon, for example, recognizes that sometimes “[w]here a sentence contains several antecedents and several consequents,” courts should “read them distributively and apply the words to the subjects which, by context, they seem most properly to relate.” 2A N. Singer & S. Singer, Sutherland Statutes and Statutory Construction §47:26, p. 448 (rev. 7th ed. 2014).

But here, context favors the ordinary disjunctive meaning of “or” for at least three reasons. First, the distributive canon has the most force when the statute allows for one-to-one matching. But here, the distributive canon would mix and match some of three nouns—“salesman, partsman, or mechanic”—with one of two gerunds—“selling or servicing.” §213(b)(10)(A). We doubt that a legislative drafter would leave it to the reader to figure out the precise combinations. Second, the distributive canon has the most force when an ordinary, disjunctive reading is linguistically impossible. Cf., e.g., Huidekoper’s Lessee v. Douglass, 3 Cranch 1, 67 (1805) (Marshall, C. J.) (applying the distributive canon when a purely disjunctive reading “would involve a contradiction in terms”). But as explained above, the phrase “salesman . . . primarily engaged in . . . servicing automobiles” not only makes sense; it is an apt description of a service advisor. Third, a narrow distributive phrasing is an unnatural fit here because the entire exemption bespeaks breadth. It begins with the word “any.” See Ali v. Federal Bureau of Prisons, 552 U. S. 214, 219 (2008) (noting the “expansive meaning” of “any”). And it uses the disjunctive word “or” three times. In fact, all agree that the third list in the exemption—“automobiles, trucks, or farm implements”—modifies every other noun and gerund. But it would be odd to read the exemption as starting with a distributive phrasing and then, halfway through and without warning, switching to a disjunctive phrasing—all the while using the same word (“or”) to signal both meanings. See Brown v. Gardner, 513 U. S. 115, 118 (1994) (noting the “vigorous” presumption that, “when a term is repeated within a given sentence,” it “is used to mean the same thing”). The more natural reading is that the exemption covers any combination of its nouns, gerunds, and objects.

D

The Ninth Circuit also invoked the principle that exemptions to the FLSA should be construed narrowly. 845 F. 3d, at 935–936. We reject this principle as a useful guidepost for interpreting the FLSA. Because the FLSA gives no “textual indication” that its exemptions should be construed narrowly, “there is no reason to give [them] anything other than a fair (rather than a ‘narrow’) interpretation.” Scalia, Reading Law, at 363. The narrow-construction principle relies on the flawed premise that the FLSA “pursues” its remedial purpose “at all costs.” American Express Co. v. Italian Colors Restaurant, 570 U. S. 228, 234 (2013) (quoting Rodriguez v. United States, 480 U. S. 522, 525–526 (1987) (per curiam)); see also Henson v. Santander Consumer USA Inc., 582 U. S. ___ ___ (2017) (slip op., at 9) (“It is quite mistaken to assume . . . that whatever might appear to further the statute’s primary objective must be the law” (internal quotation marks and alterations omitted)). But the FLSA has over two dozen exemptions in §213(b) alone, including the one at issue here. Those exemptions are as much a part of the FLSA’s purpose as the overtime-pay requirement. See id., at ___ ___ (slip op., at 9) (“Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage”). We thus have no license to give the exemption anything but a fair reading.

E

Finally, the Ninth Circuit relied on two extraneous sources to support its interpretation: the Department’s 1966–1967 Occupational Outlook Handbook and the FLSA’s legislative history. We find neither persuasive.

I

The Ninth Circuit first relied on the Department’s 1966–1967 Occupational Outlook Handbook. It identified 12 jobs from the Handbook’s table of contents that it thought could be found at automobile dealerships. See 845 F. 3d, at 930. The Ninth Circuit then stressed that the exemption aligns with three of those job titles—“[a]utomobile mechanics,” “[a]utomobile parts countermen,” and “[a]utomobile salesmen”—but not “[a]utomobile service advisors.” Ibid.

The Ninth Circuit cited nothing, however, suggesting that the exemption was meant to align with the job titles listed in the Handbook. To the contrary, the exemption applies to “any salesman . . . primarily engaged in selling or servicing auto-
mobiles.” It is not limited, like the term in the Handbook, to “automobile salesmen.” And the ordinary meaning of “salesman” plainly includes service advisors.

The Ninth Circuit also relied on legislative history to support its interpretation. See id., at 936–939. Specifically, it noted that the legislative history discusses “automobile salesmen, partsmen, and mechanics” but never discusses service advisors. Id., at 939. Although the Ninth Circuit had previously found that same legislative history “inconclusive,” Encino, 780 F. 3d, at 1275, on remand it was “firmly persuaded” that the legislative history demonstrated Congress’ desire to exclude service advisors, 845 F. 3d, at 939.

The Ninth Circuit was right the first time. As we have explained, the best reading of the statute is that service advisors are exempt. Even for those Members of this Court who consider legislative history, silence in the legislative history, “no matter how ‘clanging,’” cannot defeat the better reading of the text and statutory context. Sedima, S. P. R. L. v. Imrex Co., 473 U. S. 479, 495, n. 13 (1985). If the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity. See Avco Corp. v. Department of Justice, 884 F. 2d 621, 625 (CADC 1989). Even if Congress did not foresee all of the applications of the statute, that is no reason not to give the statutory text a fair reading. See Union Bank v. Wolas, 502 U. S. 151, 158 (1991).

* * *

In sum, we conclude that service advisors are exempt from the overtime-pay requirement of the FLSA because they are “salesmen . . . primarily engaged in . . . servicing automobiles.” §213(b)(10)(A). Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

Diverse categories of employees staff automobile dealerships. Of employees so engaged, Congress explicitly exempted from the Fair Labor Standards Act hours requirements only three occupations: salesmen, partsmen, and mechanics. The Court today approves the exemption of a fourth occupation: automobile service advisors. In accord with the judgment of the Court of Appeals for the Ninth Circuit, I would not enlarge the exemption to include service advisors or other occupations outside Congress’ enumeration.

Respondents are service advisors at a Mercedes-Benz automobile dealership in the Los Angeles area. They work regular hours, 7 a.m. to 6 p.m., at least five days per week, on the dealership premises. App. 54. Their weekly minimum is 55 hours. Maximum hours, for workers covered by the Fair Labor Standards Act (FLSA or Act), are 40 per week. 29 U. S. C. §207(a)(1). In this action, respondents seek time-and-a-half compensation for hours worked beyond the 40 per week maximum prescribed by the FLSA.

The question presented: Are service advisors exempt from receipt of overtime compensation under 29 U. S. C. §213(b)(10)(A)? That exemption covers “any salesman, partsmen, or mechanic primarily engaged in selling or servicing automobiles.” Service advisors, such as respondents, neither sell automobiles nor service (i.e., repair or maintain) vehicles. Rather, they “meet and greet [car]owners”; “solicit and suggest [repair] services” to remedy the [owner’s] complaints”; “solicit and suggest . . . supplemental [vehicle] service[s]”; and provide owners with cost estimates. App. 55. Because service advisors neither sell nor repair automobiles, they should remain outside the exemption and within the Act’s coverage.

I

In 1961, Congress exempted all automobile-dealership employees from the Act’s overtime-pay requirements. See Fair Labor Standards Amendments of 1961, §9, 75 Stat. 73.1 Five years later, in 1966, Congress confined the dealership exemption to three categories of employees: automobile salesmen, mechanics, and partsmen. See Fair Labor Standards Amendments of 1966, §209, 80 Stat. 836. At the time, it was well understood that mechanics perform “preventive maintenance” and “repairs,” Dept. of Labor, Occupational Outlook Handbook 477 (1966–1967 ed.) (Handbook), while partsmen requisition parts, “suppl[y] [them] to mechanics,” id., at 312, and, at times, have “mechanical responsibilities in repairing parts,” Brief for International Association of Machinists and Aerospace Workers, AFL–CIO, as Amicus Curiae 30; see Handbook, at 312–313 (partsmen may “measure parts for interchangeability,” test parts for “defect[s],” and “repair parts”). Congress did not exempt numerous other categories of dealership employees, among them, automobile painters, upholsterers, bookkeeping workers, cashiers, janitors, purchasing agents, shipping and receiving clerks, and, most relevant here, service advisors. These positions and their duties were well known at the time, as documented in U. S. Government catalogs of American jobs. See Handbook, at XIII, XV, XVI (table of contents); Brief for International Association of Machinists and Aerospace Workers, AFL–CIO, as Amicus Curiae 34 (noting “more than twenty distinct [job] classifications” in the service department alone).

1. The exemption further extended to all employees of establishments selling “trucks” and “farm implements.” Fair Labor Standards Amendments of 1961, §9, 75 Stat. 73. When Congress later narrowed the provision’s scope for automobile-dealership employees, it similarly diminished the exemption’s application to workers at truck and farm-implement dealerships. See, e.g., Fair Labor Standards Amendments of 1966, §209, 80 Stat. 836.
“Where Congress explicitly enumerates certain exceptions . . . , additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” TRW Inc. v. Andrews, 534 U. S. 19, 28 (2001) (internal quotation marks omitted). The Court thus has no warrant to add to the three explicitly exempt categories (salesmen, parts-men, and mechanics) a fourth (service advisors) for which the Legislature did not provide. The reach of today’s ruling is uncertain, troublingly so: By expansively reading the exemption to encompass all salesmen, parts-men, and mechanics who are “integral to the servicing process,” ante, at 6, the Court risks restoring much of what Congress intended the 1966 amendment to terminate, i.e., the blanket exemption of all dealership employees from overtime-pay requirements.

II

Had the §213(b)(10)(A) exemption covered “any salesman or mechanic primarily engaged in selling or servicing automobiles,” there could be no argument that service advisors fit within it. Only “salesmen” primarily engaged in “selling” automobiles and “mechanics” primarily engaged in “servicing” them would fall outside the Act’s coverage. Service advisors, defined as “salesmen primarily engaged in the selling of services,” Encino Motorcars, LLC v. Navarro, 579 U. S. ___, ___ (2016) (THOMAS, J., dissenting) (slip op., at 2) (emphasis added), plainly do not belong in either category. Moreover, even if the exemption were read to reach “salesmen” “primarily engaged in servicing automobiles,” not just selling them, service advisors would not be exempt. The ordinary meaning of “servicing” is “the action of maintaining or repairing a motor vehicle.” Ante, at 6 (quoting 15 Oxford English Dictionary 39 (2d ed.1989)). As described above, see supra, at 2, service advisors neither maintain nor repair automobiles.2

Petitioner stakes its case on Congress’ addition of the “partsman” job to the exemption. See Reply Brief 6–10. That inclusion, petitioner urges, has a vacuum effect: It draws into the exemption job categories other than the three for which Congress provided, in particular, service advisors. Because partsmen, like service advisors, neither sell nor “service” automobiles in the conventional sense, petitioner reasons, Congress must have intended the word “service” to mean something broader than repair and maintenance.

To begin with, petitioner’s premise is flawed. Unlike service advisors, parts-men “‘get their hands dirty’ by ‘working as a mechanic’s right-hand man or woman.’” Encino Motorcars, 579 U. S., at ___, n. 1 (GINSBURG, J., concurring) (slip op., at 1, n. 1) (quoting Brief for Respondents in No. 15–415, p. 11; alterations omitted); see supra, at 2–3 (describing duties of partsmen). As the Solicitor General put it last time this case was before the Court, a mechanic “might be able to obtain the parts to complete a repair without the real-time assistance of a partsman by his side.” Brief for United States as Amicus Curiae in No. 15–415, p. 23. But dividing the “key [repair] tasks . . . between two individuals” only “reinforces” “that both the mechanic and the partsman are . . . involved in repairing (‘servicing’) the vehicle.” Ibid. Service advisors, in contrast, “sell . . . services [to customers] for their vehicles,” Encino Motorcars, 579 U. S., at ___ (slip op., at 2) (emphasis added)—services that are later performed by mechanics and partsmen.

Adding partsmen to the exemption, moreover, would be an exceptionally odd way for Congress to have indicated that “servicing” should be given a meaning deviating from its ordinary usage. There is a more straightforward explanation for Congress’ inclusion of partsmen alongside salesmen and mechanics: Common features of the three enumerated jobs make them unsuitable for overtime pay.

Both salesmen and mechanics work irregular hours, including nights and weekends, not uncommonly offsite, rendering time worked not easily tracked.3 As noted in the 1966 Senate floor debate, salesmen “go out at unusual hours, trying to earn commissions.” 112 Cong. Rec. 20504 (1966) (remarks of Sen. Bayh). See also ibid. (remarks of Sen. Yarborough) (“[T]he salesman . . . [can] sell an Oldsmobile, a Pontiac, or a Buick all day long and all night. He is not under any overtime.”). Mechanics’ work may involve similar “dif[iculties] in [keeping] regular hours.” Ibid. For example, mechanics may be required to “answ[er] calls in . . . rural areas,” ibid., or to “go out on the field where there is a harvesting of sugar beets,” id., at 20505 (remarks of Sen. Clark).4 And, like salesmen, mechanics may be “subject to substantial seasonal variations in business.” Id., at 20502 (remarks of Sen. Hruska).

Congress added “partsman” to the exemption because it believed that job, too, entailed irregular hours. See ibid. This is “especially true,” several Senators emphasized, “in the farm equipment business where farmers, during planting, cultivating and harvesting seasons, may call on their dealers.

3. In addition to practical difficulties in calculating hours, a core purpose of overtime may not be served when employees’ hours regularly fluctuate. Enacted in the midst of the Great Depression, the FLSA overtime rules encourage employers to hire more individuals who work 40-hour weeks, rather than maintaining a staff of fewer employees who consistently work longer hours. See Overnight Motor Transp. Co. v. Missel, 316 U. S. 572, 577–578 (1942) (overtime rules apply “financial pressure” on employers to “spread employment”); 7 D. VanDeusen, Labor and Employment Law §176.02[1] (2018). But if a position’s working hours routinely ebb and flow, while averaging 40 each week, then it does not make sense to encourage employers to hire more workers for that position.

4. Recall that the exemption extends to salesmen, mechanics, and partsmen at dealerships selling farm implements and trucks, not just automobiles. See supra, at 2, n. 1.
for parts at any time during the day or evening and on weekends.” Ibid. (remarks of Sen. Bayh). See also id., at 20503 (remarks of Sen. Mansfield). In Senator Bayh’s experience, for instance, a mechanic who “could not find [a] necessary part” after hours might “call the partsman, get him out of bed, and get him to come down to the store.” Id., at 20504. See also id., at 20503 (remarks of Sen. Hruska) (“Are we going to say to the farmer who needs a part . . . on Sunday: You cannot get a spark plug . . . because the partsman is not exempt, but you can have machinery repaired by a mechanic who is exempt[*]”). Although some Senators opposed adding partsmen to the exemption because, as they understood the job’s demands, partsmen did not work irregular hours, e.g., id., at 20505 (remarks of Sen. Clark), the crux of the debate underscores the exemption’s rationale.

That rationale has no application here. Unlike salesmen, partsmen, and mechanics, service advisors “wor[k] ordinary, fixed schedules on-site.” Brief for Respondents 47 (citing Handbook, at 316). Respondents, for instance, work regular 11-hour shifts, at all times of the year, for a weekly minimum of 55 hours. See App. 54. Service advisors thus do not implicate the concerns underlying the §213(b)(10)(A) exemption. Indeed, they are precisely the type of workers Congress intended the FLSA to shield “from the evil of overwork,” Barrentine v. Arkansas-Best Freight System, Inc., 450 U. S. 728, 739 (1981) (internal quotation marks omitted).

I note, furthermore, that limiting the exemption to the three delineated jobs—salesman, partsman, and mechanic—does not leave the phrase “primarily engaged in selling or servicing,” §213(b)(10)(A), without utility. Congress included that language to ensure that only employees who actually perform the tasks commonly associated with the enumerated positions would be covered. Otherwise, for example, a worker who acts as a “salesman” in name only could lose the FLSA’s protections merely because of the formal title listed on the employer’s payroll records. See Bowers v. Fred Haas Toyota World, 2017 WL 5127289, *4 (SD Tex., June 21, 2017) (“[A]n employee’s title alone is not dispositive of whether he meets the . . . exemption.”). Thus, by partsmen “primarily engaged in . . . servicing automobiles,” Congress meant nothing more than parts-men primarily engaged in the ordinary duties of a parts-man, i.e., requisitioning, supplying, and repairing parts. See supra, at 2–3, 4–5. The inclusion of “partsman” therefore should not result in the removal of service advisors from the Act’s protections.

III

Petitioner contends that “affirming the decision below would disrupt decades of settled expectations” while exposing “employers to substantial retroactive liability.” Brief for Petitioner 51. “[M]any dealerships,” petitioner urges, “have offered compensation packages based primarily on sales commissions,” in reliance on court decisions and agency guidance ranking service advisors as exempt. Id., at 51–52. Respondents here, for instance, are compensated on a “pure commission basis.” App. 55. Awarding retroactive overtime pay to employees who were “focused on earning commissions,” not “working a set number of hours,” petitioner argues, would yield an “unjustified windfall[1]” Brief for Petitioner 53.

Petitioner’s concerns are doubly overstated. As the Court previously acknowledged, see Encino Motorcars, 579 U. S., at ___ (slip op., at 11), the FLSA provides an affirmative defense that explicitly protects regulated parties from retroactive liability for actions taken in good-faith reliance on superseded agency guidance. See 29 U. S. C. §259(a). Given the Department of Labor’s longstanding view that service advisors fit within the §213(b)(10)(A) exemption, see ante, at 2, the reliance defense would surely shield employers from retroactive liability were the Court to construe the exemption properly.

Congress, moreover, has spoken directly to the treatment of commission-based workers. The FLSA exempts from its overtime directives any employee of a “retail or service establishment” who receives more than half of his or her pay on commission, so long as the employee’s “regular rate of pay” is more than 1½ times the minimum wage. §207(i). Thus, even without the §213(b)(10)(A) exemption, many service advisors compensated on commission would remain ineligible for overtime remuneration. 5

In crafting the commission-pay exemption, Congress struck a deliberate balance: It exempted higher paid commissioned employees, perhaps in recognition of their potentially irregular hours, see Mechem v. Four Seasons Hotels, Ltd., 825 F. 2d 1173, 1176–1177 (CA7 1987); cf. supra, at 5–7, but it maintained protection for lower paid employees, to vindicate the Act’s “principal . . . purpose” of shielding “workers from substandard wages and oppressive working hours,” Barrentine, 450 U. S., at 739. 6 By stretching the §213(b)(10)(A) exemption to encompass even the lowest income service advisors compensated on commission, the Court upsets Congress’ careful balance, while stripping away protection for the most vulnerable workers in this occupation.

* * *


5. The current FLSA minimum wage, for example, is $7.25 per hour. See 29 U. S. C. §206(a)(1)(C). The only commission-based service advisors at retail or service establishments who are not already exempt under §207(i)—and who thus remain eligible for overtime—are those earning less than $10.88 per hour. Providing such workers time-and-a-half pay, as Congress directed, would confer, at most, $5.44 per overtime hour.

6. Congress struck a similar balance in 29 U. S. C. §207(f), which exempts employees whose duties “necessitate irregular hours of work,” but only if they receive specified minimum rates of pay.
The Court today, in adding an exemption of its own creation, veers away from that comprehension of the FLSA’s mission. I would instead resist, as the Ninth Circuit did, diminishment of the Act’s overtime strictures.

7. This Court has long held that FLSA “exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit.” *Arnold v. Ben Kanowsky, Inc.*, 361 U. S. 388, 392 (1960). This principle is a well-grounded application of the general rule that an “exception to a general statement of policy is usually read . . . narrowly in order to preserve the primary operation of the provision.” *Maracich v. Spears*, 570 U. S. 48, 60 (2013) (internal quotation marks omitted). In a single paragraph, the Court “reject[s]” this longstanding principle as applied to the FLSA, ante, at 9, without even acknowledging that it unsettles more than half a century of our precedent.

PER CURIAM.

Petitioner Andrew Kisela, a police officer in Tucson, Arizona, shot respondent Amy Hughes. Kisela and two other officers had arrived on the scene after hearing a police radio report that a woman was engaging in erratic behavior with a knife. They had been there but a few minutes, perhaps just a minute. When Kisela fired, Hughes was holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so. The question is whether at the time of the shooting Kisela’s actions violated clearly established law.

The record, viewed in the light most favorable to Hughes, shows the following. In May 2010, somebody in Hughes’ neighborhood called 911 to report that a woman was hacking a tree with a kitchen knife. Kisela and another police officer, Alex Garcia, heard about the report over the radio in their patrol car and responded. A few minutes later the person who had called 911 flagged down the officers; gave them a description of the woman with the knife; and told them the woman had been acting erratically. About the same time, a third police officer, Lindsay Kunz, arrived on her bicycle.

Garcia spotted a woman, later identified as Sharon Chadwick, standing next to a car in the driveway of a nearby house. A chain-link fence with a locked gate separated Chadwick from the officers. The officers then saw another woman, Hughes, emerge from the house carrying a large knife at her side. Hughes matched the description of the woman who had been seen hacking a tree. Hughes walked toward Chadwick and stopped no more than six feet from her.

All three officers drew their guns. At least twice they told Hughes to drop the knife. Viewing the record in the light most favorable to Hughes, Chadwick said “take it easy” to both Hughes and the officers. Hughes appeared calm, but she did not acknowledge the officers’ presence or drop the knife. The top bar of the chain-link fence blocked Kisela’s line of fire, so he dropped to the ground and shot Hughes four times through the fence. Then the officers jumped the fence, handcuffed Hughes, and called paramedics, who transported her to a hospital. There she was treated for non-life-threatening injuries. Less than a minute had transpired from the moment the officers saw Chadwick to the moment Kisela fired shots.
All three of the officers later said that at the time of the shooting they subjectively believed Hughes to be a threat to Chadwick. After the shooting, the officers discovered that Chadwick and Hughes were roommates, that Hughes had a history of mental illness, and that Hughes had been upset with Chadwick over a $20 debt. In an affidavit produced during discovery, Chadwick said that a few minutes before the shooting her boyfriend had told her Hughes was threatening to kill Chadwick’s dog, named Bunny. Chadwick “came home to find” Hughes “somewhat distressed,” and Hughes was in the house holding Bunny “in one hand and a kitchen knife in the other.” Hughes asked Chadwick if she “wanted [her] to use the knife on the dog.” The officers knew none of this, though. Chadwick went outside to get $20 from her car, which is when the officers first saw her. In her affidavit Chadwick said that she did not feel endangered at any time. 

Based on her experience as Hughes’ roommate, Chadwick stated that Hughes “occasionally has episodes in which she acts inappropriately,” but “she is only seeking attention.” 2 Record 108.

Hughes sued Kisela under Rev. Stat. §1979, 42 U. S. C. §1983, alleging that Kisela had used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Kisela, but the Court of Appeals for the Ninth Circuit reversed. 862 F. 3d 775 (2016).

The Court of Appeals first held that the record, viewed in the light most favorable to Hughes, was sufficient to demonstrate that Kisela violated the Fourth Amendment. See id., at 782. The court next held that the violation was clearly established because, in its view, the constitutional violation was obvious and because of Circuit precedent that the court perceived to be analogous. Id., at 785. Kisela filed a petition for rehearing en banc. Over the dissent of seven judges, the Court of Appeals denied it. Kisela then filed a petition for certiorari in this Court. That petition is now pending.

In one of the first cases on this general subject, Tennessee v. Garner, 471 U. S. 1 (1985), the Court addressed the constitutionality of the police using force that can be deadly. There, the Court held that “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.” Id., at 11.

In Graham v. Connor, 490 U. S. 386, 396 (1989), the Court held that the question whether an officer has used excessive force “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” Ibid. And “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” Id., at 396–397.

Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity.

“Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” White v. Pauly, 580 U. S. ___, ___ (2017) (per curiam) (slip op., at 6) (alterations and internal quotation marks omitted). “Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct.” Brosseau v. Haugen, 543 U. S. 194, 198 (2004) (per curiam).

Although “this Court’s case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.” White, 580 U. S., at ___ (slip op., at 6) (internal quotation marks omitted). “In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law.” Ibid. (internal quotation marks omitted). This Court has “repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.” City and County of San Francisco v. Sheehan, 575 U. S. ___, ___ (2015) (slip op., at 13) (quoting Ashcroft v. al-Kidd, 563 U. S. 731, 742 (2011)); see also Brosseau, supra, at 198–199.

“[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.” Mullenix v. Luna, 577 U. S. ___, ___ (2015) (per curiam) (slip op., at 5) (internal quotation marks omitted). Use of excessive force is an area of the law “in which the result depends very much on the facts of each case,” and thus police officers are entitled to qualified immunity unless existing precedent “squarely governs” the specific facts at issue. Id., at ___, ___ (slip op., at 6) (internal quotation marks omitted and emphasis deleted). Precedent involving similar facts can help move a case beyond the otherwise “hazy border between excessive and acceptable force” and thereby provide an officer notice that a specific use of force is unlawful. Id., at ___, ___ (slip op., at 12) (internal quotation marks omitted).

“Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers.” White, 580 U. S., at ___ (slip op., at 7) (internal quotation marks omitted). But the general rules set forth in “Garner and Graham do not by themselves create clearly established law outside an ‘obvious case.’” Ibid. Where constitutional
guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer “cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it.” Plumhoff v. Rickard, 572 U. S. ___, ___ (2014) (slip op., at 12). That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way.

Kisela says he shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.

The Court of Appeals made additional errors in concluding that its own precedent clearly established that Kisela used excessive force. To begin with, “even if a controlling circuit precedent could constitute clearly established law in these circumstances, it does not do so here.” Sheehan, supra, at ___ (slip op., at 13). In fact, the most analogous Circuit precedent favors Kisela. See Blanford v. Sacramento County, 406 F. 3d 1110 (CA9 2005). In Blanford, the police responded to a reference in the panel’s first opinion to the shooting at issue here. Thus, Kisela’s petition for rehearing en banc was pending before the Court of Appeals. 862 F.3d, at 795, n. 2 (Ikuta, J., dissenting from denial of rehearing en banc). The panel then amended its opinion, but nevertheless still attempted to “rely on Glenn as illustrative, not as indicative of the clearly established law in 2010.” Id., at 784, n. 2 (majority opinion). The panel failed to explain the difference between “illustrative” and “indicative” precedent, and none is apparent.

The amended opinion also asserted, for the first time and without explanation, that the Court of Appeals’ decision in Harris clearly established that the shooting here was unconstitutional. Id., at 785. The new mention of Harris replaced a reference in the panel’s first opinion to Glenn—the case that postdated the shooting at issue here. Compare 841 F. 3d 1081, 1090 (CA9 2016) (“As indicated by Glenn and Deorle, . . . that right was clearly established”), with 862 F. 3d, at 785 (“As indicated by Deorle and Harris, . . . that right was clearly established”).

The panel’s reliance on Harris “does not pass the straight-face test.” 862 F. 3d, at 797 (opinion of Ikuta, J.). In Harris, the Court of Appeals determined that an FBI sniper, who was positioned safely on a hilltop, used excessive force when he shot a man in the back while the man was retreating to a cabin during what has been referred to as the Ruby Ridge standoff. 126 F. 3d, at 1202–1203. Suffice it to say, a reasonable police officer could miss the connection between the situation confronting the sniper at Ruby Ridge and the situation confronting Kisela in Hughes’ front yard.

For these reasons, the petition for certiorari is granted; the judgment of the Court of Appeals is reversed; and the case is remanded for further proceedings consistent with this opinion.
It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

Officer Andrew Kisela shot Amy Hughes while she was speaking with her roommate, Sharon Chadwick, outside of their home. The record, properly construed at this stage, shows that at the time of the shooting: Hughes stood stationary about six feet away from Chadwick, appeared “composed and content,” Appellant’s Excerpts of Record 109 (Record), and held a kitchen knife down at her side with the blade facing away from Chadwick. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Chadwick or anyone else. Faced with these facts, the two other responding officers held their fire, and one testified that he “wanted to continue trying verbal command[s] and see if that would work.” Id., at 120. But not Kisela. He thought it necessary to use deadly force, and so, without giving a warning that he would open fire, he shot Hughes four times, leaving her seriously injured.

If this account of Kisela’s conduct sounds unreasonable, that is because it was. And yet, the Court today insulates that conduct from liability under the doctrine of qualified immunity, holding that Kisela violated no “clearly established” law. See ante, at 5–6. I disagree. Viewing the facts in the light most favorable to Hughes, as the Court must at summary judgment, a jury could find that Kisela violated Hughes’ clearly established Fourth Amendment rights by needlessly resorting to lethal force. In holding otherwise, the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield. I therefore respectfully dissent.

I

This case arrives at our doorstep on summary judgment, so we must “view the evidence . . . in the light most favorable to” Hughes, the nonmovant, “with respect to the central facts of this case.” Tolan v. Cotton, 572 U. S. ___ (2014) (per curiam) (slip op., at 8). The majority purports to honor this well-settled principle, but its efforts fall short. Although the majority sets forth most of the relevant events that transpired, it conspicuously omits several critical facts and draws premature inferences that bear on the qualified-immunity inquiry. Those errors are fatal to its analysis, because properly construing all of the facts in the light most favorable to Hughes, and drawing all inferences in her favor, a jury could find that the following events occurred on the day of Hughes’ encounter with the Tucson police.

On May 21, 2010, Kisela and Officer-in-Training Alex Garcia received a “check welfare” call about a woman chopping away at a tree with a knife. 862 F. 3d 775, 778 (CA9 2016). They responded to the scene, where they were informed by the person who had placed the call (not Chadwick) that the woman with the knife had been acting “erratically.” Ibid. A third officer, Lindsay Kunz, later joined the scene. The officers observed Hughes, who matched the description given to the officers of the woman alleged to have been cutting the tree, emerge from a house with a kitchen knife in her hand. Hughes exited the front door and approached Chadwick, who was standing outside in the driveway.

Hughes then stopped about six feet from Chadwick, holding the kitchen knife down at her side with the blade pointed away from Chadwick. Hughes and Chadwick conversed with one another; Hughes appeared “composed and content,” Record 109, and did not look angry. See 862 F. 3d, at 778. At no point during this exchange did Hughes raise the kitchen knife or verbally threaten to harm Chadwick or the officers. Chadwick later averred that, during the incident, she was never in fear of Hughes and “was not the least bit threatened by the fact that [Hughes] had a knife in her hand” and that Hughes “never acted in a threatening manner.” Record 110–111. The officers did not observe Hughes commit any crime, nor was Hughes suspected of committing one. See 862 F. 3d, at 780.

Nevertheless, the officers hastily drew their guns and ordered Hughes to drop the knife. The officers gave that order twice, but the commands came “in quick succession.” Id., at 778. The evidence in the record suggests that Hughes may not have heard or understood the officers’ commands and may not have been aware of the officers’ presence at all. Record 109–110, 195, 323–324 (Officer Kunz’s testimony that “it seemed as though [Hughes] didn’t even know we were there,” and “[i]t was like she didn’t hear us almost”); id., at 304 (Officer Garcia’s testimony that Hughes acted “almost as if we weren’t there”). Although the officers were in uniform, they never verbally identified themselves as law enforcement officers.

Kisela did not wait for Hughes to register, much less respond to, the officers’ rushed commands. Instead, Kisela immediately and unilaterally escalated the situation. Without giving any advance warning that he would shoot, and without attempting less dangerous methods to deescalate the situation, he dropped to the ground and shot four times at Hughes (who was stationary) through a chain-link fence. After being shot, Hughes fell to the ground, screaming and bleeding from her wounds. She looked at the officers and asked, “Why’d you shoot me?” Ibid., at 308. Hughes was immediately transported to the hospital, where she required treatment for her injuries. Kisela alone resorted to deadly force in this case. Confronted with the same circumstances as Kisela, neither of his fellow officers took that drastic measure.

II

Police officers are not entitled to qualified immunity if “(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was ‘clearly established at the time.’” District of Columbia v. Wesby, 583 U. S. ___ (2018) (slip op., at 13) (quoting Reichle v. Howards, 566
U. S. 658, 664 (2012)). Faithfully applying that well-settled standard, the Ninth Circuit held that a jury could find that Kisela violated Hughes’ clearly established Fourth Amendment rights. That conclusion was correct.

A

I begin with the first step of the qualified-immunity inquiry: whether there was a violation of a constitutional right. Hughes alleges that Kisela violated her Fourth Amendment rights by deploying excessive force against her. In assessing such a claim, courts must ask “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them.” Graham v. Connor, 490 U. S. 386, 397 (1989). That inquiry “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” Id., at 396; see also Tennessee v. Garner, 471 U. S. 1, 11 (1985). All of those factors (and others) support the Ninth Circuit’s conclusion that a jury could find that Kisela’s use of deadly force was objectively unreasonable. 862 F. 3d, at 779–782. Indeed, the panel’s resolution of this question was so convincing that not a single judge on the majority here, which simply assumes without deciding that “a Fourth Amendment violation occurred.” Ante, at 4.

First, Hughes committed no crime and was not suspected of committing a crime. The officers were responding to a “check welfare” call, which reported no criminal activity, and the officers did not observe any illegal activity while at the scene. The mere fact that Hughes held a kitchen knife down at her side with the blade pointed away from Chadwick hardly elevates the situation to one that justifies deadly force.

Second, a jury could reasonably conclude that Hughes presented no immediate or objective threat to Chadwick or the other officers. It is true that Kisela had received a report that a woman matching Hughes’ description had been acting erratically. But the police officers themselves never witnessed any erratic conduct. Instead, when viewed in the light most favorable to Hughes, the record evidence of what the police encountered paints a calmer picture. It shows that Hughes was several feet from Chadwick and even farther from the officers, she never made any aggressive or threatening movements, and she appeared “composed and content” during the brief encounter.

Third, Hughes did not resist or evade arrest. Based on this record, there is significant doubt as to whether she was aware of the officers’ presence at all, and evidence suggests that Hughes did not hear the officers’ swift commands to drop the knife.

Finally, the record suggests that Kisela could have, but failed to, use less intrusive means before deploying deadly force. 862 F. 3d, at 781. For instance, Hughes submitted expert testimony concluding that Kisela should have used his Taser and that shooting his gun through the fence was dangerous because a bullet could have fragmented against the fence and hit Chadwick or his fellow officers. Ibid.; see also Bryan v. MacPherson, 630 F. 3d 805, 831 (CA9 2010) (noting that “police are required to consider what other tactics if any were available to effect the arrest” and whether there are “clear, reasonable, and less intrusive alternatives” (internal quotation marks and alteration omitted)). Consistent with that assessment, the other two officers on the scene declined to fire at Hughes, and one of them explained that he was inclined to use “some of the lesser means” than shooting, including verbal commands, because he believed there was time “[t]o try to talk [Hughes] down.” Record 120–121. That two officers on the scene, presented with the same circumstances as Kisela, did not use deadly force reveals just how unnecessary and unreasonable it was for Kisela to fire four shots at Hughes. See Plumhoff v. Rickard, 572 U. S. 1, 11 (2014) (slip op., at 8) (“We analyze [the objective reasonableness] question from the perspective of a reasonable officer on the scene” (internal quotation marks omitted)).

Taken together, the foregoing facts would permit a jury to conclude that Kisela acted outside the bounds of the Fourth Amendment by shooting Hughes four times.

B

Rather than defend the reasonableness of Kisela’s conduct, the majority sidesteps the inquiry altogether and focuses instead on the “clearly established” prong of the qualified-immunity analysis. Ante, at 4. To be “clearly established” . . . [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” Anderson v. Creighton, 483 U. S. 635, 640 (1987). That standard is not nearly as onerous as the majority makes it out to be. As even the majority must acknowledge, ante, at 4, this Court has long rejected the notion that “an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,” Anderson, 483 U. S., at 640. “[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.” Hope v. Pelzer, 536 U. S. 730, 741 (2002). At its core, then, the “clearly established” inquiry boils down to whether Kisela had “fair notice” that he acted unconstitutionally. See id.; Broussard v. Haugen, 543 U. S. 194, 198 (2004) (per curiam) (“[T]he focus” of qualified immunity “is on whether the officer had fair notice that her conduct was unlawful”).

The answer to that question is yes. This Court’s precedents make clear that a police officer may only deploy deadly force against an individual if the officer “has probable cause to believe that the [person] poses a threat of serious physical harm, either to the officer or to others.” Garner, 471 U. S., at 11; see also Graham, 490 U. S., at 397. It is equally well established that any use of lethal force must be justified by
some legitimate governmental interest. See Scott v. Harris, 550 U. S. 372, 383 (2007); Mullenix v. Luna, 577 U. S. ___, ___ (2015) (SOTOMAYOR, J., dissenting) (slip op., at 2–3). Consistent with those clearly established principles, and contrary to the majority’s conclusion, Ninth Circuit precedent predating these events further confirms that Kisela’s conduct was clearly unreasonable. See Brosseau, 543 U. S., at 199 (“[A] body of relevant case law” may “‘clearly establish’” the violation of a constitutional right); Ashcroft v. al-Kidd, 563 U. S. 731, 746 (2011) (KENNEDY, J., concurring) (“[Q]ualified immunity is lost when plaintiffs point either to ‘cases of controlling authority in their jurisdiction at the time of the incident’ or to ‘a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful’”’ (quoting Wilson v. Layne, 526 U. S. 603, 617 (1999))). Because Kisela plainly lacked any legitimate interest justifying the use of deadly force against a woman who posed no objective threat of harm to officers or others, had committed no crime, and appeared calm and collected during the police encounter, he was not entitled to qualified immunity.

The Ninth Circuit’s opinion in Deorle v. Rutherford, 272 F. 3d 1272 (2001) proves the point. In that case, the police encountered a man who had reportedly been acting “erratically.” Id., at 1276. The man was “verbally abusive,” shouted “‘kill me’” to the officers, screamed that he would “‘kick [the] ass’” of one of the officers, and “brandish[ed] a hatchet at a police officer,” ultimately throwing it “into a clump of trees when told to put it down.” Id., at 1276–1277. The officers also observed the man carrying an unloaded crossbow in one hand and what appeared to be “a can or a bottle of lighter fluid in the other.” Id., at 1277. The man discarded the crossbow when instructed to do so by the police and then steadily walked toward one of the officers. Ibid. In response, that officer, without giving a warning, shot the man in the face with beanbag rounds. Id., at 1278. The man suffered serious injuries, including multiple fractures to his cranium and the loss of his left eye. Ibid.

The Ninth Circuit denied qualified immunity to the officer, concluding that his use of force was objectively unreasonable under clearly established law. Id., at 1285–1286. The court held, “Every police officer should know that it is objectively unreasonable to shoot . . . an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals.” Id., at 1285.

The same holds true here. Like the man in Deorle, Hughes committed no serious crime, had been given no warning of the imminent use of force, posed no risk of flight, and presented no objectively reasonable threat to the safety of officers or others. In fact, Hughes presented even less of a danger than the man in Deorle, for, unlike him, she did not threaten to “kick [their] ass,” did not appear agitated, and did not raise her kitchen knife or make any aggressive gestures toward the police or Chadwick. If the police officers acted unreasonably in shooting the agitated, screaming man in Deorle with beanbag bullets, a fortiori Kisela acted unreasonably in shooting the calm-looking, stationary Hughes with real bullets. In my view, Deorle and the precedent it cites place the unlawfulness of Kisela’s conduct “‘beyond debate.’” Wesby, 583 U. S., at ___ (slip op., at 15).

The majority strains mightily to distinguish Deorle, to no avail. It asserts, for instance, that, unlike the man in Deorle, Hughes was “armed with a large knife.” Ante, at 7. But that is not a fair characterization of the record, particularly at this procedural juncture. Hughes was not “armed” with a knife. She was holding “a kitchen knife—an everyday household item which can be used as a weapon but ordinarily is a tool for safe, benign purposes”—down at her side with the blade pointed away from Chadwick. 862 F. 3d, at 788 (Bazron, J., concurring in denial of rehearing en banc). Hughes also spoke calmly with Chadwick during the events at issue, did not raise the knife, and made no other aggressive movements, undermining any suggestion that she was a threat to Chadwick or anyone else. Similarly, the majority asserts that Hughes was “within striking distance” of Chadwick, ante, at 7, but that stretches the facts and contravenes this Court’s repeated admonition that inferences must be drawn in the exact opposite direction, i.e., in favor of Hughes. See Tolan, 572 U. S., at ___ (slip op., at 8). The facts, properly viewed, show that, when she was shot, Hughes had stopped and stood still about six feet away from Chadwick. Whether Hughes could “strik[e]” Chadwick from that particular distance, even though the kitchen knife was held down at her side, is an inference that should be drawn by the jury, not this Court.

The majority next posits that Hughes, unlike the man in Deorle, “ignored the officers’ orders to drop the” kitchen knife. Ante, at 7. Yet again, the majority here draws inferences in favor of Kisela, instead of Hughes. The available evidence would allow a reasonable jury to find that Hughes did not hear or register the officers’ swift commands and that Kisela, like his fellow officers on the scene, should have realized that as well. See supra, at 3–4. Accordingly, at least at the summary-judgment stage, the Court is mistaken in distinguishing Deorle based on Hughes’ ostensible disobedience to the officers’ directives.

The majority also implies that Deorle is distinguishable because the police in that case observed the man over a 40-minute period, whereas the situation here unfolded in less than a minute. Ante, at 7. But that fact favors Hughes, not Kisela. The only reason this case unfolded in such an abrupt timeframe is because Kisela, unlike his fellow officer, showed no interest in trying to talk further to Hughes or use a “lesser means” of force. See Record 120–121, 304.

Finally, the majority passingly notes that “this Court has already instructed the Court of Appeals not to read [Deorle] too broadly.” Ante, at 7 (citing City and County of San Francisco v. Sheehan, 575 U. S. ___, ____–____ (2015) (slip op., at ___–____)).
13–14)). But the Court in Sheehan concluded that Deorle was plainly distinguishable because, unlike in Deorle, the officers there confronted a woman “who was dangerous, recalcitrant, law-breaking, and out of sight.” 575 U. S., at ___ (slip op., at 14). As explained above, however, Hughes was none of those things: She did not threaten or endanger the officers or Chadwick, she did not break any laws, and she was visible to the officers on the scene. See supra, at 2–4. Thus, there simply is no basis for the Court’s assertion that “‘the differences between [Deorle] and the case before we leap from the page.’” Ante, at 7 (quoting Sheehan, 575 U. S., at ___ (slip op., at 14)).

Deorle, moreover, is not the only case that provided fair notice to Kisela that shooting Hughes under these circumstances was unreasonable. For instance, the Ninth Circuit has held that the use of deadly force against an individual holding a semiautomatic rifle was unconstitutional where the individual “did not point the gun at the officers and apparently was not facing them when they shot him the first time.” Curnov v. Ridgecrest Police, 952 F. 2d 321, 325 (1991). Similarly, in Harris v. Roderick, 126 F. 3d 1189 (1997), the Ninth Circuit held that the officer unreasonably used deadly force against a man who, although armed, made “no threatening movement” or “aggressive move of any kind.” Id., at 1203.16 Both Curnov and Harris establish that, where, as here, an individual with a weapon poses no objective and immediate threat to officers or third parties, law enforcement cannot resort to excessive force. See Harris, 126 F. 3d, at 1201 (“Law enforcement officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officers, or is fleeing and his escape will result in a serious threat of injury to persons”).

If all that were not enough, decisions from several other Circuits illustrate that the Fourth Amendment clearly forbids the use of deadly force against a person who is merely holding a knife but not threatening anyone with it. See, e.g., McKinney v. DeKalb County, 997 F. 2d 1440, 1442 (CA11 1993) (affirming denial of summary judgment based on qualified immunity to officer who shot a person holding a butcher knife in one hand and a foot-long stick in the other, where the person threw the stick and began to rise from his seated position); Reyes v. Bridgewater, 362 Fed. Appx. 403, 404–405 (CA5 2010) (reversing grant of summary judgment based on qualified immunity to officer who shot a person holding a kitchen knife in his apartment entryway, even though he refused to follow the officer’s multiple commands to drop the knife); Duong v. Telford Borough, 186 Fed. Appx. 214, 215, 217 (CA3 2006) (affirming denial of summary judgment based on qualified immunity to officer who shot a person holding a knife because a reasonable jury could conclude that the plaintiff was sitting down and pointing the knife away from the officer at the time he was shot and had not received any warnings to drop the knife).

Against this wall of case law, the majority points to a single Ninth Circuit decision, Blanford v. Sacramento County, 406 F. 3d 1110 (2005), as proof that Kisela reasonably could have believed that Hughes posed an immediate danger. But Blanford involved far different circumstances. In that case, officers observed a man walking through a neighborhood brandishing a 2½-foot cavalry sword; officers commanded the man to drop the sword, identified themselves as police, and warned “We’ll shoot.” Id., at 1112–1113. The man responded with “a loud growling or roaring sound,” which increased the officers’ concern that he posed a risk of harm. Id., at 1113. In an effort to “evade [police] authority,” the man, while still wielding the sword, tried to enter a home, thus prompting officers to open fire to protect anyone who might be inside. Id., at 1113, 1118. The Ninth Circuit concluded that use of deadly force was reasonable in those circumstances. See id., at 1119.

This case differs significantly from Blanford in several key respects. Unlike the man in Blanford, Hughes held a kitchen knife down by her side, as compared to a 2½-footword; she appeared calm and collected, and did not make threatening noises or gestures toward the officers on the scene; she stood still in front of her own home, and was not wandering about the neighborhood, evading law enforcement, or attempting to enter another house. Moreover, unlike the officers in Blanford, Kisela never verbally identified himself as an officer and never warned Hughes that he was going to shoot before he did so. Given these significant differences, no reasonable officer would believe that Blanford justified Kisela’s conduct. The majority’s conclusion to the contrary is fanciful.

***

In sum, precedent existing at the time of the shooting clearly established the unconstitutionality of Kisela’s conduct. The majority’s decision, no matter how much it says otherwise, ultimately rests on a faulty premise: that those cases are not identical to this one. But that is not the law, for our cases have never required a factually identical case to satisfy the “clearly established” standard. Hope, 536 U. S., at 739. It is enough that governing law places “the constitutionality of the officer’s conduct beyond debate.” Wesby, 583 U. S., at ___ (slip op., at 13) (internal quotation marks omitted). Because, taking the facts in the light most favorable to Hughes, it is “beyond debate” that Kisela’s use of deadly force was objectively unreasonable, he was not entitled to summary judgment on the basis of qualified immunity.

III

For the foregoing reasons, it is clear to me that the Court of Appeals got it right. But even if that result were not so
clear, I cannot agree with the majority’s apparent view that the decision below was so manifestly incorrect as to warrant “the extraordinary remedy of a summary reversal.” Major League Baseball Players Assn. v. Garvey, 532 U. S. 504, 512–513 (2001) (Stevens, J., dissenting). “A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.” Schweiker v. Hansen, 450 U. S. 785, 791 (1981) (Marshall, J., dissenting); Office of Personnel Management v. Richmond, 496 U. S. 414, 422 (1990) (“Summary reversals of courts of appeals are unusual under any circumstances”). This is not such a case. The relevant facts are hotly disputed, and the qualified-immunity question here is, at the very best, a close call. Rather than letting this case go to a jury, the Court decides to intervene prematurely, purporting to correct an error that is not at all clear.

This unwarranted summary reversal is symptomatic of “a disturbing trend regarding the use of this Court’s resources” in qualified-immunity cases. Salazar-Limon v. Houston, 581 U. S. ___, ___ (2017) (SOTOMAYOR, J., dissenting from denial of certiorari) (slip op., at 8). As I have previously noted, this Court routinely displays an unflinching willingness “to summarily reverse courts for wrongly denying officers the protection of qualified immunity” but “rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.” Id., at ___–___ (slip op., at 8–9); see also Baude, Is Qualified Immunity Unlawful? 106 Cal. L. Rev. 45, 82 (2018) (“Nearly all of the Supreme Court’s qualified immunity cases come out the same way—by finding immunity for the officials”); Reinhardt, The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 Mich. L. Rev. 1219, 1244–1250 (2015). Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.

The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent.
Cite as 18 C.D.O.S. 3009

JESSE GUARDADO
v.
JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS

No. 17–7171
In the Supreme Court of the United States
Filed April 2, 2018

STEVEN ANTHONY COZZIE
v.
FLORIDA

No. 17–7545
In the Supreme Court of the United States
On Petitions For Writs Of Certiorari To The Supreme Court Of Florida
Filed April 2, 2018

The petitions for writs of certiorari are denied.

JUSTICE SOTOMAYOR, dissenting from the denial of certiorari.

Twice now this Court has declined to vacate and remand to the Florida Supreme Court in cases where that court failed to address a substantial Eighth Amendment challenge to capital defendants’ sentences, and twice I have dissented from that inaction. See Truehill v. Florida, 583 U. S. ___ (2017); Middleton v. Florida, 583 U. S. ___ (2018). Four petitioners were involved in those cases. Today we add two more to the list, for a total of at least six capital defendants who now face execution by the State without having received full consideration of their claims.

It should not be necessary for me to explain again why petitioners’ challenges are substantial, why the Florida Supreme Court should have addressed those challenges, or why this Court has an obligation to intervene. Nevertheless, recent developments at the Florida Supreme Court compel me to dissent in full once again.

As a reminder, like the petitioners in Truehill and Middleton, Jesse Guardado and Steven Cozzie challenge their death sentences pursuant to Caldwell v. Mississippi, 472 U. S. 320 (1985). I summarized those challenges in Middleton as follows:

“[Petitioners] were sentenced to death under a Florida capital sentencing scheme that this Court has since declared unconstitutional. See Hurst v. Florida, 577 U. S. ___ (2016). Relying on the unanimity of the juries’ recommendations of death, the Florida Supreme Court post-Hurst declined to disturb the petitioners’ death sentences, reasoning that the unanimity ensured that jurors had made the necessary findings of fact under Hurst. By doing so, the Florida Supreme Court effectively transformed the pre-Hurst jury recommendations into binding findings of fact with respect to petitioners’ death sentences.” 583 U. S., at ___–___ (slip op., at 1–2) (dissenting from denial of certiorari).

Reliance on those pre-Hurst recommendations, rendered after the juries repeatedly were instructed that their role was merely advisory, implicates Caldwell, where this Court recognized that “the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role,” in contravention of the Eighth Amendment. 472 U. S., at 333.

Following the dissent from the denial of certiorari in Truehill, the Florida Supreme Court has on at least two occasions taken the position that it has, in fact, considered and rejected petitioners’ Caldwell-based challenges.1 In Franklin v. State, — So. 3d —, 2018 WL 897427 (Feb. 15, 2018) (per curiam), the Florida Supreme Court stated that, “prior to Hurst, [it] repeatedly rejected Caldwell challenges to the standard jury instructions.” Id., at *3. The decisions it cited in support of that pre-Hurst precedent rely on one fact: “Informing the jury that its recommended sentence is ‘advisory’ is a correct statement of Florida law and does not violate Caldwell.” Riterink v. State, 66 So. 3d 866, 897 (Fla. 2011) (per curiam); Globe v. State, 877 So. 2d 663, 673–674 (Fla. 2004) (per curiam) (stating that it has rejected Caldwell challenges to the standard jury instructions, citing cases that similarly rely on the fact that the instructions accurately reflect the advisory nature of the jurors’ role). But of course, “the rationale underlying [this] previous rejection of the Caldwell challenge [has] now been undermined by this Court in Hurst.” Truehill, 583 U. S., at ___ (slip op., at 2), and the Florida Supreme Court must therefore “grapple with the Eighth Amendment implications of [its subsequent post-Hurst] holding” that “then-advisory jury findings are now binding and sufficient to satisfy Hurst.” Middleton, 583 U. S., at ___ (slip op., at 2). Its pre-Hurst precedent thus does not absolve the Florida Supreme Court from addressing petitioners’ new post-Hurst Caldwell-based challenges.

The Florida Supreme Court in Franklin did not stop there, however. It went on to state that it had “also rejected Caldwell-related Hurst claims” more recently, citing Truehill v. State, 211 So. 3d 930 (Fla. 2017) (per curiam), and Oliver v. State, 214 So. 3d 606 (Fla. 2017) (per curiam), noting that “the defendants in Oliver and Truehill petitioned the United States Supreme Court for a writ of certiorari to review their

1. The cases in which the Florida Supreme Court has taken this position, i.e., that it has considered and rejected the Caldwell-based claims discussed herein, are not the ones currently under review before our Court in these petitions.
Caldwell claims, which the Court denied.” Franklin, 2018 WL 897427, *3. This is a surprising statement, because Quentin Truehill and Terence Oliver were the two petitioners whose claims were at issue in my dissent in Truehill. Franklin did not discuss that dissent, joined by two other Justices, which specifically noted that “the Florida Supreme Court has failed to address” the important Caldwell-based challenge. Truehill, 583 U.S., at ___. (slip op., at 1). Earlier this month, in rejecting a motion to vacate a sentence brought by petitioner Jesse Guardado, the Florida Supreme Court again held that it had “considered and rejected” post-Hurst Caldwell-based challenges, citing Franklin, 2018 WL 897427, and Truehill, 211 So. 3d 930. Guardado v. State, — So. 3d —, 2018 WL 1193196, *2 (Mar. 8, 2018).²

It is hard to understand how the Florida Supreme Court “considered and rejected” these Caldwell-based challenges based on its decisions in Truehill and Oliver. Those cases did not mention or discuss Caldwell. Nor did they mention or discuss the fundamental Eighth Amendment principle it announced: “It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.” Caldwell, 472 U.S., at 328–329. In neither Truehill nor Oliver did the Florida Supreme Court discuss the grave Eighth Amendment concerns implicated by its finding that the Hurst violations in those cases are harmless, a conclusion that transforms those advisory jury recommendations into binding findings of fact. Although the Florida Supreme Court noted in Truehill that the defendant in that case “contends that he is entitled to relief pursuant to Hurst v. Florida because the jury in his case was repeatedly instructed regarding the non-binding nature of its verdict,” 211 So. 3d, at 955, that was the first and last reference to that argument. There was absolutely no reference to the argument in Oliver. 214 So. 3d 606.³

². As petitioner Guardado explained in his supplemental brief, in addition to the postconviction motion that forms the basis of the petition currently before our Court, he also filed a motion to vacate his sentence. See Supp. Brief for Petitioner 1. It was with respect to that motion that the Florida Supreme Court issued the opinion stating that it had “considered and rejected” the Caldwell-based challenge. No mention of the Caldwell-based claim was made in the Florida Supreme Court opinion directly under review in this petition. 226 So. 3d 213 (2017). In fact, petitioner Guardado filed a motion with the Florida Supreme Court for rehearing and clarification of the denial of his postconviction motion, noting, inter alia, that the opinion “unreasonably omitted any consideration or discussion of [his] arguments regarding the interplay between Caldwell and Hurst.” App. to Pet. for Cert. in No. 17–7171, p. 68a. The Florida Supreme Court denied the motion in an unreasoned one-line order. See id., at 7a. Petitioner Steven Cozzie also moved for rehearing below, similarly arguing in part that the Florida Supreme Court “overlooked the effect of instructing [his] jury many times that its recommendation was advisory only,” citing Caldwell. App. to Pet. For Cert. in No. 17–7545, p. 66a. The Florida Supreme Court also denied the motion in an unreasoned one-line order. See id., at 43a.

³. Tellingly, in neither Franklin nor Guardado did the Florida Supreme Court supply a pincite for its “consider[ation] and reject[ion]”

Therefore, the Florida Supreme Court has (again) failed to address an important and substantial Eighth Amendment challenge to capital defendants’ sentences post-Hurst. Nothing in its pre-Hurst precedent, nor in its opinions in Truehill and Oliver, addresses or resolves these substantial Caldwell-based challenges. This Court can and should intervene in the face of this troubling situation. I dissent.

4. “Toutes choses sont dites déjà; mais comme personne n’écoute, il faut toujours recommencer.” Gide, Le Traité du Narcisse 8 (1892), in Le Traité du Narcisse 104 (R. Robidoux ed. 1978) (“Everything has been said already; but as no one listens, we must always begin again”).
Supreme Court of California

Cite as 18 C.D.O.S. 3011

THE PEOPLE, Plaintiff and Respondent, v. MARK BUZA, Defendant and Appellant.

No. S223698
In the Supreme Court of California
Ct.App. 1/2 A125542
San Francisco County Super. Ct. No. SCN 207818
Filed April 2, 2018

COUNSEL
J. Bradley O’Connell and Kathryn Seligman, under appointments by the Supreme Court; and Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant.

Michael T. Risher; Joseph R. Grodin; Paul Hastings, Peter C. Meier, Eric A. Long and Jamie L. Williams for American Civil Liberties Union Foundation of Northern California as Amicus Curiae on behalf of Defendant and Appellant.

Hanni Fakhoury, Jennifer Lynch and Lee Tien for Electronic Frontier Foundation as Amicus Curiae of Defendant and Appellant.

Linda F. Robertson and Jennifer Friedman for California Public Defenders Association, California Attorneys for Criminal Justice and Los Angeles County Public Defender as Amici Curiae on behalf of Defendant and Appellant.


Edmund G. Brown Jr., Kamala D. Harris and Xavier Becerra, Attorneys General, Edward C. DuMont, State Solicitor General, Dane R. Gillette and Gerald A. Engler, Chief Assistant Attorneys General, Jeffrey M. Laurence, Assistant Attorney General, Steven T. Oetting and Michael J. Mongan, Deputy State Solicitors General, Max Carter-Oberstone, Associate Deputy State Solicitor General, Joyce Blair, Stan Helfman and Enid A Camps, Deputy Attorneys General, for Los Angeles County District Attorney as Amicus Curiae on behalf of Plaintiff and Respondent.

Jan Scully, District Attorney (Sacramento), Anne Marie Schubert, Deputy District Attorney; W. Scott Thorpe, Mark Zahner and Albert C. Locher for California District Attorneys Association as Amicus Curiae on behalf of Plaintiff and Respondent.


Hill Wallack, Christopher H. Asplin; Newton Rimmel and Ronald F. Rimmel for Global Alliance for Rapid DNA Testing as Amicus Curiae on behalf of Plaintiff and Respondent.

Tony Rackauckas, District Attorney (Orange), Jim Tanizaki and Camille Hill, Assistant District Attorneys, Scott G. Scoville, Tammy Sprugeon, Andrew E. Katz, Katherine David and Nancy Hayashida, Deputy District Attorneys, for Orange County District Attorney as Amicus Curiae on behalf of Plaintiff and Respondent.

OPINION

In 2004, California voters passed Proposition 69 (Prop. 69, as approved by voters, Gen. Elec. (Nov. 2, 2004); known as the “DNA Fingerprint, Unsolved Crime and Innocence Protection Act” (DNA Act)) to expand existing requirements for the collection of DNA identification information for law enforcement purposes. The DNA Act requires law enforcement officials to collect DNA samples, as well as fingerprints, from all persons who are arrested for, as well as those who have been convicted of, felony offenses. (Pen. Code, § 296.1, subd. (a)(1)(A).)

Defendant Mark Buza was arrested for arson and related felonies and transported to jail. At booking, a jail official informed defendant that he was required to provide a DNA sample by swabbing the inside of his cheek. He refused. A jury later convicted him of both the arson-related felonies and the misdemeanor offense of refusing to provide a specimen required by the DNA Act. (Pen. Code, § 298.1, subd. (a).)

The Court of Appeal reversed defendant’s misdemeanor refusal conviction, holding that the DNA Act violated defendant’s rights under the Fourth Amendment to the United States Constitution. While the case was pending on appeal, the United States Supreme Court addressed a similar issue in Maryland v. King (2013) 569 U.S. 435 (King), and reached a different conclusion. The high court 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.” (Id. at pp. 465–466.)
Following the high court’s decision in *King*, this case returned to the Court of Appeal. On remand, the Court of Appeal again reversed defendant’s misdemeanor refusal conviction, this time on the ground that the DNA Act violates the California Constitution’s prohibition on unreasonable searches and seizures. (Cal. Const., art. I, § 13.)

Defendant raises a number of questions about the constitutionality of the DNA Act as it applies to various classes of felony arrestees. But the question before us is a narrower one: Whether the statute’s DNA collection requirement is valid as applied to an individual who, like defendant, was validly arrested on “probable cause to hold for a serious offense”—here, the felony arson charge for which defendant was ultimately convicted—and who was required to swap his cheek as “part of a routine booking procedure” at county jail. (*King*, supra, 569 U.S. at p. 465.) Under the circumstances before us, we conclude the requirement is valid under both the federal and state Constitutions, and we express no view on the constitutionality of the DNA Act as it applies to other classes of arrestees. We accordingly reverse the judgment of the Court of Appeal in this case.

I.

A.

For decades before the DNA Act, California law had required the collection of biological samples from individuals convicted of certain offenses. In 1983, the Legislature enacted legislation requiring certain sex offenders to provide blood and saliva samples before their release or discharge. (Stats. 1983, ch. 700, § 1, pp. 2680–2681, codified at Pen. Code, former § 290.2.) In 1998, the Legislature enacted the “DNA and Forensic Identification Data Base and Data Bank Act,” which required the collection of DNA samples from persons convicted of certain felony offenses, including certain sex offenses, homicide offenses, kidnapping, and felony assault or battery. (Stats. 1998, ch. 696, § 2, pp. 4574–4579; Pen. Code, former § 296, subd. (a).)

When the California electorate voted to pass Proposition 69 on the 2004 general election ballot, it substantially expanded the scope of DNA sampling to include individuals who are arrested for any felony offense, as well as those who have been convicted of such an offense. In *People v. Robinson* (2010) 47 Cal.4th 1104 (*Robinson*), this court upheld the expanded DNA collection requirement as applied to persons convicted of felony offenses. The question now before us concerns the application of the DNA Act to persons who have been arrested for, but not yet convicted of, a felony offense.

In its statutory findings and declarations of purpose, Proposition 69 explained that expansion of the DNA databank program was warranted to serve a “critical and urgent need to provide law enforcement officers and agencies with the latest scientific technology available for accurately and expeditiously identifying, apprehending, arresting, and convicting criminal offenders and exonerating persons wrongly suspected or accused of crime.” (Prop. 69, supra, § II, subd. (b).) With respect to arrestees in particular, Proposition 69 declared: “The state has a compelling interest in the accurate identification of criminal offenders”; that “DNA testing at the earliest stages of criminal proceedings for felony offenses will help thwart criminal perpetrators from concealing their identities and thus prevent time-consuming and expensive investigations of innocent persons”; and “it is reasonable to expect qualifying offenders to provide forensic DNA samples for the limited identification purposes set forth in this chapter.” (Id., § II, subds. (e), (f).)

The DNA Act provides that, as of January 1, 2009, all adult felony arrestees “shall provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required pursuant to this chapter for law enforcement identification analysis.” (Pen. Code, § 296, subd. (a).) Providing a buccal swab sample requires the arrestee to apply a swab to the inside of his or her cheek to collect the “inner cheek cells of the mouth,” which contain DNA. (*Id.*, § 295, subd. (e).) The statute provides that these specimens, samples, and print impressions shall be collected “immediately following arrest, or during the booking . . . process or as soon as administratively practicable . . . but, in any case, prior to release on bail or pending trial or any physical release from confinement or custody.” (Id., § 296.1, subd. (a)(1)(A).) Refusal to provide any of the required specimens is punishable as a misdemeanor. (*Id.*, § 298.1, subd. (a).)

Collected DNA samples are sent to California Department of Justice’s DNA Laboratory for forensic analysis. (Pen. Code, §§ 295, subds. (f), (g), (i)(1)(C), 295.1, subd. (c).) The laboratory uses the samples to create a unique DNA identification profile, using genetic loci that are known as “junk” or “noncoding” DNA, because the loci have no known association with any genetic trait, disease, or predisposition. (See *King*, supra, 569 U.S. at pp. 442–443, 445.) This profile is stored in California’s DNA database. California’s DNA databank is part of the Combined DNA Index System (CODIS), a nationwide database that enables law enforcement to search DNA profiles collected from federal, state, and local collection programs. (See *ibid.*; Pen. Code, § 299.6, subd. (b); Cal. Dept. of Justice (DOJ), Bureau of Forensic Services (BFS), Laboratory Services, DNA Analysis, <https://oag.ca.gov/bfs/services> [as of Apr. 2, 2018].) DNA profiles stored by the DNA Laboratory may be accessed by law enforcement agencies, (Pen. Code, § 299.5, subd. (f).) The DNA Laboratory must “store, compile, correlate, compare, maintain, and use” DNA profiles for forensic casework, for comparison with samples found at crime scenes, and for identification of missing persons. (*Id.*, § 295.1, subd. (c).)

Information obtained from an arrestee’s DNA is confidential and may not be disclosed to the public. (Pen. Code, § 299.5.) DNA samples and the biological material from which they are obtained may not be used “as a source of genetic material for testing, research, or experiments, by any person, agency, or entity seeking to find a causal link be-
tween genetics and behavior or health.” (Id., § 295.2.) Any person who knowingly uses a DNA sample or profile for any purpose other than “criminal identification or exclusion purposes” or “the identification of missing persons,” or who “knowingly discloses DNA or other forensic identification information . . . to an unauthorized individual or agency” for any unauthorized reason is subject to criminal prosecution and may be imprisoned for up to three years and fined up to $10,000. (Id., § 299.5, subd. (ii)(1).) The Department of Justice is also subject to civil damages for knowing misuse of a sample or profile by any of its employees. (Id., § 299.5, subd. (i)(2)(A).)

The DNA Act provides that if an arrestee is cleared of charges and there is no other basis for keeping the information, the arrestee “shall have his or her DNA specimen and sample destroyed and searchable database profile expunged from the databank program.” (Pen. Code, § 299, subd. (a).) An arrestee may request expungement if he or she is released without being charged, if all qualifying charges against the arrestee are dismissed, or if the arrestee is found not guilty or factually innocent of all qualifying charges. (Id., § 299, subd. (b).) The federal legislation establishing CODIS likewise requires participating states to “promptly expunge” the DNA profile of any person who is cleared of qualifying charges. (34 U.S.C. § 12592(d)(2)(A).)

The DNA Act includes a broad severability provision. The provision specifies that the invalidity of certain provisions or their application “shall not affect other provisions or applications that can be given effect without the invalid provision or application.” (Prop. 69, supra, § V, subd. (b).)

B.

On the afternoon of January 21, 2009, a San Francisco police officer saw defendant running away from a police car that had burning tires. Police found defendant hiding nearby and searched him. Matches were found in defendant’s pocket, a container of oil was found in his backpack, and a road flare and a bottle containing a liquid that smelled like gasoline were discovered in the area where he had been hiding.

Defendant was arrested and taken to county jail. There, several hours after the initial arrest, a San Francisco sheriff’s deputy asked defendant to swab the inside of his cheek for purposes of providing a sample of his DNA. The deputy told defendant he was required by law to provide the sample, asked defendant to read a form that described the pertinent requirements, and warned defendant that refusing to provide a DNA sample was a misdemeanor. Defendant refused.

On January 22, 2009, a judge of the Superior Court found probable cause to believe that defendant committed a public offense for which he could be detained, namely, felony arson in violation of Penal Code section 451, subdivision (d). The next day, the district attorney filed a felony complaint charging defendant with that offense, as well as possession of combustible material or incendiary device (id., § 453, subd. (a)), and vandalism (id., § 594, subd. (b)(1)). The complaint also charged defendant with misdemeanor refusal to provide a DNA specimen (id., § 298.1, subd. (a)). Defendant was arraigned on the same day and pleaded not guilty to the charges.

Approximately three months later, defendant was tried before a jury. Defendant moved for judgment of acquittal on the misdemeanor refusal charge, arguing that the Fourth Amendment did not permit the state to compel arrestees to furnish DNA samples. The court denied the motion. At trial, defendant admitted to setting the police car on fire; he testified that while he regarded setting the fires as a justified protest against government overreach, he knew his act was regarded as illegal. Defendant also admitted to refusing to provide a DNA sample in accordance with Penal Code section 298.1. The jury convicted defendant of all charges.

The trial court ordered defendant to provide a DNA sample before he was sentenced, and when defendant initially refused to comply with the order, the court authorized the Sheriff’s Department to use reasonable force to obtain the sample. Defendant then furnished a DNA sample. The court sentenced defendant to a prison term of 16 months on the arson charge, imposed concurrent sentences on the charges of possession of combustible material and misdemeanor refusal to provide a DNA specimen, and stayed the sentence on the vandalism charge under Penal Code section 654.

On appeal, the Court of Appeal reversed defendant’s conviction for refusing to provide a DNA sample. The court held that “the DNA Act, to the extent it requires felony arrestees to submit a DNA sample for law enforcement analysis and inclusion in the state and federal DNA databases, without independent suspicion, a warrant or even a judicial or grand jury determination of probable cause, unreasonably intrudes on such arrestees’ expectation of privacy and is invalid under the Fourth Amendment of the United States Constitution.”

We granted review. While the case was still pending, the United States Supreme Court issued its decision in King, supra, which upheld a similar DNA collection requirement against Fourth Amendment challenge. Following King, we transferred this case to the Court of Appeal for reconsideration.

The Court of Appeal again reversed defendant’s conviction. Although the court observed that California’s DNA collection law is broader than the Maryland law at issue in King, the court declined to decide whether the differences between the California law and the Maryland law change the Fourth Amendment calculus under King. The Court of Appeal instead rested its decision on the prohibition on unreasonable searches and seizures in article I, section 13 of the California Constitution. In language closely paralleling its initial decision, the court held that “the DNA Act, to the extent it requires felony arrestees to submit a DNA sample for law enforcement analysis and inclusion in the state and federal DNA databases, without independent suspicion, a warrant or even a judicial or grand jury determination of probable cause, unreasonably intrudes on such arrestees’ expectation
of privacy and is invalid under article I, section 13, of the Constitution.”

In the wake of King, other California Courts of Appeal have addressed the constitutionality of the DNA Act in the context of reviewing decisions regarding the suppression of evidence derived from DNA samples collected from felony arrestees. Those courts have concluded that, under King’s reasoning, the collection and testing of arrestee DNA samples under the DNA Act does not violate the Fourth Amendment.

We granted review to decide whether the collection and analysis of forensic identification DNA database samples from felony arrestees, as required by Proposition 69, violates either article I, section 13 of the California Constitution or the Fourth Amendment to the United States Constitution.1

II.

The Fourth Amendment to the United States Constitution provides, in pertinent part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” Article I, section 13 of the California Constitution provides, in essentially identical language: “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated.”

As the constitutional language itself makes plain, the “touchstone for all issues” under both provisions is “reasonableness.” Ingersoll v. Palmer (1987) 43 Cal.3d 1321, 1329; accord, e.g., Riley v. California (2014) 573 U.S. ___, ___. [134 S.Ct. 2473, 2482] (The question before us is whether it was unreasonable within the meaning of one or both of these provisions to require defendant to use a cheek swab to provide a DNA sample to jail officials as part of the booking process following his arrest for arson. If so, defendant cannot be penalized for failure to comply, and his misdemeanor refusal conviction must be reversed. If, on the other hand, the requirement was reasonable, then defendant’s conviction stands. (See Birchfield v. North Dakota (2016) 579 U.S. ___, ___, ___ [136 S.Ct. 2160, 2172–2173].)

The United States Supreme Court’s decision in King, which was issued while this appeal was pending, has significantly altered the terms of the debate. After King, defendant no longer argues, as he had argued in the courts below, that the Fourth Amendment categorically forbids the mandatory collection of DNA from persons who have been arrested but not yet convicted of felony offenses. Defendant argues instead that King should be either distinguished on its facts or rejected as a matter of state constitutional law. Because both arguments require us to consider the import of the United States Supreme Court’s decision in King, we will begin there.

King came to the high court against the backdrop of increasingly widespread use of DNA technology in criminal justice systems nationwide. As the court observed, all 50 states and the federal government require the collection of DNA samples from individuals who are convicted of felony offenses. In recent years, a majority of states and the federal government have also authorized the collection of DNA from some or all persons arrested for felony offenses. (King, supra, 569 U.S. at p. 445.) Although courts had generally approved the collection of DNA samples following conviction, the permissibility of this expansion of DNA sampling proved more controversial. The high court granted review in King to resolve a conflict among federal and state courts “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.” (Id. at p. 442.)

The specific question before the court concerned the application of a Maryland law that authorized law enforcement authorities to collect DNA samples from an individual charged with certain statutorily defined “crime[s] of violence,” including murder, rape, first degree assault, kidnapping, arson, and sexual assault, as well as burglary and an attempt to commit one of these enumerated crimes. (King, supra, 569 U.S. at p. 443.) The defendant in King had been arrested and charged with one such offense, “first- and second-degree assault for menacing a group of people with a shotgun.” (Id. at p. 440.) The same day, his cheek was swabbed for DNA as part of the booking process. The sample matched DNA that had been collected from a rape victim several years earlier, and the defendant was charged with and convicted of the rape. Appealing that conviction, defendant argued that the DNA sample had been taken in violation of his Fourth Amendment rights and should have been suppressed. The Maryland Court of Appeals agreed and overturned the rape conviction. (Ibid.)

The United States Supreme Court reversed. The high court agreed with the Maryland court that a buccal swab for the collection of DNA samples—like any invasion of the body—is a search within the meaning of the Fourth Amendment, “gentle” though the search may be. (King, supra, 569 U.S. at p. 446.) But the court held that both the initial collection of a DNA sample and its subsequent processing pursuant to CODIS procedures is, “like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.” (Id. at p. 466.)

The high court explained that, as a general rule, a search is presumptively unreasonable if it is undertaken in the absence of a warrant or individualized suspicion of wrongdoing. (Vernonia School Dist. 47J v. Acton (1995) 515 U.S. 646, 652–653.) But “[i]n 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.’” (King, supra, 569 U.S. at p. 447, quoting Illinois v. McArthur

1. Defendant did not invoke the California Constitution in the trial court or in his first round of appellate briefing, instead relying solely on the Fourth Amendment. The Court of Appeal, however, relied on the California Constitution in its decision on remand after King. We accordingly address the questions raised under both the Fourth Amendment and article I, section 13 of the California Constitution.
The court concluded that the buccal swab of an arrestee on booking falls into a category of routine searches, justified by special law enforcement needs, that is properly analyzed “by reference to the proposition that the ‘touchstone of the Fourth Amendment is reasonableness, not individualized suspicion.’” (King, at p. 448.)

Weighing the privacy-related concerns at stake against law enforcement needs, the court concluded that the search was reasonable. On the law enforcement side of the balance, the court identified five interrelated governmental interests in obtaining the DNA sample. First, the court explained, the state has an interest in knowing “‘who has been arrested and who is being tried.’” (King, supra, 469 U.S. at p. 450, quoting Hibel v. Sixth Judicial Dist. Court of Nev., Humboldt County (2004) 542 U.S. 177, 191.) “A suspect’s criminal history,” the high court continued, “is a critical part of his identity that officers should know when processing him for detention,” and “[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” for the suspect’s criminal history. (King, at pp. 450–451.) In this respect, the court said, the profile serves the same purpose as a name or fingerprints. (Id. at p. 451.) Second, the high court reasoned, “DNA identification can provide untainted information to those charged with detaining suspects and detaining the property of any felon,” which is significant because “officers must know the type of person whom they are detaining, and DNA allows them to make critical choices about how to proceed.” (Id. at p. 452.) Third, the court noted, using DNA samples to determine whether the accused has committed other crimes furthers the state’s “‘substantial interest in ensuring that persons accused of crimes are available for trials.’” (Ibid.) This is so, it said, because “[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,” thereby presenting “a risk to law enforcement officers, other detainees, victims of previous crimes, witnesses, and society at large.” (Id. at p. 453.) Fourth, the court explained, “an arrestee’s past conduct is essential to an assessment of the danger he poses to the public,” which may determine “whether the individual should be released on bail.” (Ibid.) And fifth, the court noted, “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.” (Id. at p. 455.)

Law enforcement agencies, the court explained, “routine[ly] have used scientific advancements in their standard procedures for the identification of arrestees” (King, supra, 569 U.S. at p. 456), including photographs, body measurements, and fingerprints. The court observed that fingerprinting, in particular, is “[p]erhaps the most direct historical analogue to the DNA technology” at issue in the case (id. at p. 458): fingerprints have long been taken for purposes of comparison to identify suspects and for purposes of matching them to fingerprints taken from the scene of unsolved crimes, and electronic databases are now available that facilitate the comparison (id. at pp. 436, 458–459). DNA identification, the court noted, is a “markedly more accurate form of identifying arrestees” and the “additional intrusion upon the arrestee’s privacy beyond that associated with fingerprinting is not significant.” (Id. at p. 459.) “DNA identification,” the court reasoned, “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.” (Ibid.)

Compared to this set of governmental interests, the high court concluded that the privacy interests at stake were more limited. To begin with, the court explained, the buccal swab used to obtain a DNA sample is a “minimal intrusion.” (King, supra, 569 U.S. at p. 463.) Moreover, the court noted, “[o]nce an individual has been arrested on probable cause for a dangerous offense that may require detention before trial,” that person has a diminished expectation of privacy and “freedom from police scrutiny.” (Ibid.) This diminished expectation distinguishes arrestee searches from “the sort of programmatic searches of either the public at large or a particular class of regulated but otherwise law-abiding citizens” (id. at p. 462), such as checkpoint searches or the drug testing of political candidates, for which the court has “insisted on some purpose other than ‘to detect evidence of ordinary criminal wrongdoing.’” (Id. at p. 463.)

The high court further concluded that analysis of the DNA sample, once collected, does not result in a privacy intrusion that violates the federal Constitution. (King, supra, 569 U.S. at p. 464.) It explained that the processed DNA loci “come from noncoding parts of the DNA that do not reveal the genetic traits of the arrestee” and that “law enforcement officers analyze DNA for the sole purpose of generating a unique identifying number against which future samples may be matched.” (Ibid) It also noted that Maryland’s DNA law “provides statutory protections that guard against further invasion of privacy” (id. at p. 465); in the court’s view, these statutory protections allayed the privacy concerns associated with the state’s analysis of the DNA sample (ibid., citing NASA v. Nelson (2011) 562 U.S.____, ____ [131 S.Ct. 746, 750]).

For these reasons, the court 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 an arrestee on booking falls into a category of routine searches, justified by special law enforcement needs, that is properly analyzed “by reference to the proposition that the ‘touchstone of the Fourth Amendment is reasonableness, not individualized suspicion.’” (King, at p. 448.)
this case was asked to provide a cheek swab as part of a routine booking procedure following an arrest supported by probable cause to believe he had committed a serious offense—namely, felony arson.

Defendant urges us to take a second look, however. He notes that while California’s legal framework for the collection, analysis, and retention of arrestee DNA is in many ways similar to the Maryland law upheld in King, it is not identical. Defendant highlights three features of the DNA Act in particular that, in his view, distinguish this case from King: (1) the DNA Act applies to a broader category of arrestees than the Maryland law; (2) the DNA Act, unlike the Maryland law, authorizes both collection and testing of DNA samples before an accusatory pleading is filed in court and before a judicial determination has been made that the charges are valid; and (3) the DNA Act, unlike the Maryland law, does not provide for automatic destruction of the DNA sample if the arrestee is cleared of felony charges.

Although these differences between the California and Maryland laws may be relevant in another case involving a differently situated arrestee, this case involves a defendant who was validly arrested on probable cause to believe he had committed felony arson, and who was promptly charged with (and ultimately convicted of) that offense. In the context of the particular case before us, we conclude that none of the differences to which defendant points meaningfully alters the constitutional balance struck in King.

We begin with defendant’s first argument, about the scope of the DNA Act’s collection requirement. Defendant observes that the Maryland law at issue in King authorized DNA collection only from those accused of specified serious crimes, including a category defined as “crime[s] of violence” under state law, whereas the DNA Act authorizes DNA collection from all felony arrestees. (King, supra, 569 U.S. at p. 443.) Defendant argues that this difference is important because the seriousness of the crime of arrest figures prominently in the high court’s balancing analysis: The high court’s opinion states that “the necessary predicate of a valid arrest for a serious offense is fundamental” (id. at p. 461), and elsewhere uses language that suggests the court was particularly concerned with persons arrested for “violent” or “dangerous” crimes (id. at pp. 453, 455). Such a limitation makes sense, defendant contends, because such crimes are the kinds of crimes that typically yield DNA evidence.

Defendant appears to read too much into the language on which he relies. The high court identified the question before it more generally as “whether the Fourth Amendment prohibits the collection and analysis of a DNA sample from persons arrested, but not yet convicted, on felony charges.” (King, supra, 569 U.S. at p. 442.) And as a matter of ordinary usage, a felony is considered a “serious” offense. (See, e.g., Carachuri-Rosendo v. Holder (2010) 560 U.S. 563, 574 [“A ‘felony,’ we have come to understand, is a ‘serious crime usu[ally] punishable by imprisonment for more than one year or by death.’ “].) Though the court also occasionally referred to “violent” and “dangerous” crimes, King did not purport to limit its holding to those felonies that happen to be classified as “violent” or “dangerous” as a matter of state law, nor did it purport to create a new classification of violent offenses as a matter of federal constitutional law.

But in any event, even if the federal Constitution permitted states to mandate collection of DNA samples only from persons arrested for felonies classified as particularly serious or violent, defendant in this case was arrested for felony arson in violation of Penal Code section 451, subdivision (d), a crime that is classified as a “serious felony” under California law. (See Pen. Code, § 1192.7, subd. (c)(14).) Defendant does not dispute the characterization.

Defendant’s argument would thus seem to amount to a request that we reverse his conviction based not on any defect in the DNA Act’s application to his case, but based on the Act’s potential application to other, differently situated individuals. This is more than he may reasonably ask. The ordinary rule is “that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself.” (In re Cregler (1961) 56 Cal.2d 308, 313 (Cregler).) This rule does have limited exceptions—most commonly invoked in free speech cases—but none is relevant here. (Sabri v. United States (2004) 541 U.S. 600, 609–610 (Sabri); see, e.g., United States v. Mitchell (3d Cir. 2011) 652 F.3d 387, 415, fn. 26 (en banc) (Mitchell) [felony arrestee could not raise a successful facial challenge to federal DNA collection law on the ground that it applies to misdemeanor arrestees and is therefore overbroad]; cf. Rakas v. Illinois (1978) 439 U.S. 128, 133–134 [“Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.”].) Outside of these limited exceptions, and “absent a good reason, we do not extend an invitation to bring overbreadth claims.” (Sabri, at p. 610.) No such reason appears in this case.

Defendant next points out that the Maryland law upheld in King permitted collection of a DNA sample only of arrestees “charged” with qualifying crimes (Md. Code Ann., Pub. Saf., § 2-504(b)(1)), and prohibited officials from testing the sample or loading the profile into the statewide database until after the arrestee was arraigned and a judicial officer determined that the arrest was based on probable cause (id., § 2-504(d)(1)). The DNA Act, by contrast, allows collection “immediately following arrest” and provides that the samples shall “immediately” be forwarded to the laboratory for analysis. (Pen. Code, § 295(i)(1)(C).) Defendant argues that these differences in the time prescribed for the collection of DNA samples would mean that the arrestee is cleared of felony charges.

2. States are, of course, under no obligation to classify any particular set of crimes as “violent,” and different states often classify similar crimes differently. Such “interstate statutory differences do not control the meaning of the Fourth Amendment.” (Robinson, supra, 47 Cal.4th at p. 1123; cf. Virginia v. Moore (2008) 553 U.S. 164, 176.) Nor does there exist a body of federal constitutional law that might supply a relevant classification. (Cf., e.g., Arwater v. City of Lago Vista (2001) 532 U.S. 318, 345 [declining to adopt a classification of “violent” misdemeanors for Fourth Amendment purposes].)
tion and testing of DNA samples tip the balance against their constitutionality.

There are two elements to this argument: one concerning the timing of the collection, the other concerning the timing of analysis. As to the timing of collection, there is no reason to believe that the differences between California’s law and Maryland’s change the Fourth Amendment balance applicable in this case. Although the text of the DNA Act does purport to authorize the collection “immediately following arrest,” that provision was not invoked and is not at issue here. Rather, jail officials in this case sought to collect a sample of defendant’s DNA on booking, as part of the routine collection of identifying information. And King, once again, upheld DNA collection as a “legitimate police booking procedure,” like fingerprinting or photographing, that enables jail officials to know whom they have taken into custody. (King, supra, 569 U.S. at p. 466, italics added.) King itself involved a sample collected on booking. (Id. at p. 441; see King v. State (Md. 2012) 42 A.3d 549, 557.) And there are practical reasons for collecting the required DNA sample at the time of booking, along with taking photographs and fingerprints. Among other things, if the arrestee is released pending adjudication, officials may not have another opportunity. (See Mario W. v. Kaipio (Ariz. 2012) 281 P.3d 476, 482 (“If . . . a juvenile is released pending adjudication and later fails to appear for trial without previously having submitted a buccal sample, the opportunity to obtain a DNA profile for identification purposes will have been lost. The State has an important interest in locating an absconding juvenile and, perhaps years after charges were filed, ascertaining that the person located is the one previously charged.”).)

As to the second point, defendant argues that it is unreasonable for officials to proceed to test the DNA sample once collected, and to upload an arrestee’s profile to the state DNA databank, before a judicial officer has found probable cause to support the arrest or before charges have been filed. Defendant argues that it is this step—the testing and recording of the arrestee’s DNA identification profile—that “represents the far greater intrusion upon privacy.” And a provision like Maryland’s ensures that this step is not taken before there is third party confirmation that the defendant was validly arrested and that he or she will face legal process for a felony offense.

Defendant, who has never contested that his arrest was based on probable cause, made no similar argument in the trial court; he argued that it was impermissible to require him to submit a DNA sample at all, not that it was unreasonable to do so without a guarantee that the analysis of the sample would be delayed until probable cause was confirmed by a neutral magistrate or charges were filed. We observe, however, that the reasoning of King itself does not lend substantial support to the argument that such a guarantee is required under these circumstances. Again, King approved “DNA identification”—which necessarily involves both taking and analyzing the sample—as a “legitimate police booking procedure” that enables law enforcement to know whom they have in custody. (King, supra, 569 U.S. at pp. 465–466.) That interest is one that attaches as soon as the suspect is “formally processed into police custody.” (Id. at pp. 449–450.) The court attached no significance to the timing provision of the Maryland statute on which defendant relies. The point was, rather, raised primarily in the dissenting opinion, which argued that delaying DNA testing until arraignment undermined the argument that the requirement qualifies as a reasonable booking procedure. (Id. at pp. 471–472 (dis. opn. of Scalia, J.).)

Defendant contends that the timing of analysis nevertheless ought to figure in the equation because, as a practical matter, officers ordinarily will not receive a suspect’s DNA profile until well after booking in any event. When officers make a warrantless arrest and take a suspect into custody, due process ordinarily requires that a judicial officer make a probable cause determination promptly after booking—ordinarily within 48 hours—to justify continued pretrial detention. (County of Riverside v. McLaughlin (1991) 500 U.S. 44, 58–59.) (No such requirement applies if the arrestee is released from detention. (In re Walters (1975) 15 Cal.3d 738, 743; see also Pen. Code, § 849, subd. (a).) By contrast, defendant notes, in California it has typically taken much longer—at the time of briefing, an average of 30 days—to generate an identification profile from an arrestee’s DNA sample. (See King, supra, 569 U.S. at p. 454 [citing the same statistic].) Defendant argues that in view of the delays already associated with sample processing, it would pose a negligible burden for officials to postpone processing until a judge has determined whether probable cause exists and a prosecutor has decided whether to file charges.

Defendant’s point about average processing times is not one that escaped the high court’s notice in King; as noted, the court itself cited the same numbers. The court nevertheless concluded that DNA identification is a reasonable booking procedure, without suggesting that its reasonableness might vary depending on average processing times. The reasons for this are not difficult to discern. For one thing, individual DNA placed in a patrol car at the scene, defendant spontaneously stated, “I didn’t think it would work” and noted that the officer who initially observed him in the act had “[p]erfect timing, him coming up the hill like that.” According to his own testimony at trial, moreover, he anticipated he would be charged for his acts. Justified as his protest was, he testified, he knew “how the legal system works” and that “[t]hey [we] re going to regard this as an illegal act.”

3. In his brief, defendant read the Maryland law’s reference to arrestees “charged” with certain offenses as prohibiting the collection of DNA until a prosecutor decides whether to file qualifying charges following arrest. (See Md. Code, Ann., Pub. Saf., § 2-504(b)(1).) But the Attorney General notes that in Maryland, charges are often filed by the police officer, rather than the prosecutor. (Md. Rules, rule 4-211(b) (2).) The high court’s opinion in King did not address the meaning or significance of this provision of the Maryland law; its analysis was focused not on the nature of the charging decision, but on the fact of an arrest supported by probable cause.

4. On the contrary, it appears that defendant acknowledged from the outset that there was probable cause to arrest him. While being...
samples may be processed more quickly than average: The court noted the states’ submission that some DNA identification samples in California have been processed significantly more quickly than others. (King, supra, 569 U.S. at p. 454.) Moreover, as is often the case in areas of fast-moving technical developments, average processing times are liable to change; the high court had been told that the technological capacity already exists to analyze DNA samples in a matter of minutes, rather than days or weeks, and that technology is likely to become more widespread in the near future. (Id. at p. 460; see Rapid DNA Act of 2017, Pub.L. No. 115-50 (Aug. 18, 2017) 131 Stat. 1001; see also 42 U.S.C. §§ 14131(a), 14135a.) The court “[take] account of these technical advances” (King, at p. 460) in evaluating the reasonableness of DNA collection and testing as a means of “prompt identification” (id. at p. 459). Given all this, we cannot proceed on the assumption that a rule delaying the collection or processing of samples until after a judicial probable cause finding or arraignment would pose no meaningful risk of interference with the central interest identified in King: the accurate identification of arrestees who are taken into police custody.

Defendant argues, not unreasonably, that we should decide this case in light of the conditions that prevailed at the time he refused to provide the sample, not in light of technological advances that might make it possible to process DNA samples more quickly in the future. But considering the matter from this vantage point does not help defendant’s case. If we assume that defendant’s sample would not have been processed significantly faster than the average of 30 days, as defendant would have us do, then we would also be bound to conclude that defendant would have, de facto, received the very delay he seeks: The record indicates that a judge found probable cause to support defendant’s felony arrest a little more than 24 hours after he was arrested, and he was arraigned within 48 hours, as the law requires. In a world of 30-day processing times, defendant’s sample would not have been processed, or his DNA profile uploaded to the state DNA databank, before these events occurred.

Although defendant himself was charged and convicted, we acknowledge defendant’s concern about the collection of DNA samples from other individuals who are booked into custody but who ultimately will never be charged with a qualifying crime, or against whom qualifying charges will ultimately be dismissed. Voters responded to that concern by providing for a particular remedy—expungement of the DNA sample and associated records—when the suspect is cleared of qualifying charges. As King illustrates, voters could also have chosen to require that all sample processing be postponed until after arraignment, regardless of technological capacity to proceed more quickly. But given the basic logic of King, we cannot say that the choice voters made is one that undermines the reasonableness of the search in this case.

Justice Liu suggests that for purposes of deciding reasonableness of an arrestee’s search, an arrest should not be considered valid until there has been a judicial determina-

5. A different provision of the DNA Act requires the Department of Justice DNA Laboratory to “remove [a] suspect sample from its database files and databases” after two years upon confirmation that the “person is no longer a suspect in a criminal investigation.” (Pen. Code, § 297, subd. (c)(2)) The parties have not addressed the relevance of this provision, if any.
later found to have been wrongly arrested or who are cleared of wrongdoing.

King does not speak directly to the issue defendant raises concerning the adequacy of the DNA Act’s expungement procedures. Although the high court mentioned Maryland’s automatic destruction provisions in passing, it attached no significance to them in its constitutional analysis. (King, supra, 569 U.S. at pp. 443–444.) Rather, the court responded to privacy concerns about the state’s processing of DNA samples by emphasizing features of the Maryland law that are shared by California’s: namely, the analysis of a sample involves the processing only of loci from “noncoding parts of the DNA that do not reveal the genetic traits of the arrestee,” and the law strictly prohibits the misuse of DNA records for any purpose other than identification. (Id. at p. 464; see id. at p. 465; Pen. Code, § 299.5.)

The court’s failure to mention the expungement provisions does not necessarily mean that they are irrelevant to the constitutional analysis, however. To be sure, the retention of an arrestee’s fingerprints, photographs, and other identifying information in law enforcement files generally has not been thought to raise constitutional concerns, even though the arrestee may later be exonerated. (Loder v. Municipal Court (1976) 17 Cal.3d 859, 864–869; People v. McNinis (1972) 6 Cal.3d 821, 826.) But the question defendant raises is whether, given the uniquely sensitive nature of DNA information, a different rule should apply here: one that calls not only for expungement, but for automatic expungement of an arrestee’s DNA sample, DNA identification profile, or both after an arrest has been shown to be invalid or after an arrestee is cleared of charges, or both.

Whether the Fourth Amendment requires this added protection for the wrongly arrested or exonerated is, however, a question we must leave for another day, because defendant in this case is neither. Defendant has not been found to have been wrongly arrested; indeed, he has never challenged the validity of his arrest. Nor was he cleared of the charges that formed the basis for his arrest; he was promptly charged with that offense and was later convicted as charged. Although our dissenting colleagues argue otherwise (dis. opn. of Liu, J., post, at pp. 7–8; dis. opn of Cuellar, J., post, at pp. 25–26), we are aware of no support for the proposition that an arrestee who, like defendant, has never claimed to be entitled to expungement, is nevertheless entitled to challenge the adequacy of expungement procedures. (See Mitchell, supra, 652 F.3d at p. 412 [arrestee who had never provided a sample and who had never sought expungement was “not in a position” to challenge the adequacy of the expungement provisions of the federal DNA collection statute].)

Again, the ordinary rule is “that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself.” (Cregler, supra, 56 Cal.2d at p. 313.) Further, “a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations.” (Ibid.) By focusing on the facts presented by the case before us, we avoid premature judgment of constitutional questions, including “‘premature interpretation[n] of statutes’ on the basis of factually bare-bones records.” (Sabri, supra, 541 U.S. at p. 609, quoting United States v. Raines (1960) 362 U.S. 17, 22.)

Restraint is particularly warranted here because much of defendant’s argument depends on assertions about the workings of the expungement procedures that are as yet untested and unproved. The record before us reveals nothing, for example, about how the expungement provisions operate in a case in which a judge finds no probable cause to support the arrest. The statute does make clear that a person who is found to have been wrongly arrested is entitled to expungement: it says that “a person who has no past or present qualifying offense” may make a request for expungement if, among other things, no qualifying charges have been filed “within the applicable period allowed by law” or if qualifying charges “have been dismissed prior to adjudication by a trier of fact.” (Pen. Code, § 299, subd. (b)(1).) But the requirement that the arrestee make a written request with supporting documentation from the court or the district attorney, for example, appears to be aimed at dispelling any doubt as to whether qualifying charges may still be filed against the arrestee. (Id., § 299, subd. (c)(2)(B).) It is unclear whether or how this requirement would apply in a case in which a judge has ruled from the outset that the defendant’s felony arrest was unsupported by probable cause.

Much the same is true about defendant’s concern that the state may indefinitely retain DNA information of a person who, though arrested, has been found innocent of any crime. Defendant contends that a prosecutor may unilaterally block expungement by objecting for any reason, and a trial court likewise may deny expungement in its unconstrained discretion. It is not clear that he is correct on either score. It is true that the DNA Act describes a process that permits prosecutors to file objections to expungement (Pen. Code, § 299, subd. (c)(2)(D)), and speaks of trial court “discretion” to grant or deny an expungement request (id., § 299, subd. (c)(1)). But the DNA Act also provides that if there is no other legal basis for retaining the information, an exonerated arrestee “shall have his or her DNA specimen and sample destroyed and searchable database profile expunged from the database program.” (Pen. Code, § 299, subd. (a), italics added.) Federal law likewise provides that a state participating in CODIS “shall promptly expunge” from that database the DNA profile of any person who is later cleared of qualifying charges. (34 U.S.C. § 12592(d)(2)(A).) And to the extent there is any question about the proper interpretation of the statute, it might well be resolved by reference to the usual rule that a statute will be interpreted to avoid serious constitutional questions if such an interpretation is fairly possible. (See, e.g., People v. Gutierrez (2014) 58 Cal.4th 1354, 1373.) Whether legislation may deprive the appellate courts of all modes of reviewing a trial court’s order, as sec-
tion 299, subdivision (c)(1) might appear to do, poses such a question. (See Cal. Const., art VI, §§ 10, 11 [jurisdiction of appellate courts over appeals and writs]; Leone v. Medical Board (2000) 22 Cal.4th 660, 668 [Legislature may not restrict appellate review in a manner that would substantially impair courts’ constitutional powers].) Nor does a trial court order appear to be a necessary prerequisite to expungement. As the Attorney General points out, the California Department of Justice has created a “streamlined” process whereby eligible individuals may seek expungement directly from the Department, using a publicly available two-page form. Defendant does not question the Department’s authority to create this alternative, “streamlined” expungement process. (See Pen. Code, § 295, subd. (h)(1) [authorizing the Department to adopt policies and enact regulations for the implementation of the DNA Act].) And although he notes that a trial court might have to get involved if the Department denies a valid expungement request, he points to no case in which such a thing has occurred.

Because defendant never sought expungement—and indeed, has never claimed to be entitled to seek expungement, since he was both charged with and ultimately convicted of a qualifying crime—we have no occasion here to resolve any questions that might arise about the implementation of the expungement provisions in other cases. It suffices to note that many of defendant’s assertions about the operation of the expungement process are, at this point, necessarily speculative. This court ordinarily does not issue constitutional rulings based on speculation, and we will not do so here. (See, e.g., Cregler, supra, 56 Cal.2d at p. 313; Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal.3d 158, 172.)

In short, although the DNA Act differs in some ways from the Maryland law at issue in King, none of those differences affects the Fourth Amendment analysis in the specific case before us. King holds that a cheek swab is a reasonable booking procedure for individuals who are arrested for serious offenses, and defendant was asked to provide a cheek swab upon being booked after a valid arrest for a serious offense. Defendant’s conviction for failing to submit a sample of his DNA therefore did not violate the Fourth Amendment to the federal Constitution.

III.

Defendant argues, and the Court of Appeal concluded on remand from King, that even if requiring him to furnish a DNA sample as part of the booking process did not violate the Fourth Amendment, it violated the parallel prohibition on unreasonable searches and seizures in article I, section 13 of the California Constitution.

We evaluate the constitutionality of searches and seizures under our state Constitution by employing the same mode of analysis that the high court applied in King, supra, 569 U.S 435. That is, we determine whether the intrusion on the defendant’s expectation of privacy is unreasonable by applying “a general balancing test ‘weighing the gravity of the governmental interest or public concern served and the degree to which the [challenged government conduct] advances that concern against the intrusiveness of the interference with individual liberty.’” (Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1, 29–30, quoting Ingersoll v. Palmer, supra, 43 Cal.3d at p. 1338.) Defendant does not argue otherwise. He instead argues that we should reject King’s balancing of these interests as a matter of state constitutional law.

In addressing defendant’s argument, we reaffirm several long-established principles. First, the California Constitution is, and has always been, “a document of independent force” (American Academy of Pediatrics v. Lungren (1997) 16 Cal.4th 307, 325) that sets forth rights that are in no way “dependent on those guaranteed by the United States Constitution” (Cal. Const., art. I, § 24). “As an historical matter, article I and its Declaration of Rights was viewed as the only available protection for our citizens charged with crimes, because the federal Constitution and its Bill of Rights was initially deemed to apply only to the conduct of the federal government.” (Raven v. Deukmejian (1990) 50 Cal.3d 336, 352–353.) While the setting changed following ratification of the Fourteenth Amendment to the United States Constitution and the selective incorporation of the Bill of Rights, it remains a basic tenet of our system of federalism that “the nation as a whole is composed of distinct geographical and political entities bound together by a fundamental federal law but nonetheless independently responsible for safeguarding the rights of their citizens.” (Brisendine, supra, 13 Cal.3d at p. 550.)
Second, although decisions of the United States Supreme Court interpreting parallel federal text are not binding, we have said they are “entitled to respectful consideration.” (People v. Teresinski (1982) 30 Cal.3d 822, 836 (Teresinski); cf., e.g., Gabrielli v. Knickerbocker (1938) 12 Cal.2d 85, 89 (“[C]ogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution.”).) This approach reflects the “respect due to the decision of that high tribunal, the fact that to it has been committed, by the consent of the states, the ultimate vindication of liberty and property against arbitrary and unconstitutional state legislation.” (People v. Budd (1889) 117 N.Y. 1, 13, affd. Budd v. New York (1892) 143 U.S. 517, cited in Gabrielli, supra, 12 Cal.2d at p. 89.)

We have had several occasions to address the application of these principles in the context of search and seizure law in particular. Today, following a 1982 state constitutional amendment passed by voter initiative, the United States Supreme Court’s interpretation of the Fourth Amendment is often not only persuasive, but controlling in criminal cases: Under Proposition 8, the “Right to Truth-in-Evidence” (Cal. Const., art. I, § 28, subd. (f)(2)), added by voters in 1982, the exclusionary rule does not apply to a search or seizure that violates article I, section 13, but does not violate the Fourth Amendment, and the fruits of such a search or seizure are admissible in a criminal trial. This means that in California criminal proceedings, issues related to the suppression of evidence seized by police are, in effect, governed by federal constitutional standards. (E.g., People v. Lenart (2004) 32 Cal.4th 1107, 1118; see In re Lance W. (1985) 37 Cal.3d 873, 891 [upholding Proposition 8].) But when voters later enacted an initiative measure that would have eliminated this court’s ability to independently construe the California Constitution’s provisions granting certain rights to criminal defendants, including the right to be free of unreasonable searches and seizures, we explained that such far-reaching change could be accomplished only by constitutional revision: While our law has long reflected a “general principle or policy of deference to United States Supreme Court decisions,” the initiative measure could not “mandate the state courts’ blind obedience thereto, despite ‘cogent reasons,’ ‘independent state interests,’ or ‘strong countervailing circumstances’ that might lead our courts to construe similar state constitutional language differently from the federal approach.” (Raven v. Deukmejian, supra, 52 Cal.3d at p. 353.)

Even before the passage of Proposition 8, this court ordinarly resolved questions about the legality of searches and seizures by construing the Fourth Amendment and article I, section 13 in tandem. (E.g., People v. Triggs (1973) 8 Cal.3d 884, 892, fn. 5 (“At least since the advent of Wolf v. Colorado (1949) 338 U.S. 25, we have treated the law under article I, section 19 [now section 13], of our state Constitution as ‘substantively equivalent’ to the Supreme Court’s construction of the Fourth Amendment.”).) On various occasions, however, this court has also decided questions pertaining to the legality of searches and seizures solely under article I, section 13, when the United States Supreme Court had not yet decided the parallel question under the Fourth Amendment. (See, e.g., People v. Ruggles (1985) 39 Cal.3d at 1, 11 (“Rather than await more definitive guidance [from the United States Supreme Court], we turn to article I, section 13 of the California Constitution”); People v. Cook (1978) 22 Cal.3d 67, 88 [adhering to the rule of Theodor v. Superior Court (1972) 7 Cal.3d 202, notwithstanding the United States Supreme Court’s later decision in United States v. Robinson, supra, 414 U.S. 218]; People v. Cook (1978) 22 Cal.3d 67, 88 [adhering to the rule of Theodor v. Superior Court (1972) 7 Cal.3d 202, notwithstanding the United States Supreme Court’s later decision in Franks v. Delaware (1978) 438 U.S. 154].)

Here, in contrast to many of our earlier cases, the United States Supreme Court has resolved the question before us under the Fourth Amendment. The question is thus not whether we should abandon our own contrary precedent, and any reliance interests that may have grown up around it, but whether we should reject the high court’s Fourth Amendment guidance. Confronted with a similar situation in Teresinski, in which this court’s Fourth Amendment ruling had been overturned by the United States Supreme Court in United States v. Crews (1980) 445 U.S. 463, we declined an invitation to reach the same conclusion based on article I, section 13, finding “no reasons . . . to justify rejecting the teaching of the Supreme Court” on the issue presented. (Teresinski, 8 Our colleagues in dissent would go further; they argue that we should take no special account of the federal high court’s interpretation of language common to the United States and California Constitutions. (See dis. opn. of Liu, J., post, pp. 11–12; dis. opn. of Cuéllar, J., post, pp. 4–5.) But as Raven v. Deukmejian made clear in rejecting an effort to eliminate our independent interpretive authority altogether, the approach we have described is neither a relic of a long-distant past nor a recent innovation. We will accordingly follow this court’s longstanding policy and practice of giving meaningful and careful consideration to federal high court decisions construing parallel constitutional text, without in any way denying or denigrating our power and duty to depart from those decisions when sufficient reasons appear. 9 The dissenting opinions ask why “the order in which this court decides an issue vis-à-vis the high court” should be of any significance. (Dis. opn. of Cuéllar, J., post, at p. 8; see also dis. opn. of Liu, J., post, at p. 12.) In reviewing this court’s past practice, our answer is straightforward: in instances where this court had previously decided an issue, that decision carried the persuasive force of stare decisis we always accord our own precedents, which had then to be balanced against the persuasive force of the contrary United States Supreme Court decision. In instances where we had not previously decided an issue, no similar counterbalance existed.
The question is whether adequate reasons are present here to conclude, despite King, that California voters exceeded constitutional bounds in mandating the collection of DNA sample from an individual arrested and booked on probable cause to believe he had committed a serious offense.

Defendant argues there are several such reasons. To begin with, he argues that King should be rejected because its central premise is faulty. King concluded that DNA collection from persons arrested for serious offenses serves a legitimate governmental interest in safely and accurately processing and identifying the persons they take into custody. Defendant argues, however, that arrestee DNA information is not used to determine an arrestee’s identity, but “solely for investigation of possible other crimes.” Echoing the dissenting opinion in King (supra, 569 U.S. at pp. 467–469 (dis. opn. of Scalia, J.)), defendant argues that gathering DNA information for this purpose is unreasonable in the absence of a warrant or individualized suspicion.

In evaluating defendant’s argument, we do not write on a blank slate. As noted, in Robinson, supra, 47 Cal.4th 1104, this court upheld against a Fourth Amendment challenge the practice of mandatory collection of DNA samples from convicted felons. This court so held precisely because of the capacity of DNA sampling to provide accurate and reliable identification of criminal offenders. This court recognized that DNA samples, like fingerprints, may also be used to establish a suspect’s involvement in crimes. (Id. at pp. 1120–1121.) Indeed, the DNA sample taken from the defendant in Robinson was used for that purpose, and led to his prosecution for an unrelated crime. But this court concluded that the search was reasonable because DNA testing is, like fingerprinting, a means of identification, and “individuals in lawful custody cannot claim privacy in their identification.” (Id. at p. 1121.)

Robinson, like King, recognized that suspects can change their names, assume a false identity using forged documents, change their hair color, have tattoos removed, have plastic surgery, and change their eye color with contact lenses. But it is impossible to alter a DNA profile. Thus, as Robinson explained, “for purposes of identifying ‘a particular person’ as the defendant, a DNA profile is arguably the most discrete, exclusive means of personal identification possible.” (Robinson, supra, 47 Cal.4th at p. 1134, quoting State v. Dabney (Wis. 2003) 663 N.W.2d 366, 372.) “A genetic code describes a person with far greater precision than a physical description or a name.” (Ibid.) For that reason, this court upheld an arrest warrant describing the arrestee by only his DNA profile. (Robinson, at p. 1137.)

California law, like federal law, has also recognized that identification of arrestees is not an end in itself; rather, the primary purpose of identification is to facilitate the gathering of information about the arrestee contained in police records, which in turn informs decisions about how to proceed with the arrestee. (Loder v. Municipal Court, supra, 17 Cal.3d at pp. 866–867 [upholding limited retention and use of arrest records, including fingerprints and other identifying information].) Our law is thus consistent with the high court’s observation that “[t]he 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.” (King, supra, 569 U.S. at p. 451.) “In this respect the use of DNA for identification is no different than matching an arrestee’s face to a wanted poster of a previously unidentified suspect; or matching tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee’s fingerprints to those recovered from a crime scene. . . .” [DNA testing] uses a different form of identification than a name or fingerprint, but its function is the same.” (Ibid.)

As counsel confirmed at oral argument, defendant does not dispute that it is reasonable for officers to check an arrestee’s fingerprints against “electronic databases of known criminals and unsolved crimes.” (King, supra, 569 U.S. at p. 451.) This, he says, is because fingerprints are capable of serving a “genuine” identification purpose, while a DNA profile is not. To be sure, a DNA profile is not, at least under present technological conditions, generated immediately or nearly immediately, in the manner of fingerprints. But as the high court noted in King, the immediate availability of fingerprints for identification purposes is also a relatively recent development; before the FBI introduced its electronic fingerprint database in 1999, processing fingerprint submissions often took “weeks or months.” (Id. at p. 459.) Such delays have not been thought to undermine the basic identification purposes of the information. (See, e.g., United States v. Kelly (2d Cir. 1932) 55 F.2d 67, 69, 70 [“Fingerprinting seems to be no more than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations . . . .” “It can really be objected to only because it may furnish strong evidence of a man’s guilt.”].)

As the high court explained in King, “[t]he 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.” (King, supra, 569 U.S. at p. 459.) Even if a DNA profile is not generated until weeks or months after the initial booking, the information it yields about the arrestee and his criminal history can still have an “important bearing” on the processing of the arrestee—whether, for example, to revisit an initial determination to release the arrestee or to impose new release conditions. (Id. at p. 460.) Information obtained after initial booking may also influence the jailer’s decision about where to house the arrestee.

To the extent defendant means to argue that fingerprinting simply makes DNA identification superfluous, we have no adequate basis for concluding that is so. Fingerprinting and DNA identification are not simply substitutes for one another. (Robinson, supra, 47 Cal.4th at p. 1134.) Fingerprinting alone would not have revealed, for example, that there was an outstanding warrant for the defendant’s arrest in Robinson.
And as the court in *King* noted, “[i]n 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.” (*King*, supra, 569 U.S. at p. 454.)

Defendant also argues that we should reject *King* as a matter of state constitutional law because *King* “ignored the highly sensitive nature of the genetic data contained in the collected DNA,” and “did not address what federal circuit courts have recognized as the more significant privacy implications posed by the state’s subsequent analysis and retention of the sensitive information contained in DNA.” The criticism is misplaced. Contrary to defendant’s characterization, the court in *King* recognized that the privacy interests at stake extended beyond the “minimally invasive” physical collection of the DNA sample by buccal swab. (*King*, supra, 569 U.S. at p. 460.) As noted above, the court acknowledged concerns about the genetic information contained in the collected DNA and its subsequent analysis. It explained that CODIS testing is designed to reveal nothing more about the arrestee than his or her identity, and that state law forbade the use of DNA information for nonidentification purposes. (*Id.* at pp. 464–465.) But the court acknowledged that if scientific advances or other developments mean that CODIS testing will now lead to discovery of personal medical information, a new Fourth Amendment analysis will be required. (*Ibid.*)

We, too, are mindful of the heightened privacy interests in the sensitive information that can be extracted from a person’s DNA. These interests implicate not only article I, section 13, but the privacy rights enjoyed by all Californians under the explicit protection of article I, section 1 of the California Constitution. (See, e.g., *Lewis v. Superior Court* (2017) 3 Cal.5th 561, 569.) But our cases have also recognized that safeguards against the wrongful use or disclosure of sensitive information may minimize the privacy intrusion when the government accesses personal information, including sensitive medical information. (E.g., *id.* at pp. 576–577 [upholding the constitutionality of government access to prescription drug record database under article I, section 1 of the California Constitution].) Here, the DNA Act makes the misuse of a DNA sample a felony, punishable by years of imprisonment and criminal fines. (Pen. Code, § 299.5.) These strong sanctions substantially reduce the likelihood of an unjustified intrusion on the suspect’s privacy. Like the *King* court, we acknowledge the possibility that technological change might alter the privacy interests at stake, requiring a new constitutional analysis. But we are no more inclined than that court to decide cases on the basis of speculation about future developments that may not come to pass.

Defendant next argues that this court should reject *King* because article I, section 13, gives arrested suspects greater privacy rights than they possess under the Fourth Amendment. Defendant points to decisions of this court holding that article I, section 13 forbids officers from conducting so-called “accelerated booking search[es]” in the field at the time of arrest (*People v. Latwa* (1983) 34 Cal.3d 711, 726–728); from conducting full body searches of arrested suspects before determining whether they will be cited and released without being booked (*People v. Longwill* (1975) 14 Cal.3d 943, 951–952 (*Longwill*)); and from conducting searches of personal effects incident to a citation or arrest for a traffic violation, absent reason to believe the effects contain weapons or contraband (*Brisendine, supra*, 13 Cal.3d at pp. 548–552; *People v. Norman* (1975) 14 Cal.3d 929, 938).

In the latter cases, we rejected the rule of *United States v. Robinson*, supra, 414 U.S. 218, which, as we described it in *Longwill*, permits “full body searches of all individuals subjected to custodial arrest,” as well as their effects, “regardless of the offense, and regardless of whether the individual is ultimately to be incarcerated.” (*Longwill*, supra, 14 Cal.3d at p. 951.)

But what motivated these decisions was not principally a difference in opinion with the federal courts about the scope of legitimate privacy rights of persons subject to custodial arrest. California law and federal law alike recognize that an arrestee has reduced privacy interests upon being taken into police custody, but that reduced privacy interests do not mean zero privacy interests—which is to say, “[n]ot every search ‘is acceptable solely because a person is in custody.’” (*Riley v. California*, supra, 134 S.Ct. at p. 2488, quoting *King*, supra, 569 U.S. at p. 463.) Rather, the cases on which defendant relies all turn on a different evaluation of legitimate law enforcement needs when arresting suspects in the field. As relevant here, this court concluded that the rationales for conducting full booking searches before a defendant enters custody do not apply to all persons cited or arrested in the field, since “it is factually demonstrable that a substantial number of the arrestees will never see the inside of a jail cell.” (*Longwill*, supra, 14 Cal.3d at p. 951.) In each case, we explained, “the same factors are operative: the potential harm to the officer if the arrestee is armed justifies a limited weapons search, but a full booking search is ‘inappropriate in the context of an arrestee who will never be subjected to that process.’” (*Id.* at p. 950, quoting *Brisendine, supra*, 13 Cal.3d at p. 547.)

The question before us, by contrast, does not concern the constitutionality of a booking search conducted immediately upon arrest, but a booking search conducted at the *time of booking*, and justified by an interest in accurate identification that applies to all persons who are taken into police custody following a valid arrest for a serious offense. Cases concluding that full booking searches are inappropriate for arrestees who will never be booked into jail are thus of limited relevance here.

Finally, defendant argues that even if the differences between the DNA Act and the law at issue in *King* do not alter the Fourth Amendment analysis, they should alter the state
constitutional analysis. For reasons already given, these differences do not change our assessment of the constitutionality of the DNA Act as applied in defendant’s case. Officials asked defendant for a DNA sample upon booking, after he was arrested on probable cause for a serious offense, and as he was entering pretrial detention. Under the circumstances before us, the requirement was not unreasonable.

IV.

Our holding today is limited. The sole question before us is whether it was reasonable, under either the Fourth Amendment or article I, section 13 of the California Constitution, to require the defendant in this case to swab his cheek as part of a routine jail booking procedure following a valid arrest for felony arson. Because we conclude the requirement was reasonable as applied to defendant, we hold he is subject to the statutory penalties prescribed in Penal Code section 298.1.

Although defendant was arrested on probable cause for felony arson and was ultimately convicted of that offense, our dissenting colleagues argue that we should reach beyond the facts of the case before us to strike down some or all of the DNA Act’s provisions as they apply to other categories of arrestees. They argue that we should consider defendant’s reasonable expectations about the use and retention of his DNA sample at the time of booking, and we should do so from behind a “veil of ignorance,” treating defendant as though his circumstances were “indistinguishable” from a suspect who is wrongly or pretextually arrested, or against whom charges are never brought, or who is ultimately acquitted of any charged offenses. (Dis. opn. of Cuéllar, J., post, at p. 28; see also dis. opn. of Liu, J., post, at pp. 1–2.)

In assessing whether the demand for a sample of an arrestee’s DNA was reasonable under article I, section 13, we agree that it may be appropriate to consider not only the minimal nature of the physical intrusion associated with a buccal swab, but the arrestee’s reasonable expectations about what would happen to the sample after collection. But in so analyzing the arrestee’s choice, we cannot ignore the safeguards built into the DNA Act: the limited nature of the information stored in databases on an arrestee (specifically, a numerical profile describing noncoding parts of the arrestee’s DNA); the legal protections against possible misuse of the profile or the sample (including felony sanctions for knowing improper use or dissemination); and the availability of procedures for removing the profile from the database and destroying the sample should the basis for the arrestee’s inclusion dissipate. We have no record before us to show that these legal protections would have been violated or proved unworkable had defendant chosen to comply with the requirement to provide a DNA sample on booking. And we note, as a purely practical matter, whatever apprehension defendant might have had about the adequacy of the Act’s protections for individuals who are found to have been wrongly arrested, for example, would certainly have been mitigated by his own knowledge of the circumstances of his arrest. (Here, the record shows that defendant knew from the outset that he had been apprehended in the act of setting fire to the tires of a police car and anticipated that he would be prosecuted for his acts, to which he would later confess at trial. (See fn. 4, ante.)) To be sure, as explained above, defendant was entitled to the full scope of constitutional protection against unreasonable searches, despite his arrest on evident probable cause. And had he later found himself in a position to seek expungement of his sample and profile and found the statutory procedures inadequate, he would have been entitled to challenge the retention of his information on that basis.

Not all arrestees will be comparably situated to the defendant in this case. An individual who, unlike defendant, is arrested in the absence of probable cause might reasonably anticipate that charges will never be brought and any attempted prosecution will inevitably fail. And such an arrestee may, at least in some circumstances, have a valid as applied challenge to the adequacy of the DNA Act’s expungement procedures or to application of the Act’s other operative provisions, in addition to the other remedies available for unlawful arrest. (Cf. People v. McInnis, supra, 6 Cal.3d at p. 826 [photograph taken pursuant to an illegal arrest could be shown to a witness asked to identify the perpetrator of a subsequent crime where there was no evidence the police had “‘exploited’” the earlier illegal arrest].) We note that a group of plaintiffs in federal court have already challenged the law’s application to those who are never charged with any crime. (See Haskell v. Harris (filed July 18, 2014, N.D.Cal. Civ. Case No. C 09-04779 CRB, docket #146), Motion to Create Subclasses, p. 1 [seeking certification of subclass consisting of arrestees compelled to submit samples under DNA Act “unless they are actually charged with a felony offense”].) We of course take no view on the merits of any such challenges. We only note them for purposes of contrast with this case, in which defendant bases his challenge to his misdemeanor refusal conviction on the potential for constitutional deprivation under circumstances that are not, in fact, present here.

To entertain defendant’s arguments here would convert our decision in this case, which concerns only the validity of defendant’s conviction for violation of Penal Code section 298.1, into the equivalent of facial constitutional review of the DNA Act as it might be applied to other arrestees. But the DNA Act itself instructs that the validity of the Act as applied to defendant does not depend on its validity as it might apply to others. (Prop. 69, supra, § V, subd. (b); see p. 6, ante.)

10. Justice Liu (dis. opn., post, at p. 9) invokes language from Florida v. Bostick (1991) 501 U.S. 429, 437–438, which decided a question of detention in the context of random police requests to search bus passengers’ luggage. The point of the cited passage of Bostick is that a person’s knowledge he or she has something to hide does not convert a consensual encounter into a detention. The passage tells us nothing about how to judge the depth of privacy intrusion involved in a postarrest demand for a DNA sample based not on the collection of the sample itself, but based on the likelihood of future use or retention of the sample under various conditions that did not, in fact, obtain in this case.

CALIFORNIA DAILY OPINION SERVICE  April 3, 2018  SUPREME COURT OF CALIFORNIA  3024
And our jurisprudence likewise counsels us to follow a narrower course. While “passing on the validity of a law wholesale may be efficient in the abstract,” the law teaches that we should ordinarily focus on the circumstances before us in determining whether the work of a coequal branch of government may stand or must fall. (Sabri, supra, 541 U.S. at p. 609.) We accordingly abide by what has been called a “‘cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more.’” (People v. Contreras (2018) 4 Cal.5th 349, 381.)

In sum: Defendant raises a number of concerns about the potential application of the DNA Act in other cases involving other, differently situated arrestees. He also raises concerns that changes in technology might open up new prospects for using his DNA samples and profiles in ways that are uniquely invasive of personal privacy. We are mindful of these concerns, and we recognize that the DNA Act may raise additional constitutional questions that will require resolution in other cases.

In addressing the concerns defendant has raised here, however, we are also mindful of our role in reviewing a law duly enacted by California voters in the exercise of their initiative power. We have often said that “it is our solemn duty to jealously guard” the initiative power secured by the California Constitution, and that we accordingly may not strike down voter measures “unless their unconstitutionality clearly, positively, and unmistakably appears.” (Legislature v. Eu (1991) 54 Cal.3d 492, 501.) Whatever else this duty might entail, it surely entails an obligation to avoid invalidating the work of the California electorate on the ground that “the law would be unconstitutionally applied to different parties and different circumstances from those at hand.” (Sabri, supra, 541 U.S. at p. 609; see Cregler, supra, 56 Cal.2d at p. 313.)

The judgment of the Court of Appeal is reversed.

KRUGER, J.

WE CONCUR: Cantil-Sakauye, C. J., Chin, J., Corrigan, J.

---

**DISSenting OPINION BY LIU, J.**

According to today’s opinion, “[t]he sole question before us is whether it was reasonable, under either the Fourth Amendment or article I, section 13 of the California Constitution, to require the defendant in this case to swab his cheek as part of a routine jail booking procedure following a valid arrest for felony arson.” (Maj. opn., ante, at p. 41, italics added.) This statement of the issue is misleading.

The DNA Fingerprint, Unsolved Crime and Innocence Protection Act (DNA Act) requires collection of DNA from all adult felony arrestees “immediately following arrest” and requires samples to be “forwarded immediately” to the laboratory for analysis. (Pen. Code, § 295(i)(1)(A), (C).) Buza was arrested on January 21, 2009. At booking a few hours later, a police officer requested a cheek swab from Buza under penalty of law. Buza refused. It was not until the next day, January 22, 2009, that a judge found probable cause to believe Buza committed arson. On January 23, 2009, the district attorney filed a complaint charging Buza with arson and related offenses as well as unlawful refusal to provide a DNA specimen on January 21, 2009 (id., § 298.1, subd. (a)). The question is whether Buza can be convicted of refusing to provide his DNA at booking prior to any judicial determination of whether he was validly arrested. Today’s opinion does not explain why the fact that Buza was found “validly arrested on probable cause to believe he had committed felony arson, and . . . was promptly charged with (and ultimately convicted of) that offense” (maj. opn., ante, at p. 15) has any bearing on whether it was lawful to require him to provide his DNA before any of those determinations were made.

The court says that a “valid arrest” in this context does not require “a judicial determination of its validity.” (Maj. opn., ante, at p. 23.) But this assertion, even if true, does not disturb the main premise of the question presented: For purposes of constitutional analysis, Buza is no different than any felony arrestee who has not been charged, convicted, or found by a neutral magistrate to be lawfully detained. This point is critical because it brings into focus the startling breadth of DNA collection and retention authorized by the statute. This is not a scheme carefully calibrated to identify felony offenders. Instead, it can be fairly described as a biological dragnet. As explained below, and for the reasons stated in Justice Cuéllar’s dissent, the DNA Act violates the prohibition on unreasonable searches and seizures in the California Constitution.

According to the Office of the Attorney General, there are 200,000 to 300,000 felony arrests in California every year. (Cal. Dept. of Justice, Crime in California 2016 (Aug. 17, 2017) p. 49.) But not all arrests end in convictions; far from it. Here are the Attorney General’s data on dispositions of adult felony arrests for each year since 2009, when the DNA Act started requiring all such arrestees to provide DNA samples immediately upon arrest:

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Law enforcement releases</th>
<th>Complaints denied</th>
<th>Dismissed, acquitted</th>
<th>Convicted</th>
</tr>
</thead>
<tbody>
<tr>
<td>#</td>
<td>%</td>
<td>#</td>
<td>%</td>
<td>#</td>
<td>#</td>
</tr>
<tr>
<td>2016</td>
<td>207,022</td>
<td>7,058</td>
<td>3.4</td>
<td>36,588</td>
<td>17.7</td>
</tr>
<tr>
<td>2015</td>
<td>242,460</td>
<td>7,517</td>
<td>3.1</td>
<td>38,733</td>
<td>16.0</td>
</tr>
<tr>
<td>2014</td>
<td>315,782</td>
<td>10,227</td>
<td>3.2</td>
<td>48,235</td>
<td>15.3</td>
</tr>
<tr>
<td>2013</td>
<td>305,503</td>
<td>10,525</td>
<td>3.4</td>
<td>45,273</td>
<td>14.8</td>
</tr>
<tr>
<td>2012</td>
<td>295,465</td>
<td>9,572</td>
<td>3.2</td>
<td>48,029</td>
<td>16.3</td>
</tr>
<tr>
<td>2011</td>
<td>292,231</td>
<td>9,780</td>
<td>3.3</td>
<td>45,988</td>
<td>15.7</td>
</tr>
<tr>
<td>2010</td>
<td>298,647</td>
<td>9,980</td>
<td>3.3</td>
<td>46,054</td>
<td>15.4</td>
</tr>
<tr>
<td>2009</td>
<td>306,170</td>
<td>9,894</td>
<td>3.2</td>
<td>43,317</td>
<td>14.1</td>
</tr>
<tr>
<td>Total</td>
<td>2,263,280</td>
<td>74,573</td>
<td>3.3</td>
<td>352,217</td>
<td>15.6</td>
</tr>
</tbody>
</table>

(Id. at table 37, p. 49.) These data show that from 2009 to 2016, nearly one in five felony arrests did not result in prosecution, and almost one in three — a total of 724,492 arrests — did not result in a conviction.
Each of those arrests triggered the requirement to provide a DNA sample. Yet the state has no legal basis for retaining the DNA sample or profile if no charges are filed, if the charges are dismissed, if the person is acquitted or found not guilty or factually innocent, or if the conviction is reversed and the case is dismissed, unless there is some other basis such as a prior offense that qualifies the person for inclusion in the state DNA database. (Pen. Code, § 299, subds. (a), (b).) The Judicial Council of California, pursuant to its reporting obligations under Penal Code section 1170.45, has reported that from 2009 to 2016, between 15 and 20 percent of felony arrestees had no criminal record, between 14 and 19 percent had one or more prior prison commitments, and around 66 percent had a criminal record with no prior prison commitment (so-called “miscellaneous” records), a category that presumably includes arrestees with only misdemeanor convictions for which DNA collection is not authorized. (See, e.g., Jud. Council of Cal., Disposition of Criminal Cases According to the Race and Ethnicity of the Defendant (Sept. 20, 2017) p. 15 (Disposition of Criminal Cases) [15 percent of felony arrestees in 2016 had no criminal record, 19 percent had one or more prior prison commitments, 66 percent had miscellaneous records]; Jud. Council of Cal., Disposition of Criminal Cases According to the Race and Ethnicity of the Defendant (2011) [20 percent of felony arrestees in 2009 had no criminal record, 14 percent had one or more prior prison commitments, 66 percent had miscellaneous records].) The percentage of felony arrestees with no prior convictions or only misdemeanor convictions is likely higher among those who are not charged or not convicted than among felony arrestees overall. Thus, even assuming that a substantial portion of the 724,492 arrests from 2009 to 2016 that resulted in no conviction involved persons with a prior (or subsequent) qualifying offense, there are tens if not hundreds of thousands of individuals who have been required to provide DNA samples that the state has no legal basis for retaining.

The statute sets forth a process for expungement, but this process is not adequate to allay constitutional concerns. In contrast to the automatic expungement provisions of the state law at issue in Maryland v. King (2013) 569 U.S. 435, 443–444 (King), California’s DNA Act provides that a person seeking expungement “must send a copy of his or her request to the trial court of the county where the arrest occurred, or that entered the conviction or rendered disposition in the case, to the DNA Laboratory of the Department of Justice, and to the prosecuting attorney of the county in which he or she was arrested or[,] convicted[,] or adjudicated, with proof of service on all parties.” (Pen. Code, § 299, subd. (c)(1).) The Department of Justice “shall destroy” the DNA specimen, sample, and searchable profile “upon receipt of a court order that verifies the applicant has made the necessary showing at a noticed hearing, and that includes all of the following: [¶] (A) The written request for expungement pursuant to this section. [¶] (B) A certified copy of the court order reversing and dismissing the conviction or case, or a letter from the district attorney certifying that no accusatory pleading has been filed or the charges which served as the basis for collecting a DNA specimen and sample have been dismissed prior to adjudication by a trier of fact, the defendant has been found factually innocent, the defendant has been found not guilty, the defendant has been acquitted of the underlying offense, or the underlying conviction has been reversed and the case dismissed. [¶] (C) Proof of written notice to the prosecuting attorney and the Department of Justice that expungement has been requested. [¶] (D) A court order verifying that no retrial or appeal of the case is pending, that it has been at least 180 days since the defendant or minor has notified the prosecuting attorney and the Department of Justice of the expungement request, and that the court has not received an objection from the Department of Justice or the prosecuting attorney.” (Id., subd. (c)(2).)

The extensive documentation, notice to multiple parties, judicial hearing, and additional steps required for expungement place a significant burden on eligible persons, assuming they are even aware of the process. In addition, although the statute says a person whose arrest resulted in no charge or conviction “shall have his or her DNA specimen and sample destroyed and searchable database profile expunged” if the state has “no legal basis for retaining” them (Pen. Code, § 299, subd. (a)), the statute also says: “The court has the discretion to grant or deny the request for expungement. The denial of a request for expungement is a nonappealable order and shall not be reviewed by petition for writ.” (Id., § 299, subd. (c)(1).) It is not clear what “discretion” the court may exercise in deciding whether to grant or deny a request, or what remedy is available if the court denies a valid request. Further, it is not clear what consequence ensues if the state does not comply with a court order granting a request for expungement. (Id., § 299, subd. (d) [“Any identification, warrant, probable cause to arrest, or arrest based upon a database or database match is not invalidated due to a failure to expunge or a delay in expunging records.”].)

The Department of Justice has sought to expedite the process by creating a “Streamlined DNA Expungement Application Form.” (Cal. Dept. of Justice, Proposition 69 (DNA) <https://oag.ca.gov/bfs/prop69> [as of Apr. 2, 2018] [“Remove Your DNA Sample from the DNA Database”]; cf. 34 U.S.C. § 12592(d)(2) [requiring states to “promptly expunge” the DNA analysis of qualified persons as a condition of state access to the DNA index maintained by the FBI].) But the reality is that few DNA samples, once collected, are ever removed.

The Department of Justice DNA Laboratory publishes monthly reports on the number of samples added or removed from its inventory as well as historical totals since the DNA collection program began in 2004. As of February 2018, the DNA Laboratory had received 2,792,083 DNA samples and had removed 44,314 samples, or 1.6 percent, since the program began. (Cal. Dept. of Justice, Proposition 69 (DNA) <https://oag.ca.gov/bfs/prop69> [February statistics as of
As of December 2008, the DNA Laboratory had removed 22,269 DNA samples from its inventory since the program began; these removals include “Expunged, Removed or Failed Samples, or where a New Sample was Requested.” (Appellees’ Response to Appellants’ Request for Judicial Notice; Supplemental Request for Judicial Notice and Supporting Declaration of Daniel J. Powell, Haskell v. Harris (filed Sept. 20, 2012, 9th Cir. case No. 10-15152) docket #103, Ex. A, p. 24; see Haskell v. Harris (9th Cir. 2014) 745 F.3d 1269 (en banc).) Even if we assume that all reported removals are expungements, the total number of expungements from January 2009, when the current DNA law went into effect, until February 2018 would be only 22,045 — i.e., the difference between 44,314 (the total number of removals through February 2018) and 22,269 (the total number of removals through December 2008). This is a small fraction of the large population of individuals since 2009 whose felony arrests have resulted in no charge or conviction, and who have no other basis for inclusion in the state DNA database. It is questionable whether the vast majority of people entitled to expungement even know about the process much less know how to navigate it. Indeed, we have no indication that any responsible official is ever required to inform an arrestee about the expungement process.

The state’s retention of DNA is troubling not only because of its sheer magnitude but also because it predictably burdens certain groups. African Americans, who are 6.5 percent of California’s population, made up 20.3 percent of adult felony arrestees in 2016. (U.S. Census Bureau, QuickFacts: California [July 1, 2016] <https://www.census.gov/quickfacts/CA> [as of Apr. 2, 2018]; Crime in California 2016, supra, at p. 36.) Yet they comprised 24.3 percent of felony arrestees who were released by law enforcement or the prosecuting attorney in 2016 before any court disposition. (Disposition of Criminal Cases, supra, at p. 10.) Non-Hispanic whites, by contrast, comprised 31.2 percent of felony arrestees but only 27.0 percent of felony arrestees released by law enforcement or the prosecuting attorney. (Crime in California 2016, supra, at p. 36; Disposition of Criminal Cases, supra, at p. 10.) The fact that felony arrests of African Americans disproportionately result in no charges or dropped charges means that African Americans are disproportionately represented among the thousands of DNA profiles that the state has no legal basis for retaining.

Penal Code section 297, subdivision (c)(2) provides an alternative route for expungement: “The law enforcement investigating agency submitting a specimen, sample, or print impression to the DNA Laboratory of the Department of Justice or law enforcement crime laboratory pursuant to this section shall inform the Department of Justice DNA Laboratory within two years whether the person remains a suspect in a criminal investigation. Upon written notification from a law enforcement agency that a person is no longer a suspect in a criminal investigation, the Department of Justice DNA Laboratory shall remove the suspect sample from its databank files and databases. However, any identification, warrant, arrest, or prosecution based upon a databank or database match shall not be invalidated or dismissed due to a failure to purge or delay in purging records.” But it is not clear how this process, which relies on the initiative of law enforcement, is monitored or enforced; the language of the statute, like Penal Code section 299, expressly contemplates “failure” or “delay” by responsible officials. In any event, this expungement process may take up to two years after a person’s DNA is sent to the laboratory, during which time the sample remains available to law enforcement even if the person was never charged or convicted of a crime.

The court says it need not consider the adequacy of the expungement process because Buza was “charged with and ultimately convicted of a qualifying crime.” (Maj. opn., ante, at p. 28.) But the question is whether it was constitutional to require Buza to provide his DNA after his arrest on January 21, 2009 — before he was charged or convicted. In answering this question, it certainly matters how his DNA would be analyzed, used, and retained, and we must address these considerations from the vantage point that existed at the time Buza was required to provide his DNA. (See People v. Gale (1973) 9 Cal.3d 788, 795 [“The question of the reasonableness of the officers’ conduct is determined on the basis of the information possessed by the officer at the time a decision to act is made.”].) We cannot ignore the (in)adequacy of expungement — the statute’s only safeguard against overbroad retention — based on the fortuity that Buza turned out to be guilty. (See McDonald v. United States (1948) 335 U.S. 451, 453 [the “guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike”].)

In addition, the court says collecting DNA from an arrestee before a judge has determined the validity of the arrest is analogous to a search incident to arrest, “where a valid arrest is also essential [and] there is no such preapproval requirement.” (Maj. opn., ante, at p. 23.) But a search incident to arrest is justified and limited by the immediate need to “protect[] arresting officers and safeguard[] any evidence of the offense of arrest that an arrestee might conceal or destroy.” (Arizona v. Gant (2009) 556 U.S. 332, 339.) DNA collection upon arrest does not serve any similarly pressing purpose. (Dis. opn. of Cuéllar, J., post, at pp. 13–14 [it takes around 30 days to generate an identification profile from an arrestee’s DNA sample].) Moreover, when an arrest is later found invalid by a neutral magistrate, a search incident to the arrest is deemed unlawful, and the evidence obtained is subject to suppression. (See People v. Macabeo (2016) 1 Cal.5th 1206, 1219.) The DNA Act does not deem unlawful the collection of DNA pursuant to an arrest that is later found invalid; such DNA may be retained and used by law enforcement so long as there is no request for expungement.

The court further contends that “whatever apprehension defendant might have had about the adequacy of the Act’s protections for individuals who are found to have been
wrongly arrested, for example, would certainly have been mitigated by his own knowledge of the circumstances of his arrest. (Here, the record shows that defendant knew from the outset that he had been apprehended in the act of setting fire to the tires of a police car and anticipated that he would be prosecuted for his acts, to which he would later confess at trial. (See fn. 4, ante.) . . . [¶] Not all arrestees will be comparably situated to the defendant in this case. An individual who, unlike defendant, is arrested in the absence of probable cause might reasonably anticipate that charges will never be brought and any attempted prosecution will inevitably fail.” (Maj. opn., ante, at p. 42, fn. omitted.) This seems to suggest that arrestees who know they are guilty are entitled to lesser constitutional protection than arrestees who believe they are innocent. Such reasoning contravenes the fundamental principle that “the ‘reasonable person’ test [in search and seizure analysis] presupposes an innocent person.” See [Florida v. Royer (1983) 460 U.S. 491, 519, fn. 4] (Blackmun, J., dissenting) (“The fact that [respondent] knew the search was likely to turn up contraband is of course irrelevant; the potential intrusiveness of the officers’ conduct must be judged from the viewpoint of an innocent person in [his] position”). Accord, [Michigan v. Chesternut (1988) 486 U.S. 567, 574] (“This ‘reasonable person’ standard . . . ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.”) [Florida v. Bostick (1991) 501 U.S. 429, 438.] If we are going to make the constitutional analysis turn on whether the defendant “knew from the outset” that he was guilty, then we might as well dispense with much of seizure and seizure law. (See People v. Schmitz (2012) 55 Cal.4th 909, 947 (conc. & dis. opn. of Liu, J.) [search and seizure doctrine “is built on cases involving guilty people”].)

I have no doubt that law enforcement is aided by the collection and retention of massive numbers of DNA profiles, whether those profiles are used to confirm a person’s identity, to facilitate access to criminal history or other information about a person, or to help solve unsolved crimes. But if those interests are enough to justify the collection and retention of DNA from persons who are arrested but not convicted, not charged, or not even found to be lawfully detained so long as they do not seek expungement, then it is not that far a step for the state to collect and retain DNA from law-abiding people in general, including anyone who “applies for a driver’s license” or “attends a public school.” (King, supra, 569 U.S. at p. 482 (dis. opn. of Scalia, J.).) Such broad-based policies would similarly aid law enforcement while having the virtue of being less discriminatory in their effects.

Indeed, the court’s analogy to fingerprinting, a less invasive and less powerful technology, should give us pause. (Maj. opn., ante, at pp. 35–37; see dis. opn. of Cuéllar, J., post, at pp. 19–22.) State law already requires individuals to provide a fingerprint in order to get a driver’s license (Veh. Code, § 12800, subd. (c)), to become a school teacher (Ed. Code, § 44340), to be a professional engineer (Cal. Code Regs., tit. 16, § 420.1), to be a practicing attorney (Bus. & Prof. Code, § 6054, subd. (b)), or to join many other occupations (id., § 144 [requiring “a full set of fingerprints for purposes of conducting criminal history record checks” from applicants to 29 state licensing boards, including nurses, pharmacists, physicians, court reporters, funeral directors, guide dog instructors, contractors, and accountants]). These requirements serve important public safety and law enforcement purposes. But if DNA matching is constitutionally justified by its unparalleled efficacy in serving the “‘same’ identification “‘function’” as fingerprinting (maj. opn., ante, at p. 36, quoting King, supra, 569 U.S. at p. 451), then it is not clear what constitutional principle stands in the way of requiring a DNA sample in every context where the law now requires a fingerprint. (See King, at p. 451 [“the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides”]). One need not be a diehard civil libertarian to have serious qualms about where all of this may lead.

I conclude with a few words about the court’s approach to state constitutional analysis against the backdrop of King. Today’s opinion affirms that “the California Constitution is, and has always been, ‘a document of independent force’ [citation] that sets forth rights that are in no way ‘dependent on those guaranteed by the United States Constitution’ (Cal. Const., art. I, § 24).” (Maj. opn., ante, at p. 30.) And the court is correct that “although decisions of the United States Supreme Court interpreting parallel federal text are not binding, we have said they are ‘entitled to respectful consideration.’” (Id. at p. 31.) But the court errs in framing the inquiry as “whether adequate reasons are present here to conclude, despite King,” that the DNA Act is unconstitutional. (Id. at p. 34.) By analyzing the state constitutional issue, the court takes King as the starting point and asks “whether we should reject the high court’s Fourth Amendment guidance.” (Id. at pp. 33–34, fn. omitted.) In so doing, the court appears to accord King “a presumption of correctness that has no sound basis in our federal system.” (Liu, State Constitutions and the Protection of Individual Rights: A Reappraisal (2017) 92 N.Y.U. L.Rev. 1307, 1314.)

“Just as the Supreme Court, when interpreting a provision of the Federal Constitution, does not accord a presumption of correctness to any state’s interpretation of an analogous state constitutional provision or even to an interpretation adopted by a majority of states, there is no reason why a state court, when interpreting a provision of its state constitution, should accord a presumption of correctness to the Supreme Court’s interpretation of an analogous federal constitutional provision. State courts should and often do give respectful consideration to relevant Supreme Court decisions, just as they often give respectful consideration to relevant decisions of sister states. And state courts may often be persuaded that the Supreme Court’s approach is correct and worthy of adoption, just as they may often be persuaded by a majority view among state high courts. But the crucial point is that state
courts, as the ultimate arbiters of state law, have the prerogative and duty to interpret their state constitutions independently.” (Liu, supra, 92 N.Y.U. L.Rev. at pp. 1314–1315.)

As Justice Cuéllar notes, today’s opinion provides no convincing rationale for why our analytical approach to a state constitutional issue should depend on “the order in which this court decides an issue vis-à-vis the high court.” (Dis. opn. of Cuéllar, J., post, at p. 8.) The court’s response is that “in instances where this court had previously decided an issue, that decision carried the persuasive force of stare decisis we always accord our own precedents, which had then to be balanced against the persuasive force of the contrary United States Supreme Court decision. In instances where we had not previously decided an issue, no similar counterbalance existed.” (Maj. opn., ante, at p. 34, fn. 9.) But this statement of the obvious misses the point. It does not explain why our approach should be different (1) when we consider a state constitutional issue of first impression on which the high court has spoken under federal law, as compared to (2) when we consider a state constitutional issue of first impression on which the high court has not spoken under federal law. To be sure, in scenario (1) we should give respectful consideration to the views of the high court, as well as the views of other state courts that have decided the issue under their states’ laws. But our duty to interpret the California Constitution independently is no different in scenario (1) than in scenario (2). We may decide, in our independent judgment, that the views of the high court should be followed. But that is different from the mode of analysis in today’s opinion, which accords a presumption of correctness to the high court’s decision in King and then asks whether there are “sufficient reasons” to depart from King. (Id. at p. 32, fn. 8.)

Moreover, the court fundamentally missteps in attributing its deferential reading of King to “the fact that to [the high court] has been committed, by the consent of the states, the ultimate vindication of liberty and property against arbitrary and unconstitutional state legislation.”” (Maj. opn., ante, at p. 31.) It is of course true that the United States Supreme Court serves as a backstop against state infringements on constitutional rights, and when the high court issues a federal constitutional ruling, state courts “shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” (U.S. Const., art. VI, cl. 2.) But that is not a reason for state courts to treat the floor of constitutional rights under federal law as a presumptive ceiling on constitutional rights under state law. Doing so runs counter to the basic precept that “federalism secures to citizens the liberties that derive from the diffusion of sovereign power” (Bond v. United States (2011) 564 U.S. 211, 221.) “The Framers concluded that allocation of powers between the National Government and the States enhances freedom” (ibid.), and a crucial feature of this freedom-enhancing allocation of powers is judicial federalism: “state courts no less than federal are and ought to be the guardians of our liberties” (Brennan, State Constitutions and the Protection of Individual Rights (1977) 90 Harv. L.Rev. 489, 491). “State courts interpreting state law remain particularly well situated to enforce individual rights against the States. Institutional constraints, it has been observed, may limit the ability of [the United States Supreme] Court to enforce the federal constitutional guarantees. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv.L.Rev. 1212, 1217–1218 (1978). Prime among the institutional constraints, [the United States Supreme] Court is reluctant to intrude too deeply into areas traditionally regulated by the States. This aspect of federalism does not touch or concern state courts interpreting state law.” (Arizona v. Evans (1995) 514 U.S. 1, 30–31 (dis. opn. of Ginsburg, J.).) I do not see how deferring to high court decisions under federal law when we construe parallel provisions of state law serves the basic purposes of federalism, and the court has no answer on this point.

Notwithstanding today’s opinion, this court is no stranger to the importance of judicial federalism. In People v. Cahan (1955) 44 Cal.2d 434, we adopted the exclusionary rule for violations of the state constitutional prohibition on unreasonable searches and seizures, declining to follow the high court’s refusal to adopt a federal exclusionary rule in Wolf v. Colorado (1949) 338 U.S. 25. In People v. Wheeler (1978) 22 Cal.3d 258, we held that a prosecutor’s exercise of a racially motivated peremptory strike in an individual case violates the state constitutional right to be tried by a fair and impartial jury, declining to follow the contrary federal constitutional rule set forth in Swain v. Alabama (1965) 380 U.S. 202. And in In re Marriage Cases (2008) 43 Cal.4th 757, we held that laws denying same-sex couples the right to marry violate equal protection under the state constitution, even though the only high court authority on point at the time, Baker v. Nelson (1972) 409 U.S. 810, had dismissed a similar appeal for want of a substantial federal question.

In each of these instances, we interpreted the guarantees of our state constitution without according any deference or presumption of correctness to high court precedent. And on each of these issues, the high court eventually overruled its precedent and adopted as a matter of federal law the rule we had adopted as a matter of state law. (See Mapp v. Ohio (1961) 367 U.S. 643, 651–653 [overruling Wolf and citing Cahan]; Batson v. Kentucky (1986) 476 U.S. 79, 82–82 & fn. 1 (1986) [overruling Swain and citing Wheeler]; Obergfell v. Hodges (2015) 576 U.S. ___ (2015) 576 U.S. ___, ___ [135 S.Ct. 2584, 2505, 2610] [overruling Baker and citing In re Marriage Cases].) These examples show how the exercise of independent judgment by state courts in our system of judicial federalism provides a crucial safeguard for constitutional rights.

Instead of looking to these examples, today’s opinion cites Gabrielli v. Knickerbocker (1938) 12 Cal.2d 85, which rejected a state constitutional challenge to a law requiring schoolchildren to salute and pledge allegiance to the flag. (Maj. opn., ante, at p. 31.) I would not rely on such dubious precedent. Whatever may be said about the merits of the issue, the court’s analysis in Gabrielli consists of little more
than uncritical acceptance of United States Supreme Court decisions that had rejected similar claims under the federal Constitution. (See Gabrielli, at p. 89 "[C]ogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution.") quoted in maj. opn., ante, at p. 31.) Five years later, the high court overruled its precedent and decided the issue the other way in West Virginia State Board of Education v. Barnette (1943) 319 U.S. 624.

In sum, we should not indulge any suggestion that the job of protecting individual rights in our federal system belongs primarily to the United States Supreme Court or that the high court is invariably better positioned than state supreme courts to discharge that critical function. Because I do not agree with the court’s analysis of the state constitutional question presented or its judgment upholding Buza’s conviction for refusing to provide a DNA sample just hours after his arrest, I respectfully dissent. Having concluded that Buza’s conviction for refusing to comply with the DNA Act is invalid under the California Constitution, I express no view on whether it is also invalid under the Fourth Amendment.

LIU, J.

WE CONCUR: Cuéllar, J., Perluss, J.*

* Presiding Justice of the Court of Appeal, Second Appellate District, Division Seven, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

DISSENTING OPINION BY CUÉLLAR, J.

In California people are protected not only by federal constitutional guarantees against unreasonable searches or seizures, but by state constitutional provisions governing privacy and prohibiting arbitrary coercion. Those protections require courts to distinguish between routine lawful procedures, such as those governing collection of biological samples from convicts, and arbitrary commands purporting to force people who have not been convicted of anything to surrender their most private information. (See Riley v. California (2014) 573 U.S. ___ [134 S.Ct. 2473, 2488] (Riley) ["Not every search ‘is acceptable solely because a person is in custody.’ ’”]; White v. Davis (1975) 13 Cal.3d 757, 766 (White) [“The inherent legitimacy of the police ‘intelligence gathering’ function does not grant the police the unbridled power to pursue that function by any and all means. In this realm, as in all others, the permissible limits of governmental action are circumscribed by the federal Bill of Rights and the comparable protections of our state Constitution.”].) Yet the majority today sanctions the collection and analysis of DNA samples from all adults arrested on felony charges — fully one-third of all arrestees — regardless of whether those individuals will ever be charged with a crime or, if charged, ever convicted. As Justice Liu explains in more detail, over half of these individuals are released before a judicial determination of probable cause. But at whatever point the arrestees are released, their DNA sample stays with the government until the expungement process, which burdens individuals and is contingent rather than automatic, runs its course if it ever does.

For all these individuals, the majority provides no protection — except to say that if they are exonerated, they may file written requests for the expungement of their DNA records. In so holding, the majority sidesteps the problems associated with the collection and expungement procedures of Proposition 69, the DNA Fingerprint, Unsolved Crime and Innocence Protection Act (DNA Act or the Act). It contends that the scope of the legitimate privacy rights of persons arrested is no different under our constitution than under the Fourth Amendment to the federal Constitution and, by implication, that our own constitution plays no role in determining whether the rights of a California citizen subjected to a search of his person and collection of his DNA have been violated. I cannot agree.

Our state Constitution provides heightened protections for the privacy rights of individuals, including arrestees. Those protections do not vanish merely because someone is arrested. An arrest itself requires probable cause — but such cause, however probable, is a far cry from a conviction. Indeed, the underlying logic of our system of criminal investigation and enforcement is grounded in the distinction between the relatively low-threshold probable cause determination and the onerous burden the government must carry to achieve a criminal conviction. The government may justify a variety of investigative activities without probable cause — from routine patrol of a particular geographic location to following up on tips or information from undercover agents. (E.g., Kyllo v. United States (2001) 533 U.S. 27, 31–32 (Kyllo) [reiterating the ‘lawfulness of warrantless visual surveillance of a home’]; Illinois v. Gates (1983) 462 U.S. 213, 227, 243 [holding that a tip alone did not supply probable cause but the police follow-up investigation of the tip did].) But when the Act compels the collection of a DNA sample before a determination of probable cause, the government’s rationale for seeking DNA samples for all felony arrestees is not sufficiently compelling to outweigh the intrusion on an arrestee’s privacy that accompanies the collection and storage of his personal genetic information. Though the United States Supreme Court may have reached a different conclusion when evaluating another state’s DNA collection statute under the federal Constitution, the role of our state charter, the unique importance it assigns to privacy, and the differences between the statute considered in Maryland v. King (2013) 569 U.S. 435 (King) and the DNA Act involved here all suggest that we should find the implicated provisions of the Act unconstitutional. So I respectfully dissent.
I.

What the parties in this case have asked us to decide is whether the DNA Act’s provisions requiring collection from all adult felony arrestees violate article I, section 13 of the California Constitution. So we begin by considering our state Constitution, its relationship to the federal charter, and where the two diverge.

Construing a different statute and a different constitution, the high court in King decided that the Fourth Amendment permits — in some instances — collections of DNA from adults arrested for serious crimes. (King, supra, 569 U.S. at p. 446.) Although such a decision merits “respectful consideration” when its analysis is relevant, our own constitution deserves far more than that. In deciding whether our own state Constitution provides protection against the search or seizure at issue, we are not only free, but obligated, to perform an independent analysis. (People v. Teresinski (1982) 30 Cal.3d 822, 835–836 (Teresinski) “[T]he California courts, in interpreting the Constitution of this state, are not bound by federal precedent construing the parallel federal text. . . . [T]he state courts, in interpreting constitutional guarantees contained in state constitutions, are independently responsible for safeguarding the rights of their citizens.” (internal quotation marks omitted)). Because of our precedent interpreting the scope of article I, section 13 and the relevance of article I, section 1’s explicit protection of privacy, our constitution is more solicitous of the privacy interests of arrestees than the Fourth Amendment.

The California Constitution is not some minor codicil to the United States Constitution. As the majority has no choice but to acknowledge (maj. opn., ante, at pp. 30–31), our state Constitution is a document of “independent force,” whose meaning is to be independently distilled and propagated by this court, acting in our authority as the state court of last resort. (Cal. Const., art. I, § 24 [making explicit that “[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution”]; People v. Brisendine (1975) 13 Cal.3d 528, 549–550 (Brisendine) [“the California Constitution is, and always has been, a document of independent force”]; People v. Longwill (1975) 14 Cal.3d 943, 951, fn. 4 (Longwill) [stating that “in the area of fundamental civil liberties,” “we sit as a court of last resort” and “our first referent is California law and the full panoply of rights Californians have come to expect as their due”].) In cases where the wording of the state constitutional provision at issue parallels a phrase in the federal Constitution, high court opinions on the subject merit respectful consideration. (Teresinski, supra, 30 Cal.3d at p. 835.) But any such parallels in wording must not occlude our state Constitution’s force as the basic charter of government, which is why it is appropriate in some circumstances to take a different course in interpreting our state Constitution. (Ibid.)

We have done so in a variety of cases, where we concluded that California’s Constitution extends protections to our citizens well beyond those the high court has announced in the federal context. (Raven v. Deukmejian (1990) 52 Cal.3d 336, 353–354 (Raven) [listing the “numerous decisions” from this court “interpreting the state Constitution as extending protection to our citizens beyond the limits imposed by the high court under the federal Constitution”]; see also, Longwill, supra, 14 Cal.3d at pp. 951–952 [holding that our state charter, unlike the federal Constitution, does not allow for carte blanche “full body searches of all individuals subjected to custodial arrest”]; People v. Maher (1976) 17 Cal.3d 196, 198–203 [concluding, as in Longwill, that “the search of [an arrestee’s] person beyond the scope of a pat-down was unlawful under article I, section 13, of the California Constitution”]; People v. Cook (1978) 22 Cal.3d 67, 88 [holding that because a Supreme Court’s decision “would afford our citizens less protection than is guaranteed to them under California law,” it is “not to be followed in California” and that “all challenges to the veracity of a search warrant affidavit in our courts are to be governed by [our own precedent] and article I, section 13, of the California Constitution”]; Gerawan Farming, Inc. v. Lyons (2000) 24 Cal.4th 468, 476 [“the marketing order in question does not implicate any right to freedom of speech under the First Amendment, but does indeed implicate such a right under article I [of our state Constitution]”].)

What’s more, within the specific context of search and seizure of arrestees, we have been quite explicit in holding that article I, section 13 provides greater protection than does the Fourth Amendment. (Brisendine, supra, 13 Cal.3d at pp. 545–546; Longwill, supra, 14 Cal.3d at p. 951 & fn. 4; People v. Norman (1975) 14 Cal.3d 929, 939 (Norman); People v. Ruggles (1985) 39 Cal.3d 1, 9–11 (Ruggles); see also People v. Laiwa (1983) 34 Cal.3d 711, 727 (Laiwa).) In those cases, we have emphasized that article I, section 13 “requires a more exacting standard” for search and seizure cases arising in this state. (Brisendine, supra, 13 Cal.3d at p. 545.) We’ve also rejected the notion — which the United States Supreme Court has embraced — that an individual subject to custodial arrest has significantly diminished expectations of privacy. (Id. at p. 547 [“we cannot accept . . . that ‘an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person’ ”].) Even full custodial arrest, booking, and incarceration do not authorize the police to search an arrestee in the hope of discovering evidence of a more serious crime. (See Laiwa, supra, 34 Cal.3d at pp. 727–728.) What these authorities make clear is as simple as it is important: individuals placed under arrest enjoy greater protection against searches of their persons and things under our state Constitution than under the federal counterpart.

The majority wisely avoids debating such principles. Instead, it seeks to limit relevance of cases like Brisendine, Longwill, Norman, and Laiwa by asserting that they all concern “the constitutionality of a [field] search conducted immediately upon arrest,” and not, as was the case with petitioner Mark Buza, a search “conducted at the time of book-
decisions to the sideline in its rush to adhere to what it calls the high court’s “guidance,” but in fact, treats as controlling authority. In doing so, the majority fails to maintain fidelity to our caselaw and Constitution.

The position the majority takes is in tension even with its own logic. There is simply no good reason to believe that the order in which this court decides an issue vis-à-vis the high court should determine the outcome of our deliberation, or that we should read our prior cases as supporting some kind of ersatz presumption that we should ration as much as possible the discussion of state constitutional rights. The framing is inconsistent with the majority’s purported “reaffirm[ation]” of “long-established principles” that the rights guaranteed by our state Constitution “are in no way ‘dependent on those guaranteed by the United States Constitution.’ ” (Maj. opn., ante, at p. 30.) If the rights of our citizens are not dependent on the federal Constitution, then our analytical route for determining what those rights are should not take a different course simply because the United States Supreme Court issued an opinion before we did.

In replying to our criticism, the majority seeks its answer to the awkward question of why temporal order matters so much for its analysis in a rationale that it describes as “straightforward” — so straightforward, in fact, it may be captured in two words: “stare decisis.” (Maj. opn., ante, at p. 34, fn. 9.) When we have not spoken, says the majority, the weight of stare decisis does not exist to counterbalance against the “force of the contrary United States Supreme Court decision.” (Ibid.) This contention is doubly flawed. First, by positing that California courts have not spoken, the majority wrongly implies that nothing in our own precedent weighs as much as even a single federal court decision that’s not binding on us. Yet as detailed in this section, any reasonable reading of our past decisions reveals them to be enormously relevant to the question before us.

Second, how the majority decides to frame its inquiry is just as much a problem. By asking whether we may grant our own courts a permission slip to “depart” from a United States Supreme Court decision addressing a matter that is no more than partially similar to the case before us, the majority has done more than to adjust the weight on the state side of the jurisprudential scale relative to the federal side. It’s dispensing with the scale altogether. Instead of weighing the relative merits of the issue at hand according to our independent responsibility to construe our Constitution, the majority appears to deploy words like “depart” and “guidance” to embrace the view that we should presumptively comply with a United States Supreme Court opinion that does not even address the precise question before us. In this new analysis, our own authorities are emaciated in importance by being read narrowly, such that booking searches are presumed to be so categorically distinct from field searches that nothing meaningful can be gleaned for this case from decisions involving the latter. Meanwhile, a far-broader reading and presumption of validity is reserved for a non-binding United

11. I would also note that the DNA Act authorizes cheek swabs “immediately following arrest” and thus encompasses field searches. (Pen. Code § 296.1, subd. (a)(1)(A).)
States Supreme Court decision — even though the decision is interpreting a different Constitution, and a different DNA collection scheme that does not come close to applying to all felony arrestees. This position implies that the United States Supreme Court can dictate what we do whenever we interpret an issue under the California Constitution, despite our prior decisions supporting a contrary answer, so long as we have not previously resolved precisely the same question. Remarkably, this position removes both the “stare” and “decisis” from “stare decisis” — inverting the concept to justify departures from California decisions governing the scope of state privacy protection.

Those decisions underscore how adopting King’s approach would be at odds with article I, section 1 of California’s Constitution. And it would be at odds with our case law construing that provision and emphasizing the importance of informational and dignitary privacy interests under California law. In contrast to its federal counterpart, the California Constitution contains an express statement about the importance of personal privacy: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” (Cal. Const., art. I § 1.) True: we have previously found that article I, section 1 does not by itself confer a privacy right substantively different from what article I, section 13 purports to protect. (People v. Crownson (1983) 33 Cal.3d 623, 629.) But neither have we held that this language is devoid of meaning when considered together with that of article I, section 13.

The reason we have not so held is because the most sensible reading of the California Constitution would assign both importance and meaning to its mention of personal privacy. Even if the language in article I does not create a separate class of privacy rights, at a minimum this reference undercuts how certain infringements of personal privacy deserve heightened scrutiny in our search and seizure analysis relative to what the federal analysis requires. Our cases construing article I, section 1 in relation to the federal Constitution reinforce this conclusion. What we have emphasized is that the scope of the state constitutional right of privacy is broader than the concept of privacy the federal courts have identified — and that this distinction may at times lead us to provide greater protection for individuals’ privacy rights than the federal courts might. (Lungren, supra, 16 Cal.4th at pp. 326–327 (“past California cases establish that, in many contexts, the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts”).)

Our cases have described the “core value” of article I, section 1 as protecting so-called “informational privacy,” meaning the privacy interest in sensitive and confidential personal information. (Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1, 35–36 (Hill); Lungren, supra, 16 Cal.4th at p. 406.) We have found that article I, section 1 grew out of the electorate’s fears of “increased surveillance and data collection activity in contemporary society” (White, supra, 13 Cal.3d at p. 774), and was intended to address the potential collection, stockpiling, and use of individuals’ most personal information in an arbitrary and unjustified fashion. (Ballot Pamp., Gen. Elec. (Nov. 7, 1972) argument in favor of Prop. 11, p. 27 (Article I, section 1 Ballot Pamp.) [privacy initiative targeted the “collecting and stockpiling [of] unnecessary information . . . and misusing information gathered for one purpose in order to serve other purposes or to embarrass”].) Article I, section 1 provides special protection for what we have deemed “autonomy,” or dignitary, privacy, which we have described as protecting the interest in making “personal decisions or conducting personal activities without observation, intrusion, or interference.” (Hill, supra, 7 Cal.4th at p. 35.) We have found dignitary privacy to embrace a person’s interest in retaining control over his or her own body and “bodily integrity.” (Lungren, supra, 16 Cal.4th at pp. 326–327, 337.) Finally, it has not escaped our attention that article I, section 1 addresses the unique harms that can occur when the government intrudes on a person’s privacy. The proponents of the provision warned of the possibility of the government assembling “personal information” and referred specifically to the possibility that private information could be permanently stored in government records. (Article I, section 1 Ballot Pamp., supra, at p. 26 (“Government agencies seem to be competing to compile the most extensive sets of dossiers of American citizens. Computerization of records makes it possible to create ‘cradle-to-grave’ profiles of every American.”).)

Given the nature of these concerns, the machinery of the DNA Act appears to epitomize the sort of intrusion relevant under article I, section 1. The collection of DNA — whether it is via cheek swab or any of the other collection processes the Act permits (see Pen. Code, § 298.1, subd. (b) [permitting the use of reasonable force to collect DNA database samples]) — violates the subject’s bodily integrity. (See Hill, supra, 7 Cal.4th at pp. 40–41 [finding that the collection of a urine sample “impacts legally protected privacy interests”].) And the use of that sample to create and store a DNA profile gives the government long-term access to the subject’s genetic code — some of the most personal information imaginable. (Id. at p. 41 (“‘A person’s medical profile [as revealed by the collection and analysis of urine] is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected.’ ”); Birchfield v. North Dakota (2016) 579 U.S. ___ [136 S.Ct. 2160, 2177] (Birchfield) noting that DNA collection and analysis “put into the possession of law enforcement authorities a sample from which a wealth of additional, highly personal information could potentially be obtained”).) The DNA Act’s processes thus seem to fall close to the heart of article I, section 1’s scope. Consequently, it is vital to consider article I, section 1 in our independent
analysis of the constitutionality of the DNA Act under our state charter.

Ultimately, the majority’s approach to constitutional federalism fails to do justice to the importance of state constitutional rights. The majority does not appear to reject the well-settled principle that “[t]he construction of a provision of the California Constitution remains a matter of California law regardless of the narrower manner in which decisions of the United States Supreme Court may interpret provisions of the federal Constitution.” (People v. Pettingill (1978) 21 Cal.3d 231, 247–248.) Yet it ironically finds that neither our constitution nor case law offers “adequate reasons” for us to take a fresh look at this case beyond what it takes to be the long shadow cast by King. (Maj. opn., ante, at p. 34.)

The path we are bound to follow is a different one. Instead of relying primarily on King to yield a tidy solution in this case, we owe it to the citizens of our state to perform an independent analysis to determine whether “‘the particular governmental invasion of a citizen’s personal security’” is reasonable under the circumstances of this case. (In re Tony C. (1978) 21 Cal.3d 888, 892.) Our analysis shows the intrusion to be unreasonable.

II.

Once we assign proper weight and meaning to the California Constitution, we can turn to the ultimate question in any case arising under article I, section 13: whether the search or seizure in question is reasonable. (Ingersoll v. Palmer (1987) 43 Cal.3d 1321, 1329 (Ingersoll); see also Brisendine, supra, 13 Cal.3d at p. 536.) At issue here is the compelled physical production of a biological sample from someone who has not been convicted. Whether this particular search satisfies the reasonableness standard is judged by balancing its intrusion on the individual’s reasonable expectations of privacy against its promotion of legitimate government interests. (People v. Robinson (2010) 47 Cal.4th 1104, 1120 (Robinson).) In this section, we examine the interests the government says are served by the DNA Act. Ultimately, such interests either ring hollow or prove insufficient to justify suspicionless, warrantless searches of the type allowed by the Act.

As a threshold matter, it is questionable whether the DNA Act genuinely furthers many of the interests the government identifies. The government must create a DNA profile and compare it against existing profiles to obtain any of the “identification” information it needs. The State informs us here that it takes “around 30 days on average” to generate an identification profile from an arrestee’s DNA sample. Yet in seeking to justify the collection of DNA, the government points to functions — verifying identity, making bail decisions, and so forth — that it must perform near to the time an arrestee is booked and processed into jail, or shortly thereafter. In fact, the Attorney General acknowledges that “in many cases” an arrestee is released from custody before the State obtains his or her DNA profile. So, it seems unlikely that DNA collection actually furthers any of these identification interests; the government even acknowledges that it uses fingerprints, not DNA, to aid most of these decisions and that fingerprinting “plays the lead role in confirming who a person is.” Law enforcement officials are able to collect fingerprints promptly, compare them against an electronic database composed of prints from various sources — including former arrestees but also civil sources such as persons who have served or are serving in the United States military, or have been or are employed by the federal government — and obtain a response as to any “hits” within approximately 27 minutes. (FBI, Integrated Automated Fingerprint Identification System archived at https://web.archive.org/web/20120921125141/http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafs/iafis/> [as of Apr. 2, 2018].) In short, it seems that DNA collection does little to meaningfully further the State’s asserted interests in establishing an arrestee’s identity and making various intake and processing decisions.

The majority acknowledges that there may be a delay of “weeks or months” between the initial booking and when a DNA profile is generated. (Maj. opn., ante, at pp. 36–37.) Nonetheless, it asserts that governmental interest in identifying arrestees is unaffected because information from an DNA profile — late as it may be in coming in — can still “influence the jailer’s decision about where to house the arrestee,” or lead to a “revisit [of] an initial determination to release the arrestee” or “impos[ition] [of] new release conditions.” (Id. at p. 36.) The government did not advance interests so far removed from the time of booking in its own briefs. Tellingly, the majority has cited no source to suggest that jails have the capacity to rehouse felony arrestees — those arrested for “serious or violent” crimes (id. at p. 17) — in more secured places simply because they are now suspected of a second crime, as revealed by a “hit” against their DNA profile. We also question the premise that a reassessment of the initial release decision is in itself a compelling governmental interest, especially when we have little idea — as neither the government nor the majority has told us — how often such a circumstance presents itself. We are asked to tip the scale in favor of the government without knowing how many felony arrestees are released; released with less than a full set of conditions imposed; or face a revisit of the initial release determination when their DNA generates a hit (as opposed to an arrest on the new crime). To expect that we would simply look past this absence of justification is to take the idea of a blindfold on the judicial process far too literally. (See Riley, supra, 134 S.Ct. at p. 2485 [finding an asserted government interest inadequate when “neither the United States nor California offers evidence to suggest that their concerns are based on actual experience”].)

Instead of the supposed interests tied to the initial arrest and booking, the most plausible justification for the present DNA collection is that it aids in identifying arrestees who may have been perpetrators of unsolved crimes. Proposition 69 was titled the “DNA Fingerprint, Unsolved Crime and Innocence Protection Act.” Ballot arguments in favor of the
initiative relied heavily on the promise that DNA collection would increase the likelihood of solving cold cases and help police investigations. (See Ballot Pamp., Gen. Elec. (Nov. 2, 2004) argument in favor of Prop. 69.) For instance, those arguments referenced a number of murders that had been solved based in part on DNA evidence and promised that the DNA Act would help “solve crime, free those wrongfully accused, and stop serial killers.” (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. 69, p. 62.) Likewise, the findings section of the proposed law declared that it would “solve crime[s],” “apprehend perpetrators,” expand the number of “cold hits and criminal investigation links,” and thereby “substantially reduce the number of unsolved crimes.” (Id. at p. 135.)

The Attorney General's arguments in defense of the DNA Act suffer essentially the same malady. Most of the government’s justifications for the DNA Act that the Attorney General emphasizes — even those couched in terms of “identity” — pivot on generalized concerns about crime-solving. For instance, the Attorney General argues that since the DNA Act was enacted, the State has recorded more than 31,000 “hits” between identification profiles taken from arrestees and DNA stored from unsolved cases. The government argues that DNA identification yields “substantial benefits” for law enforcement, and illustrates the point by referencing cold cases that were solved after many years when DNA evidence was collected and linked to the unsolved matter. The government also argues that the “benefits” from the DNA Act include deterrence, insofar as a potential criminal is aware that the Act enhances law enforcement's capacity to identify the perpetrators of crimes and prosecute them.

Crime-solving through identification of such perpetrators can certainly constitute a legitimate government interest. (See Robinson, supra, 47 Cal.4th at pp. 1121–1122.) At issue here is whether the government can have a legitimate interest in solving crimes, but whether such a generalized interest — without more — is sufficient to overcome the privacy rights of individuals subject to arrest. We have made clear that where the primary purpose of a search or seizure is to detect crime or gather evidence of crime, the government must ordinarily have individualized suspicion that the person to be searched has committed a specific offense for the search or seizure to be valid. (See Ingersoll, supra, 43 Cal.3d at pp. 1327–1328.) Such individualized suspicion is utterly missing when the government searches all arrestees for evidence that, at some unknown time in some unknown place under unknown circumstances, they might have committed some other unidentified crime.

The risk in simply embracing generalized crime-solving as sufficient justification for compelled collection of a DNA sample from someone who has merely been arrested is that such a move may be understood to justify searches and seizures of people and places without any particularized suspicion. The detection of legal wrongdoing is perhaps the preeminent justification for all policing activity, making such a generalized interest virtually always loom in the background when any law enforcement search is attempted. To allow such an interest to tip the balance and allow for, first, an intrusion into the body; second, analysis of the information seized therefrom; and, finally, potentially indefinite retention of the results (regardless of the outcome of the initial arrest that served as justification for the search), is to permit such an interest to become not only omnipresent but also omnipotent. Having trumped a person’s interest in what is often the most jealously guarded fount of information — and having done so on the basis of nothing more than that the mere fact a person was subject to a felony arrest — the diffuse governmental interest in generalized crime-solving will almost always overwhelm any offsetting consideration. Which is why we must be especially vigilant before embracing the government’s argument. (See King, supra, 569 U.S. at p. 482 (dis. opn of Scalia, J.) [acknowledging that “the construction of [a] genetic panopticon,” culled from “the taking of DNA samples from anyone who flies on an airplane,” “applies for a driver’s license,” or “attends a public school” would have the “beneficial effect of solving more crimes” but denouncing the idea that this was enough to override “the charter of our liberties”].)

So it is beyond question that the government may deploy reasonable techniques to solve crime — so long as those techniques do not effect a search or a seizure without individualized suspicion. Yet the fact that the class of persons subject to the DNA Act is limited to arrestees, rather than all citizens, does not give rise to the necessary threshold of suspicion to conduct a generalized search for incriminating information, nor does it change the usual presumption that searches are unlawful absent a warrant. Moreover, the warrant exception for a search incident to arrest is limited. It allows only for searches to uncover evidence of the crime that gave rise to the arrest itself or weapons that might be used to injure an arresting officer or accomplish an escape. (Brisendine, supra, 13 Cal.3d at p. 539.) We made this rule clear in Brisendine, and have continued to adhere to it in subsequent cases, where we have refused to allow the fact of arrest to justify the warrantless search of arrestees, or their property, for items not related to one of these two governmental interests. (See Ruggles, supra, 39 Cal.3d at pp. 11–12 [finding search of containers in trunk of felony arrestee’s car unconstitutional]; Laiwa, supra, 34 Cal.3d at pp. 727–728 [finding search of individual’s tote bag following arrest unconstitutional].)

Under this authority, even full custodial arrest, booking, and incarceration will not authorize law enforcement to conduct an exploratory search of an arrestee in the hope of discovering evidence of another, possibly more serious crime. (See Laiwa, supra, 34 Cal.3d at pp. 727–728.) Rather, booking an arrestee into custody only permits a further search necessary to serve the government’s administrative needs. (Id. at p. 726; People v. Macabeo (2016) 1 Cal.5th 1206, 1214.) In contrast to such searches, the DNA collection at issue would effect a search and seizure to uncover evidence of any and
all illicit activities — those committed in the past as well as those that might be committed in the future, none of which the State has justifiable reason to suspect that the arrestee has done. To allow such an intrusion would contravene our precedent and dramatically expand the recognized exceptions to the warrant requirement.

It is true that DNA sampling will “provide accurate and reliable identification of criminal offenders” and that “DNA samples, like fingerprints, may also be used to establish a suspect’s involvement in crimes.” (Maj. opn., ante, at p. 35.) What does not follow from this observation is that the constitutionality of fingerprinting renders DNA sampling constitutional. To treat fingerprints and DNA samples as essentially similar is akin to comparing a single piece of fruit to a chain of supermarkets. Neither we, nor the high court, have ever held that the taking of fingerprints, photographs, or the like invades any expectation of privacy, or otherwise heightens the risks that bring article I, section 13 or the Fourth Amendment into play.12 To the contrary, we have indicated that the taking of fingerprints is “standard police procedure,” rather than a search or seizure of an arrestee’s person. (People v. McInnis (1972) 6 Cal.3d 821, 825–826; see also Loder v. Municipal Court (1976) 17 Cal.3d 859, 865 (Loder).)13

Rather than finding these police processes to constitute reasonable invasions of an arrestee’s privacy, our precedent instead concludes that the taking of fingerprints or photographs does not implicate article I, section 13 at all. (See Loder, supra, at pp. 864–865 [arrestee’s right of privacy is not infringed by the taking of his fingerprints and photographs, or recording of his vital statistics].) The high court, likewise, has suggested that fingerprinting — and similar recordings of bodily characteristics that do not require an “intrusion into the body” — does not come within the Fourth Amendment’s scope. (See United States v. Dionisio (1973) 410 U.S. 1, 14–15; see also Davis v. Mississippi (1969) 394 U.S. 721, 727 [concluding that fingerprinting “involves none of the probing into an individual’s private life and thoughts that marks an interrogation or search”].) In contrast to the collection of DNA, fingerprinting does not intrude on a person’s bodily autonomy, or record information that is not otherwise available to public view (like the image of one’s face or markings on a person’s body). (Cf. Robinson, supra, 47 Cal.4th at pp. 1119–1120 [characterizing intrusions necessary for DNA profiling as “intrusions of the body” constituting searches within the meaning of the Fourth Amendment].) All this makes it difficult to accept the majority’s argument that DNA collection is tantamount to fingerprinting and therefore necessarily constitutional. (See State v. Medina (2014) 102 A.3d 661, 682–683 [rejecting comparison of DNA collection to fingerprinting in holding Vermont’s DNA collection statute unlawful under Vermont Constitution’s prohibition against unreasonable searches and seizures].)

A recent United States Supreme Court decision also cuts against treating fingerprinting and DNA collection as equivalent. In Birchfield, supra, 136 S.Ct. at p. 2185, the high court held that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample to measure blood alcohol content (BAC). To reach this conclusion, the high court weighed the privacy interests affected by blood tests against the government’s need for such tests. It found that the tests implicated significant privacy concerns — not only because of the intrusive nature of the tests, which involve piercing the skin, but also because a blood sample contains sensitive information which may be susceptible to substantial further analysis. (Id. at p. 2178.) The court noted that a blood test “places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading.” (Ibid.) As such, “[e]ven if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.” (Ibid.) In contrast, “breath tests are capable of revealing only one bit of information, the amount of alcohol in the subject’s breath.” (Id. at p. 2177.)

Breath tests are like fingerprints, and DNA samples, like blood. Fingerprints reveal only limited bytes of information. Not so with DNA. DNA samples contain a wealth of genetic information, which would make an individual nervous about possible violations of his or her privacy as long as the information remains in the state’s possession. The Supreme Court had no trouble distinguishing between breath and blood tests, finding one constitutional and the other not. We likewise would do well not to ignore the distinction between DNA analysis and fingerprinting.

Nor should we ignore that fingerprinting remains available to advance many of the very interests that allegedly support the DNA Act. The existence of fingerprints as a fast and accurate means to ascertain the identity of an arrestee further diminishes the state’s interest in identifying individuals by their DNA. Undoubtedly there are some instances where a DNA sample may help to solve a cold case but a set of fingerprints would not. (See maj. opn., ante, at p. 37 [identifying Robinson as one such case].) Nonetheless, just as the “reasonableness [of blood tests] must be judged in light of the availability of the less invasive alternative of a breath test” (Birchfield, supra, 136 S.Ct. at p. 2184), DNA tests must be
judged in light of the availability of the less invasive alternative of fingerprints — even if the alternative is not a perfect substitute. The high court in Birchfield recognized various advantages that a blood test offers over a breath test (id. at pp. 2184–2185), and yet did not find that enough for the former to pass constitutional muster. Instead, because “breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests,” the court concluded that there was no sufficiently compelling justification for warrantless blood tests. (Id. at p. 2185, italics added.) The same conclusion follows with the DNA tests at issue here.

III.

Even as the DNA Act falls short of legitimately advancing the interests the government asserts, its requirements constitute a major intrusion into the privacy of all the people subject to its procedures. Focusing solely on the physical collection of DNA samples understates the invasion at issue in this case. The DNA Act is unusual in that it effects more than one intrusion into a person’s privacy and autonomy: the intrusion occurs not only when the arrestee is physically subjected to the DNA collection, but also when his biological sample is processed to create a DNA profile, stored indefinitely in federal and state databases, and potentially analyzed in the future when conducting comparisons against newly obtained samples. This continuing intrusion makes the DNA Act’s search unlike other ordinary searches and seizures, as the potential infringement on an individual’s privacy is ongoing.

The second intrusion — the processing, storage, and comparison of an individual’s DNA sample — is a far more significant invasion of an arrestee’s privacy. That one’s DNA reveals much of a person’s most private, closely guarded information — and the risks implicit in such access — constitutes a violation in itself, even if the government does not presently wright from the DNA all the flows of information to be found there. (Ibid.; see also United States v. Jones, 565 U.S. 400, 415–416 (conc. opn. of Sotomayor, J.) [finding continuous GPS monitoring to be an unconstitutional search in part because of the risk that the government “[could] store such records and efficiently mine them for information years into the future.”]

Moreover, it is precisely this kind of intrusion that justifies California’s heightened privacy protections in the first place. As discussed above, the purpose of the constitutional grant of privacy is to protect citizens from governmental surveillance and other forms of information gathering. The DNA Act permits the government to store DNA with the potential to reveal information of an indisputably private nature. Article I, section 13 of our state Constitution — as informed by the privacy clause of article I, section 1 — protects against such an invasion of core privacy. (See Ruggles, supra, 39 Cal.3d at pp. 9–10.)

Furthermore, that the DNA Act invades the privacy of arrestees in particular does not mean we can ignore the resulting privacy invasion — or the risks associated with it. We have rejected the premise that an individual placed under arrest — even custodial arrest — lacks a significant, constitutionally protected interest in the privacy of her person. We have done so for good reason: valid justification to arrest an individual for a specific offense does not consequently extinguish all of her privacy rights, nor does it imply — without more — that there is a basis to suspect her of involvement in any other kind of felony. (Brisendine, supra, 13 Cal.3d at p. 556.) In contrast, convicted felons “ ‘retain no constitutional privacy interest against their correct identification.’ ” (Robinson, supra, 47 Cal.4th at p. 1121.) But we have never held, as the government argues, that individuals lawfully placed under custodial arrest lack a constitutionally protected interest in their genetic identity.
Nor can we consider the privacy interests at stake in this case solely from the perspective of an individual who has been lawfully arrested and convicted. It is undisputed that Buza was arrested with probable cause and convicted of three felonies. But Buza declined to provide a sample of his DNA during his booking into jail — long before his felony convictions, and prior to a probable cause determination by a neutral magistrate. Whatever is the basis for a felony arrest, the arrestee may not be subjected to a presumption of guilt until proven innocent. At the time of refusal, Buza enjoyed the presumption of innocence, and the ultimate disposition of his felony charges was uncertain. At that moment, Buza had just as much a right to assert noncompliance in order to raise a challenge against the DNA Act as an arrestee who would eventually be acquitted of felony charges. Far from asserting the privacy interests of third parties, Buza challenges the DNA Act as it applies to himself under the circumstances of this case. (Cf. Sabri v. United States (2004) 541 U.S. 600, 609 [disapproving of a facial challenge to the constitutionality of a statute]; In re Cregler (1961) 56 Cal.2d 308, 313 [“one will not be heard to attack a statute on grounds that are not shown to be applicable to himself”].)

Suppose we waited instead for another case brought by a plaintiff lawfully arrested for, and ultimately acquitted of, a felony charge. When this hypothetical plaintiff is told to submit to a DNA test upon arrest, she is presented with only two choices, both causing irreparable harm: (1) she could refuse the test and be lawfully prosecuted for (and found guilty of) a misdemeanor; or (2) she could submit to the test, and suffer the very harm to her privacy that she would later attempt to mitigate partially by seeking expungement. We may on occasion tolerate some degree of privacy harm and still uphold a search and seizure as reasonable. (See, e.g., People v. Medina (1972) 7 Cal.3d 30, 40 [“Reasonableness of a search may depend on the degree of invasion of privacy which occurs,” (italics added)].) But this case raises more serious privacy concerns, because of the character of the information the government seeks to obtain. (See Birchfield, supra, 136 S.Ct. at p. 2178; State v. Medina, supra, 102 A.3d at p. 682 [stating that it is “important to note that the DNA samples being seized provide a massive amount of unique, private information about a person that goes beyond identification” in finding unconstitutional a state statutory amendment which had permitted DNA collection from all felony arraignees].)

By declining to reach the issue here, we force a potential future plaintiff to suffer irreversible adverse consequences, either by penal sanction or harm to genetic informational privacy. This seems a substantial burden to impose upon an individual seeking to challenge the infirmities of the retention provisions, particularly where, based on the facts of this case, the majority already implicitly recognizes that there are likely constitutional defects in the statutory provisions regarding the government’s retention of genetic information. (Maj. opn., ante, at p. 25 [stating that “we must leave for another day” the question of whether automatic expunge-ment is constitutionally required for “the wrongly arrested or exonerated”].)

That Buza was ultimately arraigned and convicted is therefore irrelevant to our analysis. (Cf. maj. opn., ante, at pp. 2, 41-44.) We must consider Buza’s claim in light of how he was situated when that claim accrued — when he was merely “[a]n arrestee whose arrest has not even been subjected to a judicial determination of probable cause,” and so held privacy interests “closest on the spectrum of privacy rights to an ordinary citizen.” (People v. Buza (2014) 231 Cal. App.4th 1446, 1488; see People v. Triggs (1973) 8 Cal.3d 884, 893 (Triggs) [“In seeking to honor reasonable expectations of privacy through our application of search and seizure law, we must consider the expectations of the innocent as well as the guilty.”].) The majority makes much of the fact that Buza made incriminating statements when he was arrested, which it takes to mean that he knew his arrest was supported by probable cause. (Maj. opn, ante, at pp. 20 & fn. 4, 42.) Why exactly an individual arrestee’s subjective belief about probable cause should factor into the analysis is far from clear, particularly since we consider probable cause objectively, from the point of view of a reasonable person in possession of all the facts known to the arresting officer. (E.g., Whren v. United States (1996) 517 U.S. 806, 812-813.) Moreover, simply because Buza knew the authorities were “going to regard [his setting fire to a police car] as an illegal act” does not mean that he forfeited all reasonable expectations of privacy. Irrespective of Buza’s state of mind when he was arrested, his refusal to allow collection of his DNA sample at booking spoke volumes in manifesting his subjective expectation of privacy. The question facing us here is whether that expectation is reasonable. Because of the veil of ignorance that prevents society from knowing for certain whether an arrested individual is in fact guilty of the offense that is the basis for the arrest, Buza was in every meaningful respect indistinguishable from an arrestee who is later found to be innocent. So we explore the reasonableness of Buza’s privacy expectation from that perspective.

Unlike the Maryland statute scrutinized in King, the DNA Act does not require that a lawful arrest have occurred before DNA collection, as it permits the retrieval and processing of a DNA sample before a magistrate or other judicial officer has determined that the arrest was supported by sufficient probable cause. This aspect of the DNA Act vastly expands the number of individuals subject to its dragnet. As Justice Liu points out, almost one in five felony arrestees are released prior to a judicial determination of probable cause. Yet all of these individuals must allow their DNA to be collected and retained by the state (for at least 180 days) under threat of criminal sanction. (Pen. Code, § 299, subd. (c)(2)(D).) Even more invidiously, the fact that the state may compel a DNA sample from even those wrongfully arrested provides the perverse incentive for law enforcement to engage in pretextual arrests as a means to obtain a person’s DNA and whereabouts uncover evidence of crimes.
The DNA Act’s lack of an automatic expungement provision exacerbates such concerns. Again, unlike the Maryland statute, the Act does not require the destruction of the DNA sample and removal of any resulting profile from state and federal databases if the individual at issue is never convicted of a felony. Instead, the DNA Act requires a discharged arrestee to initiate expungement proceedings and navigate the resulting process himself. Although the Department of Justice assures us that the “vast majority of requests have resulted in expungement,” the Attorney General does not provide — and the record does not elsewhere contain — any information about how often eligible individuals initiate expungement proceedings in the first place. The absence of automatic expungement proceedings, and the employment of a process that requires the arrestee to initiate expungement and provide required documentation, heightens the possibility that the State will retain possession of DNA profiles for individuals who were never convicted of qualifying felonies, who may never have been charged with a felony in the first place, or who may not have been lawfully arrested at all.

Ironically, the interests advanced by the Attorney General on behalf of the state — i.e., generalized crime solving, proper housing of arrestees within the jails, and decision-making about pretrial release — are likely to be quite well-served even if the statutory scheme avoided its present constitutional defects. Indeed, the concerns about inadequate expungement measures and pretextual or abusive arrests could be alleviated by provisional amendments to the DNA Act already enacted by the Legislature. Under the version of the Act that will become operative if we affirm the appellate court, a jail official is not to transmit a DNA sample to the Department of Justice until there has been a felony arrest warrant signed by a magistrate, a grand jury indictment issued, or a judicial determination of probable cause for the arrest. (Pen. Code, § 298, subd. (a)(1)(A).) Waiting for a neutral determination of probable cause would add, at most, 48 hours to the 30 days needed on average to process a DNA sample. (See County of Riverside v. McLaughlin (1991) 500 U.S. 44, 56.) In view of the delays already associated with DNA processing, postponing the process until a detained and neutral magistrate has found probable cause would diminish none of the state’s interests furthered by the DNA Act, since the state would be as able to “identify” arrestees after a 32-day waiting period as it would after a 30-day period. The amendment, however, would significantly cut down on the number of people whose privacy is invaded due to the analysis, storage, and comparison of their DNA samples.

Nowhere does the majority seem to reject the merits of that approach. (See maj. opn., ante, at pp. 21–22.) Instead, it argues that since DNA processing is so slow, processing of the arrestees’ samples in practice — regardless of what the law permits — usually does not take place until judicial probable cause has been made anyway. (Id. at p. 22.) The slow operation of existing technology and institutional practices thus become features supporting the constitutionality of the Act. As odd as this argument is, its force is sapped further still by the Act’s blanket permission for the processing of DNA samples even if a magistrate finds that the arrest was without probable cause. (See Pen. Code, § 298 [requiring jail officials to “promptly” forward biological samples to the Department of Justice without providing any exception for those wrongfully arrested].) The burden remains on the individual — even if wrongfully arrested or later exonerated — to seek expungement. But were we to strike down the Act, automatic expungement would become law. (See Pen. Code, § 299 [conditional provision to the Act requiring automatic expungement of DNA profiles from databank when the arrests do not lead to valid convictions].) In contrast, the existing statute creates a default regime that requires DNA samples from anyone subject to a felony arrest — irrespective of whether they will eventually be judged guilty or whether a neutral magistrate finds probable cause — and leaves the state in a position to retain such information indefinitely unless expungement is pursued and achieved.

None of these observations implies we should strike down the DNA Act because we prefer its replacement on policy or prudential grounds. (Cf. maj. opn., ante, at p. 29, fn. 7.) Instead we emphasize what remains obvious even if downplayed by the majority: the Legislature has approved a law that accomplishes much of the Government’s interests while alleviating the constitutional problem.

While the DNA Act is an initiative entitled to a presumption of validity, the searches it permits — and in fact, requires law enforcement to carry out — occur without a warrant or probable cause. If those searches are to be upheld, it is the State’s burden to persuade us that they fall within one of the recognized exceptions to the warrant requirement, or that they are otherwise reasonable. While “mere doubt” about the DNA Act’s invalidity is not reason enough to strike it down (Calfarm Insurance Co. v. Deukmejian (1989) 48 Cal.3d 805, 814 (Calfarm)), we must nevertheless require the State to justify the searches the Act accomplishes. In this case, the State has not carried its burden to show the reasonableness of its searches when balanced against the interference with individual privacy. So provisions of the DNA Act authorizing such unreasonable searches must be struck down.

Insofar as the majority would lean on majoritarian impulses to imply that something more is required because the Act is an initiative passed by voters (see maj. opn., ante, at pp. 22–23, 34, 44), we note that there is no formal distinction in our role in evaluating initiatives versus legislation enacted by representative political institutions. (Calfarm, supra, 48 Cal.3d at pp. 814–815 [evaluating an initiative “‘in the light of established constitutional standards’” and finding it unconstitutional].) The Constitution applies both, and equally, to legislators and the general public. The majority cannot mean to suggest otherwise.

In the final analysis, arrestees do not have such diminished expectation of privacy as to permit the State to retain their DNA profile and conduct repeated searches of it. As such,
when weighed against the State’s generalized interest in identifying arrestees and solving crimes, an arrestee’s reasonable privacy interest in his or her genetic information — uniquely protected under the California Constitution — must win. (Triggs, supra, 8 Cal.3d at p. 892 [“‘important as efficient law enforcement may be, it is more important that the right of privacy guaranteed by these constitutional provisions be respected’”].)

IV.

The DNA Act unlawfully invades people’s reasonable expectation of privacy in their personal genetic information. Any diminished expectation of privacy arrestees may or may not have in their genetic code does not justify an intrusion of this magnitude. The government’s asserted interest in identifying individuals in its custody and solving crimes may prove important in justifying a variety of practices. But it does not countenance this intrusion, as the government’s rationale for the DNA Act is neither borne out by the Act’s implementation nor consistent with our precedent’s restrictions on suspicionless searches. This makes the DNA Act unconstitutional under our state charter as applied to felony arrestees — individuals, like Buza, who are not yet known to be lawfully arrested, much less found guilty. Far from invalidating the work of the California electorate, striking down the Act would vindicate our core constitutional values, which recognize that our citizens have the “inalienable rights” to be free of arbitrary governmental intrusion and to enjoy “safety, happiness, and privacy.” (Cal. Const., art. I, §§ 1, 13.)

With respect, I dissent.

CUÉLLAR, J.

WE CONCUR: LIU, J., PERLUSS, J.*

* Presiding Justice of the Court of Appeal, Second Appellate District, Division Seven, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
EHM PRODUCTIONS, INC., Plaintiff and Respondent,

v.

STARLINE TOURS OF HOLLYWOOD, INC., Defendant and Appellant.

No. B281594
In The Court of Appeal of the State of California
Second Appellate District
Division Two
(Los Angeles County Super. Ct. No. BS164473)
APPEAL from a judgment of the Superior Court of Los Angeles County. Michael J. Raphael, Judge. Affirmed.
Filed March 28, 2018

COUNSEL
Lex Opus, Mohammed K. Ghods, Jeremy A. Rhyne, and Lori Speak for Defendant and Appellant.
Boies Schiller Flexner, Linda M. Burrow and Kelly L. Perigoe for Plaintiff and Respondent.

OPINION

Starline Tours of Hollywood, Inc. (appellant) appeals from a judgment confirming an arbitration award. The arbitration involved a contract dispute between appellant and EHM Productions, Inc. doing business as TMZ (respondent) regarding appellant’s duty to defend respondent in a lawsuit brought by appellant’s bus drivers. Respondent obtained an award requiring appellant to defend respondent in the bus driver action. Following arbitration, the award was confirmed by a JAMS appellate panel. Respondent filed a petition to confirm the award, which was granted. Appellant appealed, and this court affirmed the award on October 4, 2017.1

After respondent filed its petition to confirm the arbitration award, the JAMS appellate panel determined that appellant owed respondent $41,429.92 in costs. Following confirmation of the initial arbitration award, respondent sought, and received, confirmation of the cost award. Appellant now appeals from the second judgment granting respondent’s petition to confirm the cost award. Appellant’s sole contention on appeal is that the trial court erred by entering two consecutive judgments resulting from the same arbitration. We find that appellant has failed to demonstrate error, therefore we affirm the second award.

award in its entirety. The determination of costs on appeal was reserved for further decision.

On May 9, 2016, respondent filed a petition to confirm the partial final award in Superior Court. Starline opposed the petition on numerous grounds. On June 21, 2016, the trial court granted the petition, ordering respondent to give notice and prepare and serve a proposed order. Appellant objected to the proposed order. The court held a hearing on July 27, 2016. At the conclusion of the hearing, the court signed an amended judgment confirming the arbitration award.

On August 26, 2016, appellant filed an appeal from the judgment. On October 4, 2017, this court filed an opinion affirming the judgment in full.

**Award of costs for the JAMS appeal**

On May 12, 2016, three days after respondent filed its petition to confirm the partial final award, the JAMS appellate panel issued its “Final Award on Appeal” (cost award), determining respondent’s costs for the JAMS appeal. The cost award granted respondent $41,429.92 in costs.

On August 22, 2016, respondent petitioned for confirmation of the cost award. Appellant opposed the petition, arguing, among other things, that respondent waived its right to obtain confirmation of the cost award by failing to present it for confirmation prior to the entry of the first judgment.

The trial court rejected appellant’s arguments and entered a judgment confirming the cost award on January 23, 2017. The court ordered appellant to pay respondent $41,429.92 in accordance with the cost award. The court cited Hightower v. Superior Court (2001) 86 Cal.App.4th 1415, 1434 (Hightower), for the proposition that “utilization of a multiple incremental or successive award process may be appropriate.”

**Appeal of the cost award**

Appellant filed a timely notice of appeal of the cost award on March 20, 2017.

**DISCUSSION**

**I. STANDARD OF REVIEW**

The trial court’s decision granting respondent’s petition to confirm the cost award is reviewed de novo. (Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal.4th 362, 376, fn. 9.) If the trial court’s ruling relies on a determination of disputed factual issues, we apply the substantial evidence test on those particular issues. (Toal v. Tardif (2009) 178 Cal. App.4th 1208, 1217.) Where error is shown, this court may vacate the first judgment if the error prejudiced the appellant. (Cal. Const. art. VI, § 13; Code Civ. Proc., § 475.)

We briefly review the procedures leading up to confirmation of an arbitration award. Pursuant to Code of Civil Procedure section 1285, any party to an arbitration in which an award has been made may petition the court to “confirm, correct or vacate the award.” Once a petition to confirm an award is filed, the superior court must select one of only four courses of action: it may confirm the award, correct and confirm it, vacate it, or dismiss the petition. (Cooper v. Lavelle & Singer Professional Corp. (2014) 230 Cal.App.4th 1, 11.) “It is the general rule that, with narrow exceptions, an arbitrator’s decision cannot be reviewed for errors of fact or law.” (Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1, 11.) Under section 1286.2, the court may vacate the award only under “very limited circumstances.” (Roehl v. Ritchie (2007) 147 Cal.App.4th 338, 347.) Neither the trial court, nor the appellate court, may “review the merits of the dispute, the sufficiency of the evidence, or the arbitrator’s reasoning, nor may we correct or review an award because of an arbitrator’s legal or factual error, even if it appears on the award’s face. Instead, we restrict our review to whether the award should be vacated under the grounds listed in section 1286.2. [Citations.]”

**II. APPELLANT HAS FAILED TO SHOW THAT THE ONE FINAL JUDGMENT RULE PRECLUDES CONFIRMATION OF THE COST AWARD**

Appellant argues that the incremental judgments entered in this case violate the one final judgment rule. (Fleuret v. Hale Constr. Co. (1970) 12 Cal.App.3d 227, 230 (Fleuret) “[o]rdinarily there may be but one final judgment in an action”.)

Appellant argues that “piecemeal disposition[s]” in a single action are “oppressive and costly” and may result in multiple appeals. (Kurwa v. Kistlinger (2013) 57 Cal.4th 1097, 1101 (Kurwa).) Appellant argues that no case sanctions the entering of multiple independent judgments on an

---

2. The JAMS appellate panel had reserved this issue in its April 11, 2016 order.
abortion award and its subsequent cost award arising from a single arbitration.

The authority cited by appellant does not support appellant’s position that the one final judgment rule prevented the trial court from confirming the cost award in this case. Fleuret involved a direct action and a cross-action. The trial court found in favor of the cross-defendants on the cross-complaint and entered a judgment that the cross-plaintiff take nothing on his cross-complaint. However, the issues raised in the direct action, and the resulting damages, had not been determined, and no judgment had been entered on the original complaint. Under those circumstances, the court determined that “[a] cross-complaint is not considered sufficiently independent to allow a separate final judgment to be entered upon it.” (Fleuret, supra, 12 Cal.App.3d at p. 230.) The case does not address a situation where, as here, a cost award is entered subsequent to the entry of a partial final award in arbitration.

Nor does Kurwa. Kurwa explains that “[u]nder California’s ‘one final judgment’ rule, a judgment that fails to dispose of all the causes of action pending between the parties is generally not appealable. [Citations.]” (Kurwa, supra, 57 Cal.4th at p. 1100.) The case posed the question of “whether an appeal may be taken when the judgment disposes of fewer than all the pled causes of action.” (Ibid.) In Kurwa, the judgment disposed of certain counts by dismissal with prejudice. The remaining counts were dismissed without prejudice, and operation of the statute of limitations was waived. Under those circumstances, the judgment was not appealable. The case does not suggest that the trial court erred in confirming the cost award in this case.

Appellant has failed to provide legal support for its argument that the one final judgment rule precludes confirmation of the cost award in this matter. Further, as the trial court pointed out, Hightower suggests that an incremental award process may be appropriate in situations where not all issues may be resolved at the time of the initial partial final award. (Hightower, supra, 86 Cal.App.4th at p. 1419.) Appellant has cited no authority for its position that the procedure undertaken in this case was error. Hightower supports the incremental award process used by the arbitrator in this matter, thus the cost award was the proper subject of a petition to confirm.

Appellant also attempts to distinguish Hightower because it involved costs that had not yet been incurred. In contrast, appellant argues, in this case there were no “potential and conditional issues” at hand. (Hightower, supra, 86 Cal.App.4th at p. 1439.) Instead, all that had to be decided was how much respondent should be awarded in costs already accrued. Appellant argues that it makes no sense to seek confirmation of such costs, which are likely to be determined shortly after the substantive award, as a separate action.

Hightower approved an incremental process where it is “reasonably necessary, if not essential” to the establishment and enforcement of the remedy that the arbitrator has fashioned. (Hightower, supra, 86 Cal.App.4th at p. 1439.) At the time that the partial final award was affirmed by the JAMS appellate panel, respondent had no way of knowing when, or if, a cost award would issue. Thus, costs remained a “potential and conditional” issue. (Ibid.) The cost award was not issued until after respondent had filed a petition to confirm the partial final award in the trial court. While the most efficient means of obtaining confirmation may have been to amend the petition once the cost award was issued, Hightower does not require such action. Appellant has cited no authority requiring amendment of a petition to confirm arbitration award under the circumstances of this case.

When presented with a petition to confirm an arbitration award, the court’s role is to “confirm, correct, or vacate the award, or dismiss the petition entirely.” (Citations.) (Cinel v. Christopher (2012) 203 Cal.App.4th 759, 765.) As an incre-  

5. Section 1283.4 provides that an arbitration award “shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy.”  

6. Appellant has requested that this court reverse the trial court judgment and direct the trial court to enter an order denying the petition. The statutory scheme does not provide an option for “denial” of a petition to confirm arbitration, as appellant has requested. (Law Offices of David S. Karon v. Segreto (2009) 176 Cal.App.4th 1, 9 [“If the trial court which does not dismiss the petition also does not correct or vacate an arbitration award, it must confirm the award.”].)
ment award permitted under *Hightower*; the cost award was subject to confirmation, unless the court found that the award was subject to dismissal or vacation under section 1286.2. The petition was not subject to dismissal, and appellant does not suggest on appeal that the order should be vacated pursuant to section 1286.2. Thus, the trial court properly confirmed the award. No error occurred.

**III. PRINCIPLES OF WAIVER AND ESTOPPEL DO NOT PRECLUDE CONFIRMATION OF THE COST AWARD**

Appellant next argues that respondent should not be permitted to seek separate confirmation of awards and cost awards in sequential fashion when those awards co-exist before any judgment has been entered. Appellant asks that we determine that appellant has waived any right to obtain, or should be estopped, from seeking confirmation of the cost award. Appellant cites *Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.* (2006) 144 Cal.App.4th 1175, 1194, for the proposition that: “Whether denominated ‘estoppel’ or ‘implied waiver as a matter of law,’ the operative principle is exactly the same -- where a party’s conduct is so inconsistent with the intent to enforce a legal right, the intention to give up that right will be presumed, notwithstanding evidence that the party did not subjectively ‘intend’ to relinquish it. [Citation.]”

Appellant notes that respondent had four years to confirm the underlying arbitration award, (§ 1288), thus could have waited for the cost award prior to filing a petition to confirm. Appellant cites several cases as examples of situations where an arbitration award and subsequent cost award were presented simultaneously to the trial court for confirmation. What appellant fails to provide is legal authority requiring this procedure, or suggesting that a winning party in arbitration is not entitled to confirmation of a fee award unless it is presented to the trial court simultaneously with the substantive arbitration award. Under the circumstances, we decline to apply the doctrines of waiver or estoppel to reverse the trial court judgment.

Appellant criticizes respondent’s choice not to present the cost award to the trial court via amended petition. Appellant cites *In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1212, as an example of a case in which the petitioner filed an amended petition to confirm after the final award. However, in the absence of a rule requiring an amended petition to confirm a cost award under the circumstances of this case, there is no basis for reversal.

---


8. We note that the arbitrator in this matter has reserved jurisdiction to enforce appellant’s defense obligation going forward. Thus, the arbitrator may enter future substantive and cost awards. Appellant’s position that there may be only one final judgment for one arbitration could arguably prevent confirmation of such future awards in this matter. Under the circumstances of this case, where appellant has an ongoing enforceable obligation to defend respondent, such a result would be inequitable.

**DISPOSITION**

The judgment is affirmed.

**CERTIFIED FOR PUBLICATION**

**CHAVEZ, J.**

We concur: LUI, P. J., ASHMANN-GERST, J.
THE PEOPLE, Plaintiff and Respondent, v. COREY JOHNSON, Defendant and Appellant.

No. B282810
In The Court of Appeal of the State of California Second Appellate District
Division Seven
(Los Angeles County Super. Ct. No. TA141221)
APPEAL from a judgment of the Superior Court of Los Angeles County, Patrick Connolly, Judge. Affirmed. Filed March 28, 2018

COUNSEL
Melissa L. Camacho-Cheung, under appointment by the Court of Appeal, for Defendant and Appellant.
Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Zee Rodriguez and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

Following the denial of a motion to suppress evidence found during a search of his car, Corey Johnson pleaded no contest to one count of sale of a controlled substance (cocaine base) and admitted that the crime had been committed to benefit a criminal street gang and that he had previously been convicted of a serious felony within the meaning of the three strikes law. On appeal Johnson contends the motion to suppress should have been granted because the warrantless search of his car was neither a valid search incident to his arrest nor supported by probable cause to believe the car contained contraband or evidence of criminal activity. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Johnson's Arrest and the Search of His Car

While monitoring the Nickerson Garden Housing Development on closed circuit television on May 5, 2016, Los Angeles Police Officer Darryl Danaher saw a woman approach a man as he was walking by a baseball field. The man produced a knotted clear plastic bag and poured off-white, rock-like substances into his left hand. He then extended his left hand. The woman picked out one of the off-white solids with her right hand and handed what appeared to be a $5 bill to the man. The two individuals then walked away from each other.

As the transaction was taking place, Officer Danaher called three narcotics officers into the surveillance room to watch with him. When the exchange was completed, the narcotics officers left to try to apprehend the man. Danaher continued watching the closed circuit feed and observed the man walk a short distance, enter a car and drive away. He relayed a description of the car and its license plate number to the narcotics officers.

A short time later the man returned, parked the car inside the housing development and got out from the driver’s side. Officer Danaher watched him walk away from the parking area and again transmitted information about the man’s location to the other officers.

Two officers, Detective Michael Owens and Officer Joshua Fluty, made contact and arrested Johnson. Owens searched Johnson’s pockets and found car keys. He did not find any money or drugs. Owens and Fluty then drove to the parking lot where Johnson’s car had been parked, approximately two blocks from the site of the arrest.

The two officers parked their car and approached the vehicle Johnson had been driving. A young woman was in the driver’s seat. Officer Fluty walked to the passenger side of the car and saw a small bag containing what appeared to be marijuana in the middle of the front passenger seat. Fluty reported this to Detective Owens, who asked the young woman to step outside the car. When she did, Owens smelled marijuana and saw the bag with marijuana on the passenger seat. The woman told Owens she was watching the car for her uncle. Fluty asked her uncle’s name; she replied, “Corey.”

Detective Owens searched the car. In the armrest of the rear passenger door he found a clear plastic bag containing several off-white solids that appeared to be rock cocaine. He also found a $5 bill and an electronic benefits transfer (EBT) card with the name “Corey Johnson.” The substance in the baggie was subsequently tested and found to contain 1.37 grams of cocaine base.

2. The Motion To Suppress

After being charged with possession of cocaine base for sale (Health & Saf. Code, § 11351.5) and sale of a controlled substance (cocaine base) (Health & Saf. Code, § 11352), Johnson waived his right to counsel, pleaded not guilty and moved to suppress the evidence discovered in the warrantless search of his car. (Pen. Code, § 1538.5.) Several weeks later Johnson withdrew his waiver of counsel. Appointed counsel filed a supplemental motion to suppress.

Johnson’s motion was considered by the court in conjunction with the preliminary hearing. After hearing testimony and argument from counsel, the court denied the motion.
The court first found there was probable cause to arrest Johnson after the officers witnessed him selling what appeared to be a controlled substance. (The court pointed out that, although Johnson’s face was not identifiable on the video, his shirt and hat—a red and gray/black baseball cap and a shirt with “23” on it—were “unbelievably unique.”) The court then ruled under Arizona v. Gant (2009) 556 U.S. 332 [129 S.Ct. 1710, 173 L.Ed.2d 485] (Gant) the officers were entitled to search Johnson’s car “if the police have reason to believe that the vehicle contained evidence relevant to the crime of the arrest . . . . Doesn’t matter where it is necessarily. Doesn’t matter that it’s two blocks away. And under these particular facts, it was pretty clear that they had reasonable belief and probable cause to believe that the narcotics that he had just witnessed in the defendant’s hand and the money that was exchanged was kept in a safe place, the safe place being the car that he just exited.”

As a second basis to uphold the search the court ruled, because Johnson’s car had just been driven, the officers had ample evidence to believe he had transported marijuana in violation of Health and Safety Code section 11360, subdivision (a).4

3. Johnson’s Plea Agreement

Johnson was originally charged in a felony complaint with one count of possessing cocaine base for sale and one count of selling, furnishing or transporting a controlled substance (cocaine base). The information filed following denial of the motion to suppress evidence added special allegations that the crimes had been committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)) and Johnson had suffered one prior drug offense (Health & Saf. Code, § 11370.2, subd. (a)) and three prior serious felony convictions within the meaning of the three strikes law (Pen. Code, §§ 667, subds. (b)-(j), 1170.12) and had served five prior prison terms for felonies (Pen. Code, § 667.5, subd. (b)).

Pursuant to a negotiated agreement, Johnson pleaded no contest to selling cocaine base and admitted the offense had been committed to benefit a criminal street gang allegation and he had one prior strike conviction. The second charge and additional special allegations were dismissed. Johnson was sentenced to an eight-year state prison term.5

---

4. The court noted the offense had occurred in May 2016, “nearly four months before the change in law that legalized marijuana.”

5. An appeal of the denial of a motion to suppress evidence following a plea of guilty or no contest is authorized by Penal Code section 1538.5, subdivision (m), and California Rules of Court, rule 8.304(b)(4)(A). As the Attorney General explains in his brief in this court, the failure of Johnson’s attorney to renew the motion to suppress following the filing of the information ordinarily forfeits the issue for appellate review. (People v. Lilienthal (1978) 22 Cal.3d 891, 896.) However, the trial court assured Johnson before he entered his plea that he would be able to appeal the ruling on the suppression motion. Given that representation, the Attorney General does not assert the issue has been forfeited. (See generally People v. Hart (1999) 74 Cal.App.4th 479, 486-487 [to determine whether defense counsel was constitutionally ineffective in failing to preserve the legality of the search as an issue for appeal, appellate court must determine the legality of the search].)

### DISCUSSION

#### 1. Standard of Review

“A defendant may move to suppress evidence on the ground that ‘[t]he search or seizure without a warrant was unreasonable.’” ([Pen. Code,] § 1538.5, subd. (a)(1)(A).) A warrantless search is presumed to be unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search. (Citation.) “The standard of appellate review of a trial court’s ruling on a motion to suppress is well established. We defer to the trial court’s factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.” (People v. Stiff (2014) 58 Cal.4th 1013, 1053; accord, People v. Macabeo (2016) 1 Cal.5th 1206, 1212; Robey v. Superior Court (2013) 56 Cal.4th 1218, 1223; see People v. Ayala (2000) 24 Cal.4th 243, 279.)

Although it is a settled principle of appellate review that a correct decision of the trial court will be affirmed even if based on erroneous reasons, the Supreme Court has cautioned that “appellate courts should not consider a Fourth Amendment theory for the first time on appeal when the People’s new theory was not supported by the record made at the first hearing and would have necessitated the taking of considerably more evidence . . . or when the defendant had no notice of the new theory and thus no opportunity to present evidence in opposition.” (Robey v. Superior Court, supra, 56 Cal.4th at p. 1242.) However, when “the record fully establishes another basis for affirming the trial court’s ruling and there does not appear to be any further evidence that could have been introduced to defeat the theory,” a ruling denying a motion to suppress will be upheld on appeal. (Green v. Superior Court (1985) 40 Cal.3d 126, 138-139; see People v. Walker (2012) 210 Cal.App.4th 1372, 1383; People v. Loudermilk (1987) 195 Cal.App.3d 996, 1004-1005.)

The question whether relevant evidence obtained by assertedly unlawful means—that is, in violation of the Fourth Amendment—must be excluded is determined by deciding whether its suppression is mandated by the federal Constitution. (Cal. Const., art. I, § 24; People v. Macabeo, supra, 1 Cal.5th at p. 1212; see People v. Schmitz (2012) 55 Cal.4th 909, 916; People v. Lomax (2010) 49 Cal.4th 530, 564, fn. 11.)

#### 2. Governing Law

a. Search of an automobile incident to arrest

A search incident to a lawful arrest is a well-established exception to the general rule prohibiting warrantless searches. (Riley v. California (2014) 573 U.S. ___ [134 S.Ct. 2473, 2482-2483, 189 L.Ed.2d 430]; United States v. Robinson
In Chimel v. California (1969) 395 U.S. 752, 763 [89 S. Ct. 2034, 23 L.Ed.2d 685] the Supreme Court “laid the groundwork for most of the existing search incident to arrest doctrine.” (Riley, supra, 573 U.S. at p. ___.) As the rule for assessing the reasonableness of a search incident to arrest, the Chimel Court held, “When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction. . . . There is ample justification, therefore, for a search of the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” (Chimel, at pp. 762-763.)

The Supreme Court considered the application of the Chimel rule in the context of a vehicle search in New York v. Belton (1981) 453 U.S. 454 [101 S.Ct. 2860, 69 L.Ed.2d 768] (Belton). The Court held, “while a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile;” as well as “any containers found within the passenger compartment.” (Id. at p. 460.) Thornton v. United States (2004) 541 U.S. 615 [124 S.Ct. 2127, 158 L.Ed.2d 905] extended Belton to allow vehicle searches incident to the arrest of individuals who were “recent occupants” of a vehicle. (Id. at pp. 622-623.) “For years, Belton was widely understood to have set down a simple, bright-line rule. Numerous courts read the decision to authorize automobile searches incident to arrests of recent occupants, regardless of whether the arrestee in any particular case was within reaching distance of the vehicle at the time of the search. [Citation.] Even after the arrestee had stepped out of the vehicle and had been subdued by police, the prevailing understanding was that Belton still authorized a substantially contemporaneous search of the automobile’s passenger compartment.” (Davis v. United States (2011) 564 U.S. 229, 233 [131 S.Ct. 2419, 180 L.Ed.2d 285].)

Gant rejected this broad interpretation of Belton: “To read Belton as authorizing a vehicle search incident to every recent occupant’s arrest,” even when the arrestee was out of reach of the passenger compartment, would “un tether the rule from the justifications underlying the Chimel exception.” (Gant, supra, 556 U.S. at p. 343.) Such a broad reading of the search incident to arrest exception, the Court explained, would “seriously undervalue[ ] the privacy interests at stake.” (Id. at pp. 344-345.) Accordingly, the Court in Gant adopted a new, two-part rule under which an automobile search incident to a recent occupant’s arrest is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains ‘evidence relevant to the crime of arrest.’” (Davis v. United States, supra, 564 U.S. at pp. 234-235, citing Gant, at p. 343.) Gant noted that the second prong of the test flowed not from Chimel, but from Justice Scalia’s concurrence in Thornton v. United States, supra, 541 U.S. at page 632, and was justified by “circumstances unique to the vehicle context.” (Gant, at pp. 335, 343; see also People v. Evans (2011) 200 Cal.App.4th 735, 745; People v. Nottoli (2011) 199 Cal. App.4th 531, 549.) Where neither justification is present, “a search of an arrestee’s vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.” (Gant, at p. 351.)

**b. The automobile exception to the warrant requirement**

While limiting the justifications for the search of a vehicle incident to the arrest of one of its recent occupants, the Supreme Court in Gant recognized that “[o]ther established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand.” (Gant, supra, 556 U.S. at p. 346.) In particular, the Court emphasized, “If there is probable cause to believe a vehicle contains evidence of criminal activity, United States v. Ross [(1982)] 456 U.S. 798, 820-821 . . . authorizes a search of any area of the vehicle in which the evidence might be found. . . . Ross allows searches for evidence relevant to offenses other than the offense of the arrest, and the scope of the search authorized is broader.” (Gant, at p. 347; see Missouri v. McNeely (2013) 569 U.S. 141, 150, fn. 3 [133 S.Ct. 1552, 185 L.Ed.2d 696] [the automobile exception is one of a “limited class of tradition exceptions to the warrant requirement that apply categorically and thus do not require an assessment of whether the policy justifications underlying the exception, which may include exigency-based considerations, are implicated in a particular case”].)

Under the so-called automobile exception officers may search a vehicle without a warrant if it “is readily mobile and probable cause exists to believe it contains contraband” or evidence of criminal activity. (Pennsylvania v. Labron (1996) 518 U.S. 938, 940 [116 S.Ct. 2485, 135 L.Ed.2d 1031]; see Robey v. Superior Court, supra, 56 Cal.4th at p. 1234 [“[i]n Ross, the high court held that when police have probable cause to believe a vehicle is carrying evidence or contraband, the scope of a search may extend to ‘every part of the vehicle that might contain the object of the search,’ including the glove compartment, the trunk, and even the upholstery.”].) Probable cause exists when, considering the totality of the circumstances, the “known facts and circumstances are sufficient to warrant a [person] of reasonable prudence in the belief that contraband or evidence of a crime will be found. . . .” (Ornelas v. United States (1996) 517 U.S. 690, 696 [116 S.Ct. 1657, 134 L.Ed.2d 911]; see People v. Farley (2009) 46 Cal.4th 1053, 1098 [probable cause to search exists when, based upon the totality of the circumstances, there
is a fair probability that contraband or evidence of a crime will be found in a particular place]; see also People v. Bryant, Smith and Wheeler (2014) 60 Cal.4th 335, 369-370 [probable cause requires a showing that makes it substantially probable there is specific property lawfully subject to seizure presently located in the particular place to be searched; “[t]he showing required in order to establish probable cause is less than a preponderance of the evidence or even a prima facie case”].

3. The Search of Johnson’s Automobile Was Not a Valid Search Incident to His Arrest

Johnson concedes his arrest after Officer Danaher and other officers observed him engage in what appeared to be a hand-to-hand drug transaction was supported by probable cause. Nonetheless, he contends the trial court erred in ruling the search of his car was a valid search incident to arrest under Gant, supra, 556 U.S. 332 because the car was two blocks away from the site of his arrest. We agree.

As discussed, Gant established a two-part rule for a valid automobile search incident to a recent occupant’s arrest: Either the arrestee is within reaching distance of the vehicle during the search (thereby justifying the search to protect officer safety or prevent the destruction of evidence), or the police have reason to believe the car contains evidence relevant to the crime of arrest. (Gant, supra, 556 U.S. at p. 343.) Thus, the Attorney General is correct in observing that the arrestee’s inability to access the car does not preclude a search under Gant if the police reasonably believe it contains evidence of the offense for which the individual has been arrested. (See, e.g., People v. Evans, supra, 200 Cal.App.4th at pp. 745-746; People v. Nottoli, supra, 199 Cal.App.4th at p. 551.) But that Gant permits an automobile search as a contemporaneous incident to arrest even though the arrestee no longer has access to the car (for example, because he was tased and lying on the ground as in Evans or handcuffed and sitting in a patrol car as in Nottoli) does not mean that proximity of the search to the time and place of arrest is irrelevant to an evaluation of its validity.

In his opinion for the Court in Gant, Justice Stevens twice noted that the second aspect of the two-part rule announced in that case was based on Justice Scalia’s suggestion in his concurring opinion in Thornton v. United States, supra, 541 U.S. 615. (Gant, supra, 556 U.S. at pp. 335 [“following the suggestion in Justice Scalia’s opinion concurring in the judgment in that case [citation], we also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense might be found in the vehicle”], 343 [“[a]lthough it does not follow from Chimel, we also conclude that circumstances unique to the vehicle context justify a search incident to arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle’,” citing Justice Scalia’s concurring opinion in Thornton.]) It thus becomes crucial to determine exactly what Justice Scalia suggested.

In Thornton v. United States, supra, 541 U.S. 615, the Supreme Court upheld the search of the passenger compartment of a car as a contemporaneous incident of arrest under Belton even though the officer had initiated contact with the arrestee after he had stepped out of his vehicle. (Thornton, at p. 617.) The Court explained, “In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle. . . . A custodial arrest is fluid and ‘[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress and uncertainty’ [citation].” (Id. at p. 621.)

Justice Scalia (joined by Justice Ginsburg) concurred in the judgment. (Thornton v. United States, supra, 541 U.S. at p. 625 (conc. opn. of Scalia, J.).) Justice Scalia noted that Thornton was handcuffed and secured in the back of a patrol car when the passenger compartment of his car was searched; “[t]he risk that he would nevertheless ‘grab a weapon or evidentiary item’ from his car was remote in the extreme.” (Ibid.) “If Belton searches are justifiable,” Justice Scalia reasoned, “it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested.” (Id. at p. 629.) The Justice continued, “There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested. The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of his crime from general rummaging. Moreover, it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.” (Id. at p. 630.) Thus, Justice Scalia concluded, he would “limit Belton searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” (Id. at p. 632.)

6. In her opinion concurring with the majority in part, Justice O’Connor also expressed tentative agreement with Justice Scalia’s approach to the issue of an automobile search incident to arrest, but declined to adopt it because the parties had not had an opportunity to speak to its merit. (Thornton v. United States, supra, 541 U.S. at pp. 624-625 (conc. opn. of O’Connor, J.).)

7. In a separate concurring opinion in Gant, Justice Scalia explained his preference, as he had indicated in Thornton, was to abandon entirely the application of the officer-safety rationale of Chimel in the context of an automobile search incident to arrest (that is, the first part of Justice Stevens’s two-part rule) and hold, “a vehicle search incident to arrest is ipso facto ‘reasonable’ only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred.” (Gant, supra, 556 U.S. at p. 353 (conc. opn. of Scalia, J.).) However, because there were four dissenting votes to maintain Belton’s bright-line rule permitting a warrantless search of the passenger compartment of an automobile incident to any lawful arrest of the occupant, Justice Scalia joined Justice Stevens’s opinion to avoid a four-one-four decision that would leave the governing rule uncertain. (Gant, at p. 354.)
Significantly for the argument advanced by Johnson in the case at bar, Justice Scalia’s suggested approach in *Thornton*, expressly adopted by the Court in *Gant*, was predicated on the reasonableness of a search for evidence “when and where the perpetrator of a crime is lawfully arrested.” (*Thornton v. United States*, supra, 541 U.S. at p. 630 (conc. opn. of Scalia, J.).) It was those searches, “permitted by Justice Scalia’s opinion” when based on a reasonable belief the vehicle contained evidence relevant to the crime of arrest, that the *Gant* majority concluded “are reasonable for purposes of the Fourth Amendment” as incident to a lawful arrest. (*Gant, supra*, 556 U.S. at p. 347.) In other circumstances, legitimate law enforcement evidentiary interests were adequately safeguarded by the ability of officers to search any area of a vehicle in which evidence might be found when there is probable cause to believe the vehicle contains evidence of criminal activity. (Id. at pp. 346-347.)

Here, the search of Johnson’s car, parked two blocks away from the site of his arrest, did not occur “when and where” he was lawfully arrested. Because it did not take place “where the suspect was apprehended,” as posited by Justice Scalia (*Thornton v. United States*, supra, 541 U.S. at p. 630 (conc. opn. of Scalia, J.)), it was not a valid search incident to Johnson’s arrest.

**4. The Search of Johnson’s Automobile Was Supported by Probable Cause**

Johnson also contends the trial court’s alternate ground for denying his motion to suppress—that Officer Fluty’s observation of a bag containing marijuana in plain view on the passenger seat of the car established probable cause to believe the vehicle, which had been recently driven, contained evidence of criminal activity (transportation of marijuana in violation of Health and Safety Code section 11360, subdivision (a)—was erroneous. Johnson is only partially correct. Although the court’s reasoning was flawed, its conclusion the search was supported by probable cause was not.

Effective January 1, 2016—four months prior to Johnson’s arrest—the Legislature amended Health and Safety Code section 11360, which makes it unlawful to transport, import into the state, sell, furnish, administer or give away marijuana, to define “transport” to mean “transport for sale.” (Health & Saf. Code, § 11360, subd. (c); Stats. 2015, ch. 77, § 1.) The practical effect of this amendment is that transportation of marijuana in a vehicle established probable cause to search the car. The *Waxler* court held, “That California has decriminalized medicinal marijuana in some situations and has reduced the punishment associated with possession of up to an ounce of marijuana does not bar a law enforcement officer from conducting a search pursuant to the automobile exception. Here, Deputy Griffin was entitled to investigate to determine whether appellant possessed marijuana for personal medical needs and to determine whether he adhered to the CUA’s limits on possession.” (*Waxler*, at p. 723; see *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1055 [affirming denial of a motion to suppress because “the Compassionate Use Act provides a limited defense against prosecution, but does not provide a shield against reasonable investigations and searches”].)

We need not address Johnson’s argument *Waxler* was wrongly decided. While watching the hand-to-hand transaction on the closed circuit television, the officers saw Johnson in possession of a clear plastic bag with multiple off-white, rock-like substances. The customer took only one of them. Yet when Detective Owens searched Johnson following his arrest, he found no other drugs on Johnson’s person. He also did not find the $5 bill that had been given to Johnson during the exchange. Because Johnson had entered his car immediately after the transaction with the woman, Owens had a substantial basis to believe that Johnson left the plastic bag with the remaining rock-like objects and the money he had been paid in the car and that a search of the vehicle would, therefore, disclose contraband or evidence of criminal activity. In short, Owens had probable cause to search the car under the automobile exception to the general prohibition on warrantless searches. (See *Pennsylvania v. Labron*, supra, 518 U.S. at p. 940; *Robey v. Superior Court*, supra, 56 Cal.4th at p. 1234.) The motion to suppress was properly denied.

**DISPOSITION**

The judgment is affirmed.

PERLUSS, P. J.

We concur: ZELON, J., SEGAL, J.
Cite as 18 C.D.O.S. 3050

THE PEOPLE, Plaintiff and Respondent, v. KODY LEE SAMUELS, Defendant and Appellant.

2d Crim. No. B280619
In The Court of Appeal of the State of California
Second Appellate District
Division Six
(Super. Ct. No. 1450951)
(Santa Barbara County)
Filed March 28, 2018

COUNSEL
Wayne C. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.
Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Analee J. Brodie, Deputy Attorney General, for Plaintiff and Respondent.

OPINION

In 2011, the Legislature enacted the Criminal Justice Realignment Act (Realignment Act or Act) to address public safety issues. (People v. Scott (2014) 58 Cal.4th 1415, 1418 (Scott).) Among the Act’s purposes are: (1) reducing recidivism, and (2) using resources more efficiently by supporting community-based corrections programs. (Pen. Code, §17.5, subd. (a)(1) & (8)(B); see also People v. Lynch (2012) 209 Cal.App.4th 353, 361; People v. Cruz (2012) 207 Cal. App.4th 664, 679.) One such community-based program is the “‘split sentence,’ which allows a defendant to serve a realigned sentence partially in local custody and partially on mandatory supervision by the probation department.” (People v. Borynack (2015) 238 Cal.App.4th 958, 963; see § 1170, subd. (h)(5).) While under mandatory supervision, a defendant is “entitled to only actual time credit against the term of imprisonment” unless “in actual custody related to the sentence imposed by the court.” (§ 1170, subd. (h)(5)(B).)

Here, we hold that pursuant to section 1170, subdivision (h)(5)(B), an incarcerated defendant may not accrue section 4019 credits against a term of mandatory supervision unless the conduct resulting in the supervision was the “true and only unavoidable basis” for the incarceration. (People v. Bruner (1995) 9 Cal.4th 1178, 1192, italics omitted (Bruner).) If the defendant’s status and performance on mandatory supervision were merely factors the court considered in its decision to impose custodial time in another case, the defendant is entitled to only actual time credits against the term of mandatory supervision. We affirm.

FACTUAL AND PROCEDURAL HISTORY

In March 2014, Kody Lee Samuels pled no contest to the unlawful driving or taking of a vehicle (the vehicle case). (Veh. Code, § 10851, subd. (a).) The trial court suspended execution of sentence and ordered five years of mandatory supervision. (§ 1170, subd. (h)(5)(B).)

Over the next 14 months, Samuels violated the terms of his supervision multiple times. He served several stints in custody. In May 2015, he pled no contest to possession of methamphetamine for sale (the drug case). (Health & Saf. Code, §11378.) He also admitted violating the terms of his mandatory supervision. The trial court sentenced him to three years in county jail on the drug case. It released him from custody on the vehicle case, and reinstated mandatory supervision.

Samuels was incarcerated from May 21, 2015, to May 5, 2016. After his release, Samuels moved to correct the credit calculation in his vehicle case, claiming entitlement to work and conduct credits for the 351 days he spent in jail. (See § 4019, subds. (a)(6), (b) & (c).) The trial court denied the motion. It found that Samuels was released from custody in his vehicle case on May 20, 2015, and that Samuels’s drug case was “unrelated” to his vehicle case. Accordingly, it ruled that Samuels was not in “actual custody” on his vehicle case from May 2015 to May 2016, and was not entitled to work and conduct credits against his term of mandatory supervision.

DISCUSSION

Samuels contends he was in “actual custody related to the sentence imposed by the [trial] court” on his vehicle case when he was incarcerated on his drug case, and is thus entitled to work and conduct credits against his term of mandatory supervision. His logic is as follows: The court presumably considered all relevant factors when it sentenced him on his drug case. (Cal. Rules of Court, rule 4.409.) Relevant factors in aggravation include his status as a mandatory supervisee and his performance during supervision. (Cal. Rules of Court, rule 4.421(b)(4) & (5).) The mandatory supervision in Samuels’s vehicle case is thus presumed to have factored into the sentence imposed on his drug case. His custody on the latter is therefore “related to the sentence imposed” on the former. We are not persuaded.

This appeal presents a question of statutory interpretation subject to de novo review. (People v. Prunty (2015) 62 Cal.4th 59, 71.) “As in any case involving statutory interpretation, our fundamental task . . . is to determine the Legislature’s
were in custody because of the sentences imposed in previous proceedings. 

In all three cases, the court rejected the defendants’ requests for credits. (Bruner, supra, 21 Cal.4th at pp. 1182-1192.) In In re Atiles (1983) 33 Cal.3d 805 (Atiles) to the extent it reached a contrary conclusion. (Bruner, supra, 9 Cal.4th at p. 1194.) Both Bruner and Atiles considered the dual-credit issue in the context of a defendant’s parole violation: “how section 2900.5 [is] applied when a defendant sentenced to a new criminal term seeks credit for presentence custody attributable to a parole revocation caused in part, but not exclusively, by the conduct that led to the new sentence.” (Bruner, at pp. 1182-1183.) In Atiles, the court held that a trial court “is not required to eliminate all other possible bases for the defendant’s presentence incarceration” before granting section 2900.5 credits. (Atiles, at p. 810.) Instead, “[t]he court need only determine that the defendant was not already serving a term for an unrelated offense when restraints related to the new charge were imposed on him, and the conduct related to the new charge is a basis for those restraints.” (Id., italics added.)

The Bruner court rejected this holding, finding persuasive the concerns Justice Mosk expressed in his dissent in Atiles. (Bruner, supra, 9 Cal.4th at p. 1193.) “[N]either the words nor the history of section 2900.5 imply[ed] that separately imposed criminal and revocation terms based on unrelated conduct should collapse into one simultaneous term whenever it happens that there was some common factual basis for both proceedings.” (Bruner, at pp. 1193-1194.) Rather, “where a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a ‘but for’ cause of the earlier restraint.” (Id. at pp. 1193-1194.)

The situation here is analogous. Like the Bruner, Joyner, and Rojas defendants, Samuels seeks dual credits for “separately imposed . . . terms based on unrelated conduct”: that in his vehicle case, and that in his drug case. (Bruner, supra, 9 Cal.4th at p. 1193.) But Samuels’s vehicle case was not the “true and only unavoidable basis” for the time he spent in custody (id. at p. 1192, italics omitted); it was merely one factor the trial court presumably considered when it sentenced him to jail in his drug case. Under Bruner, that the vehicle case provided a basis for Samuels’s jail sentence does not entitle him to credits against his term of mandatory supervision. (Id. at p. 1193.) “But for” causation is required. (Id. at pp. 1193-1194.)

The purposes of the Realignment Act reinforce our conclusion. The Act aims to “reduce[e] recidivism among crimi-
nal offenders” and to increase “[i]ntensive community supervision.” (§ 17.5, subd. (a)(1) & (8)(B).) Allowing Samuels to accrue section 4019 credits on his vehicle case while incarcerated on his drug case could encourage recidivism by rewarding him with a shorter term of mandatory supervision. And a shorter term of mandatory supervision would decrease, rather than increase, the intensive community supervision the trial court ordered Samuels to receive.

Samuels argues we should not apply the Bruner standard here because the Legislature was aware of the strict “but for” causation requirement of section 2900.5 and used different language when it wrote section 1170, subdivision (h)(5)(B). (See People v. Weidert (1985) 39 Cal.3d 836, 844 [the Legislature is “deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted”].) But under section 2900.5, subdivision (b), a defendant can only earn credits “where the custody . . . is attributable to proceedings related to the same conduct for which the defendant has been convicted.” (Italics added.) And under section 1170, subdivision (h)(5)(B), a defendant can only earn credits where the “custody [is] related to the sentence imposed by the court.” (Italics added.) Because the relevant language in the two statutes is identical, we presume the Legislature meant to adopt the strict causation requirement of section 2900.5, subdivision (b), when it wrote section 1170, subdivision (h)(5)(B). (Scott, supra, 58 Cal.4th at p. 1424; Harrison, supra, 48 Cal.3d at p. 329; see Bruner, supra, 9 Cal.4th at p. 1180 [“related to” requires application of a strict causation standard].)

Samuels also argues that the trial court’s application of a strict causation requirement to section 1170, subdivision (h)(5)(B), forced counsel to argue against release on his vehicle case—and for a jail term concurrent with his drug case instead—to entitle him to conduct credits, which he deems an absurd proposition. (See Flatt v. Superior Court (1994) 9 Cal.4th 275, 289 [attorney should not take a position adverse to a client’s interest].) But counsel did not argue for a concurrent jail term on the vehicle case at sentencing. We thus need not consider Samuels’s argument here. (People v. Brawley (1969) 1 Cal.3d 277, 294-295 [issues not raised at trial and not supported by record on appeal need not be considered].) We note, however, that arguing for incarceration over release is not an inherently absurd proposition; a defendant may rationally choose a shorter term of custody over a longer term of supervision. (See In re Tyrell J. (1994) 8 Cal.4th 68, 82, overruled on other grounds by In re Jaime P. (2006) 40 Cal.4th 128, 139.)

Finally, Samuels urges us to apply the rule of lenity to resolve this case in his favor. But “the rule of lenity applies ‘“only if two reasonable interpretations of the statute stand in relative equipoise.’ [Citation.]’” [Citations.]’ “The rule “has no application where, ‘as here, a court “can fairly discern a contrary legislative intent.”’”’ [Citations.]’ [Citation.]” (Scott, supra, 58 Cal.4th at p. 1426.)

DISPOSITION
The trial court’s January 25, 2017, order denying Samuels’s motion to correct credits is affirmed.

CERTIFIED FOR PUBLICATION.

TANGEMAN, J.
We concur: YEGAN, Acting P. J., PERREN, J.
Cite as 18 C.D.O.S. 3053

THE PEOPLE, Plaintiff and Respondent, v. SALVADOR OSWALDO CHAVEZ et al., Defendants and Appellants.

No. D069533
In The Court of Appeal of the State of California
Fourth Appellate District
Division One
(Super. Ct. No. SCS273327)
APPEALS from judgments of the Superior Court of San Diego County, Stephanie Sontag, Judge. Affirmed with directions.
Filed March 28, 2018

COUNSEL
Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant Salvador Oswaldo Chavez.

Dacia A. Burz, under appointment by the Court of Appeal, for Defendant and Appellant Daniel Arce Gonzalez.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Brendon W. Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

Summer Stephan, District Attorney, Mark A. Amador, Chief Deputy District Attorney, Linh Lam, Assistant Chief Deputy District Attorney, and Vanessa C. Gerard Benner, Deputy District Attorney, as Amicus Curiae on behalf of Plaintiff and Respondent.

OPINION

Following a physical altercation involving two groups of men, defendant Salvador Oswaldo Chavez knifed a member of the other group in the back and defendant Daniel Arce Gonzalez shot and killed another member of that group. Chavez and Gonzalez appeal judgments following their jury convictions of second degree murder (Pen. Code, § 187), assault with a deadly weapon (§ 245, subd. (a)) and assault with a deadly weapon (§ 245, subd. (a)). On appeal, Chavez contends: (1) the trial court erred by instructing with CALCRIM No. 3472, but not modifying the instructions to allow the trial court to exercise its discretion to strike and (2) the court abused its discretion under Evidence Code section 352 by admitting the testimony of an eyewitness regarding the death threat he (Gonzalez) made to dissuade that eyewitness from testifying at trial, and also abused its discretion by denying his motion for mistrial. Chavez joins in Gonzalez’s contentions. After the parties submitted their briefs in this case, Gonzalez filed a supplemental brief arguing that we should: (1) conclude the provisions of 2017 Senate Bill No. 620, effective January 1, 2018, apply retroactively to judgments not yet final; and (2) remand the matter for resentencing to allow the trial court to exercise its discretion to strike or dismiss the section 12022.53 firearm enhancement. Based on our reasoning post, we affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

On June 17, 2014, the Rincon Del Mar restaurant in National City was filled with customers, many of whom were there to watch the World Cup soccer match between Mexico and Brazil. There was one group of customers with ties to Tijuana, including Gonzalez, Chavez, Alfonso Vasquez, Vincente Roldan, and brothers Vicente Gutierrez (Vicente) and Rafael Gutierrez (Rafael). Another group of customers had ties to National City, including Josue Crook, Edward (also known as Eddie) Lopez, Jesus Morfin, Anthony Aguilar, Tomas (also known as Tommy) Lujan, and Enrique Chavez. After the match, Rafael argued with Morfin in front of the restaurant about whether he had a problem with his brother Vicente. When Morfin approached Vicente, Vicente punched him in the face, causing him to fall to the ground unconscious. Vicente and Rafael beat Morfin while he was unconscious on the ground. Meanwhile, Gonzalez hit Aguilar in the face, causing him to fall unconscious onto Lujan who had been standing nearby. While on the ground, Lujan was punched by Gonzalez. Lujan escaped by crawling under a flatbed truck that was parked on the street directly in front of the restaurant. When Lujan tried to get out from under the truck, Gonzalez kicked him in the face. From under the truck, Lujan saw Gonzalez pacing back and forth, holding a pistol by his side. During the fight, Gonzalez and Chavez at times were back-to-back and then face-to-face. Other members of the two groups also began fighting with each other.

1. All statutory references are to the Penal Code unless otherwise specified.

2. To avoid confusion, we refer to defendant Salvador Chavez by his last name and Enrique Chavez by his full name.
After Juan Carlos Lopez, the restaurant’s owner, broke up the initial physical altercation, the combatants moved away from the restaurant. Rafael and Vicente ran southward as Eddie Lopez chased them. When Eddie Lopez was about 15 feet away from them, he threw a beer bottle at them, possibly striking one of them, and then ran back toward the restaurant. While Eddie Lopez was running after them, Gonzalez ran in Eddie Lopez’s direction and, from a distance, pointed a gun at his back. Crook, who had just come out of the restaurant, approached Gonzalez from behind and Crook tapped him on the shoulder. Gonzalez spun around and shot Crook twice at point-blank range, striking him in the chest near his armpit and in the upper right side of his back. Immediately before being shot, Crook put up his hands and began turning away from Gonzalez. Except for possibly a plastic cup, Crook did not have anything in his hands at the time and no weapons were found on or near him. Gonzalez then pointed his gun at Lujan, but Juan Carlos Lopez intervened and begged him not to shoot. Crook died from his gunshot injuries.

While Eddie Lopez was running away from the Gutierrez brothers, he saw Chavez chasing after him with a knife in his hand. However, immediately after Gonzalez shot Crook, Chavez stopped his chase and ran eastward with Gonzalez. Chavez and Gonzalez got into a black truck and fled the scene. Remaining at the scene, Eddie Lopez felt his shirt was wet and then realized he had been stabbed in the back.

Gonzalez was arrested in Mexico and extradited to the United States. Police searched Chavez’s house and found two folding knives and clothing matching what he was seen wearing on the day of the shooting. Juan Carlos Lopez told police the restaurant’s surveillance camera was inoperable because a car crashed into the restaurant two to three weeks before the shooting. However, police searched the restaurant and found a flash drive containing a five- to seven-minute video recording from one of its surveillance cameras, which recording showed, inter alia, the initial physical altercation between the two group’s members and Crook placing an object on the ground. Roldan did not see either Gonzalez or Chavez attack or shoot anyone. In his defense, Chavez presented the testimony of Scott Fraser, an eyewitness identification expert, who testified generally about how alcohol, memory convergence, and stress could result in an eyewitness’s faulty memory. The jury found Gonzalez and Chavez guilty on both counts and found true the firearm allegation.

The trial court sentenced Gonzalez to an indeterminate term of 40 years to life in prison plus a consecutive determinate term of seven years. The court sentenced Chavez to an indeterminate term of 15 years to life in prison plus a consecutive determinate term of two years. Gonzalez and Chavez each timely filed a notice of appeal challenging the judgments against them.

DISCUSSION

I

Admission of Eddie Lopez’s Identification of Chavez

Chavez contends, and Gonzalez joins in his contention, that the trial court erred by admitting Eddie Lopez’s in-court identification of him (Chavez) as the man who stabbed him. In particular, Chavez argues Eddie Lopez’s in-court identification was the result of a pretrial identification procedure that was unduly suggestive and that pretrial identification was unreliable under the totality of the circumstances.

A

Before trial, Chavez filed an in limine motion to exclude evidence of Eddie Lopez’s pretrial identification of him as the man who stabbed him in the back. Noting that during a pretrial interview with police Eddie Lopez described his at-

3. We refer to Juan Carlos Lopez and Eddie Lopez by their full names to avoid confusion.
4. According to Lujan, at the time of the shooting, he (Lujan) was 12 feet away from where the shooting occurred.
5. A video recording from the restaurant’s surveillance camera in the exterior front area of the restaurant showed, inter alia, Chavez at the time of the initial physical altercation holding an object in a manner consistent with someone holding a folding knife. However, because the camera’s angle or range was limited, the recording did not show Eddie Lopez throwing the beer bottle at the Gutierrez brothers, Gonzalez pointing his gun at Eddie Lopez, Crook approaching Gonzalez from behind and tapping his shoulder, Gonzalez turning and shooting Crook, or Chavez stabbing Eddie Lopez in the back.
6. Gonzalez subsequently admitted the truth of the other allegations.
7. The trial court imposed a total consecutive determinate term of seven years, consisting of two years for count 2, two years for the section 12022.1, subdivision (b), enhancement, and three years for Gonzalez’s three prior prison terms (§ 667.5, subd. (b)). As Gonzalez notes, the court’s minute order and abstract of judgment do not accurately reflect the consecutive determinate sentence it imposed. Instead of the two-year term the court imposed for count 2, they erroneously indicate a three-year term was imposed. Accordingly, we direct the trial court to issue a new minute order nunc pro tunc and amended abstract of judgment to reflect the correct consecutive two-year term imposed for count 2.
tacker as wearing a red T-shirt and blue jeans and the police detective showed him only his (Chavez’s) photograph, he argued Eddie Lopez’s pretrial identification was unduly suggestive and should be excluded because there were at least two people wearing red shirts and blue jeans. He also argued the photograph shown Eddie Lopez depicted him (Chavez) holding something in his hand, which made the pretrial identification more suggestive.

The prosecutor opposed the motion, arguing Eddie Lopez’s pretrial identification was not unduly suggestive and was reliable based on the totality of the circumstances. The prosecutor described the circumstances of that pretrial identification. On June 25, 2014, eight days after the incident, National City Police Detectives Depascale and Ballardo interviewed Eddie Lopez at the National City Police Department. When shown various photographs taken about the time of the incident, Eddie Lopez recognized and/or identified many of the persons shown in the photographs. Eddie Lopez then described his assailant, stating: “There was another guy, a fat, short guy in a red t-shirt and blue jeans. He’s the one who stabbed me.”

Eddie Lopez stated he did not see his assailant until he turned around and saw his assailant with a knife. Detective Ballardo left the room and returned with one photograph, which he placed in front of Eddie Lopez without saying anything. Eddie Lopez immediately stated: “[T]hat’s him, that’s the guy who stabbed me.” He did not identify the person shown in the photograph as Chavez by name, but only as the man who stabbed him. The prosecutor argued Eddie Lopez’s identification of Chavez, as shown in the photograph, was not unduly suggestive because he had been shown other photographs before instantly identifying the photograph depicting Chavez in a red T-shirt and blue jeans as his assailant. The prosecutor also argued the fact that the photograph showed Chavez holding something in his hand did not make the pretrial identification unduly suggestive or unreliable because Eddie Lopez immediately identified the man in the red T-shirt and blue jeans (i.e., Chavez) as his assailant before having sufficient time to closely examine the photograph and see that the man had something in his hand. The prosecutor conceded there was another man at the restaurant that day, but that man (Maurice Lopez) was wearing white shorts and not blue jeans. Also, the prosecutor noted that during a July 10, 2014 interview with police Chavez identified himself as the man depicted in surveillance camera photographs wearing the red shirt. Accordingly, the prosecutor argued the evidence of Eddie Lopez’s pretrial identification of Chavez should be admitted in evidence at trial.

At the hearing on Chavez’s motion, counsel repeated the arguments they made in their papers. Chavez argued he did not want Eddie Lopez’s pretrial identification of him to be admitted as a “backhanded” identification even though the prosecutor apparently planned to have Eddie Lopez identify him (Chavez) as his assailant at trial. The trial court commented: “So really the issue is whether that identification impacts [Eddie] Lopez’s identification of Mr. Chavez at trial.” The court denied the motion, finding there was nothing unduly suggestive about the pretrial identification.

At trial, Eddie Lopez testified regarding the incident and, in particular, described the man he saw running after him holding a knife. He described the man as “[j]ust a little heavy-set, red t-shirt, blue jeans.” From a distance of about 10 feet, he saw the man holding a knife with a blade that was “maybe a couple of inches long.” When shown the surveillance camera photograph of Chavez, Eddie Lopez stated it “looks like the guy that was running behind me” and confirmed it was a fair and accurate photograph of that man. He thought he remembered telling the man to put the knife down. When asked whether he saw that man in court, Eddie Lopez stated: “I’m not sure. I mean I just remember the clothing and I remember that.” When shown the video recording from the restaurant’s surveillance camera, Eddie Lopez stated that he recognized the man in the red shirt and blue jeans shown in the recording. On cross-examination, Eddie Lopez stated he did not know the name of the man shown wearing the red shirt and blue jeans. On redirect examination, he confirmed the only person he saw with a knife was the man wearing the red shirt. He could not say whether that man had stabbed him, but he saw that man behind him with a knife in his hand.

Detective Depascale testified at trial and stated he and Detective Ballardo had spoken with Eddie Lopez on about June 25, 2014, at the police station. He stated they did not show Eddie Lopez the video recording from the surveillance camera, but had shown him about five still photographs from that recording. On cross-examination, Chavez’s counsel asked Depascale: “When [Eddie] Lopez identified the man in the red shirt, isn’t it true that Detective Ybarra [sic] came in and showed him a picture, correct?” Depascale replied, “Yes, came in and placed a picture on the interview room table.”

Chavez’s counsel asked: “And the picture only had the man in the red shirt on it, correct?” Depascale replied, “No, sir.” Chavez’s counsel then asked Depascale questions about a still photograph (exh. No. 14) that had been taken from the surveillance video recording.

In order to determine whether the admission of identification evidence violates a defendant’s constitutional right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness’s degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.” (People v. Cunningham (2001) 25 Cal.4th 926, 989 (Cunningham).) A single person showup, or a single person photograph, is not inherently unfair or suggestive. (People v. Clark (1992)
48x72

Eddie Lopez’s in-court testimony identifying the photograph of the apparently argues on appeal only that the trial court erred by admitting placed a picture on the interview room table.” Accordingly, Chavez in the red shirt, isn’t it true that Detective Ybarra [\textit{supra} (1998) 19 Cal.4th 680, 700.] On appeal, we review de novo, or independently, a trial court’s conclusion whether or not an identification procedure is unduly suggestive or unreliable under the totality of the circumstances. (\textit{Id.} at pp. 698-699.) If an identification procedure was not unduly suggestive, there is no violation of a defendant’s due process right. (\textit{Ochoa}, supra, 19 Cal.4th at p. 412.) If a defendant’s federal constitutional right to due process is violated, reversal of the defendant’s conviction is required unless the People show that error was harmless beyond a reasonable doubt. (\textit{Chapman v. California} (1967) 386 U.S. 18, 24 (\textit{Chapman}.).)

Chavez asserts Eddie Lopez’s pretrial identification of him as his assailant was the result of the impermissibly suggestive identification procedure used by the National City Police detectives during their pretrial interview of Eddie Lopez and his pretrial identification was also unreliable under the totality of the circumstances. Chavez therefore argues the trial court erred by admitting Eddie Lopez’s in-court identification of him (Chavez) as his assailant, which identification was the result of, or tainted by, his pretrial identification.\footnote{8} However, based on our independent review of the record, we conclude that the pretrial identification procedure used by the detectives was not unduly suggestive and Eddie Lopez’s identification of the photograph depicting the man who attacked him (i.e., Chavez) during that procedure was reliable under the totality of the circumstances.

During their pretrial interview of Eddie Lopez, the detectives first questioned him and ascertained his detailed version of events before showing him photographs of various persons from the restaurant’s surveillance camera video recording. After not recognizing any of those persons as his assailant, Eddie Lopez stated: “There was another guy, a fat, short guy in a red t-shirt and blue jeans. He’s the one who stabbed me.” Detective Ballardo left the room and returned with a single photograph depicting a man wearing a red shirt and blue jeans (i.e., Chavez, per his own subsequent admission to police) obtained from the surveillance camera video recording. Without saying anything, Ballardo placed the photograph in front of Eddie Lopez, who immediately stated: “[T]hat’s him, that’s the guy who stabbed me.”

Although single photograph lineups may be suggestive and not the preferred identification procedure, we cannot conclude Eddie Lopez’s pretrial identification of Chavez was unduly suggestive in the circumstances of this case. The detectives did not present Eddie Lopez with just one photograph during their interview, but showed him a number of photographs before he spontaneously described his assailant to them. Given that description, Ballardo obtained a still photograph of a man matching that description from the restaurant’s surveillance camera video recording. The photograph did not bear any markings or titles and Ballardo did not make any statement when he placed it in front of him. Without hesitation, Eddie Lopez identified the man depicted in the photograph as his assailant. Although that identification procedure was suggestive, it was not unduly suggestive. Ballardo simply presented Eddie Lopez with a photograph from the surveillance camera video recording of a man that matched his description of his assailant and did not expressly or implicitly attempt to persuade Eddie Lopez to identify that man as his assailant.

Assuming arguendo that pretrial identification procedure was unduly suggestive, we nevertheless conclude Eddie Lopez’s pretrial identification of the man in the photograph (i.e., Chavez) was reliable under the totality of the circumstances. Most importantly, the man wearing a red T-shirt and blue jeans depicted in the photograph was the only person shown in the surveillance camera video recording before or during the incident who was wearing that type of clothing. The only other man with a red T-shirt was wearing white shorts, not blue jeans, and had a distinctively different appearance.\footnote{9} Further...
thermore, the man depicted in the photograph also matched Eddie Lopez’s additional description of his assailant as a “fat” and “short” man. He also had an excellent opportunity to view his assailant at the time. He turned around and faced him from a distance of only 10 feet and asked him to put the knife down. He viewed the man long enough to remember what he was wearing (i.e., red T-shirt and blue jeans) and his body type (i.e., fat and short). His pretrial identification of the man in the photograph as his assailant was made only eight days after the attack. Finally, the immediacy and certainty of his pretrial identification of the man depicted in the photograph as his assailant supports the reliability of his identification. Based on our consideration of the totality of the circumstances, we conclude Eddie Lopez’s pretrial identification of the man depicted in the photograph as his assailant (i.e., the man who chased him with a knife) was reliable. (Cunningham, supra, 25 Cal.4th at p. 989.) Because Eddie Lopez’s pretrial identification was reliable, it did not violate Chavez’s federal constitutional due process right and the trial court properly allowed him to testify that the man shown in that photograph (i.e., Chavez) depicted his assailant. (Ochoa, supra, 19 Cal.4th at p. 412.)

Contrary to Chavez’s assertion, that in-court identification was not the result of, or tainted by, any unduly suggestive pretrial identification procedure or unreliable pretrial identification. People v. Rodriguez (1977) 68 Cal.App.3d 874, cited by Chavez, is factually inapposite to this case and does not persuade us to reach a contrary conclusion. Furthermore, neither the fact the man in the photograph appeared to be holding an object that possibly could have been a knife, nor Eddie Lopez’s prior unfamiliarity with that man, made his pretrial identification unreliable based on the totality of the circumstances.

II

Limitation on Opinion Testimony by Chavez’s Eyewitness Identification Expert

Chavez contends the trial court erred by improperly limiting the scope of opinion testimony by Fraser, his eyewitness identification expert.

A

Before trial, Chavez filed an in limine motion to allow him to present testimony by an eyewitness identification expert. His motion did not state the specific nature or content of his expert’s expected testimony. The prosecution opposed the motion, arguing such expert testimony should be excluded because there was substantial corroboration of the eyewitnesses’ identification of Chavez and Gonzalez. The trial court granted Chavez’s motion, but stated the prosecution had the discovery right to receive his expert’s reports and information regarding the expected substance of his testimony.

After the prosecution completed its case-in-chief, Chavez’s counsel presented the prosecution and the trial court with a letter from Fraser, his eyewitness identification expert, regarding the expert’s expected testimony. The prosecutor described the content of that letter, stating the expert’s expected testimony would relate to the “general topics of fight or flight, conscious transference, memory decay, and confus-

ences.” She moved to exclude that type of testimony, arguing it potentially affected witness credibility issues. Chavez’s counsel replied that those issues were within the broad topic of witness identifications and should be admitted.

The trial court noted that before trial the proffered eyewitness identification testimony appeared to be pertinent, but that the expert’s letter appeared to enlarge the scope of that testimony. The prosecutor objected to the enlarged scope of the expert’s testimony, referring to “the last couple of sentences of the first paragraph, that he be offered to testify about situations in which witnesses misperceive a harmless object to be a lethal weapon and provide an opinion about the discrepancies in Mr. Lujan’s [sic] testimony regarding his purported knife wound and his contradictory statement at trial. I think that this is again going a little bit a foul of the jury’s [province] and determination of a witness’s credibility . . . .” The court agreed, stating: “I don’t know how he’s going to comment on anybody’s testimony.” Chavez’s counsel then stated that he planned to use hypotheticals. He stated that until the previous night he did not know the depth of his expert’s knowledge. The prosecutor again stated the expert’s expected testimony was “dang-

erously coming close to opining about the credibility of a specific witness, given the way that this particular letter is written.” The court indicated that an Evidence Code section 402 hearing may be needed to ascertain exactly what the expert’s testimony would be, stating: “[b]ecause a general statement . . . that somebody can see something take it as a weapon when it’s not, I’m not sure that’s a subject appropriate for expert testimony. The fact that a witness’s statement might conflict with something that he said before, again I don’t see that that’s a subject for expert testimony.”

Chavez’s counsel stated:

“Just to clarify, the intent is for Dr. Fraser to explain that these witnesses are not untruthful, they are not fabricat-

ing evidence, but there are certain processes in the brain that occur after witnessing a traumatic event, which he can explain . . . what the cause of the discrepancies is; that these people are not lying, they are not disingenuous, they have suffered whatever memory decay, conscious transference, misperception, post-observational influences. And these are all things that affect the memory retention after a traumatic event. And that is what he is going to testify to explain to the jury why the incon-
The court replied:

“Well, I wouldn’t allow a hypothetical. I would—because—well, the most I would allow is if there are studies that—where [Fraser] can state that after a traumatic event that witnesses are not always reliable because of other factors that are going through—chemical or otherwise, through the brain, that is one thing, but to comment on specific evidence, no. To comment on somebody, even hypothetical or not to comment on what you perceive to be discrepancies, you argue that to the jury. That is what the juries are for. They are the fact finders. They find whether there are material discrepancies between witness statements. It is not up to your expert to decide whether there are discrepancies, and if there are discrepancies, why.

“...[I]f there’s a foundation for the expert’s opinion concerning the reliability of eyewitnesses of an event after a traumatic event, if there is a basis for that generally, I might allow it, but not commenting hypothetically or otherwise on specific witness’s testimony, because the jury’s going to decide whether there’s discrepancies. . . It’s up to them to decide whether they are reliable witnesses.” (Italics added.)

The court stated that was its ruling and then asked the prosecutor whether she would like an Evidence Code section 402 hearing. The court ruled that it would not allow that type of expert testimony.

Chavez then presented Fraser’s expert testimony generally on how alcohol, memory convergence, and stress could cause an eyewitness to have a faulty memory.

B

Evidence that is relevant is generally admissible at trial. (Evid. Code, §§ 210, 350.) A criminal defendant has the right to present the testimony of witnesses in his or her defense, subject to a court’s application of ordinary rules of evidence which generally does not infringe on a defendant’s right to present a defense. (People v. Cromwell (2005) 45 Cal.4th 50, 82.) In particular, a court may exclude relevant evidence pursuant to Evidence Code section 352. (People v. Babbitt (1988) 45 Cal.3d 660, 684.) Evidence Code section 801 allows expert opinion testimony on subjects that are “sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” However, an expert witness may not give testimony that “amounts to no more than an expression of his [or her] general belief as to how the case should be decided.” (People v. Killebrew (2002) 103 Cal.App.4th 644, 651.)

Regarding eyewitness identifications, expert testimony may be allowed to “inform[] the jury of certain factors that may affect such an identification in a typical case.” (People v. McDonald (1984) 37 Cal.3d 351, 370.) “[T]o the extent that [expert testimony] may refer to the particular circumstances of the identification before the jury, such testimony is limited to explaining the potential effects of those circumstances on the powers of observation and recollection of a typical eyewitness.” (Id. at pp. 370-371.) Accordingly, a trial court may exclude expert testimony “that any particular witness is or is not truthful or accurate in his [or her] identification of the defendant.” (Id. at p. 370.)

On appeal, we review a trial court’s ruling on the admissibility of expert testimony on psychological factors affecting eyewitness identification for abuse of discretion. (McDonald, supra, 37 Cal.3d at p. 377.) Nevertheless, “[e]xclusion of the expert testimony is justified only if there is other evidence that substantially corroborates the eyewitness identification and gives it independent reliability.” (People v. Jones (2003) 30 Cal.4th 1084, 1112.) Although a “defendant has the general [constitutional] right to offer a defense through the testimony of his or her witnesses [citation], . . . a state court’s application of ordinary rules of evidence . . . generally does not infringe upon this right [citations].” (People v. Cromwell (2005) 37 Cal.4th 50, 82; see also Holmes v. South Carolina (2006) 547 U.S. 319, 326-327 [application of ordinary rules of evidence generally does not infringe on a defendant’s constitutional right to present a defense].)

---

11. It appears there was no Evidence Code section 402 hearing conducted thereafter.
Chavez’s contention is premised on his assumption that the trial court’s ruling excluded any testimony by Fraser on the issues of fight or flight, conscious transference, memory decay, and confluences, and prohibited him from using hypothetical questions or discussing psychological facts that may explain discrepancies in witness statements. However, the record on appeal does not support that premise. Based on our reading of the trial court’s ruling, quoted ante, it is clear the court excluded only expert testimony, whether directly or hypothetically, on how a traumatic event or other psychological factors affected a specific witness’s memory or the reliability of that witness’s identification. The court stated that it would not allow Fraser “to comment on specific evidence” or to comment on discrepancies in a specific witness’s identification, whether by hypothetical questions or otherwise. (Italics added.) The court noted it was the jury’s function, and not the expert’s function, to decide whether there were discrepancies in a specific witness’s identification or other statements. The court restated its ruling, explaining it would allow expert testimony on eyewitness identifications generally (e.g., on the effect of traumatic events generally), but would not allow Fraser to “comment[] hypothetically or otherwise on specific witness's testimony.” (Italics added.) Accordingly, contrary to Chavez’s assertion, the court did not exclude general expert testimony on the issues of fight or flight, conscious transference, memory decay, and confluences, or from using general hypothetical questions to explain those concepts. Rather, the court excluded such expert testimony to the extent it commented on, whether directly or indirectly, on a specific witness’s identification or other statements or testimony. In so doing, the court did not abuse its discretion. (Cf. People v. Smith (2003) 30 Cal.4th 581, 628 [trial court did not abuse its discretion by excluding expert testimony on credibility of defendant’s expressions of remorse].) Although the court could have expressed, or elaborated on, its ruling in a more concrete or explicit manner, the gist of its ruling, as we summarized it ante, was clear from the record. Accordingly, to the extent Chavez argues the court erred by precluding his expert witness from testifying on those issues generally, he is incorrect.12

12. In any event, contrary to Chavez’s assertion, there was other substantial corroboration of Eddie Lopez’s identification of the man shown in the red shirt and blue jeans in the photograph as his attacker that gave his identification independent reliability. (Jones, supra, 30 Cal.4th at p. 1112.) In particular, before seeing the photograph, Eddie Lopez told the detectives that a man (i.e., a fat, short guy who was wearing a red T-shirt and blue jeans) chased him with a knife shortly before he heard the two gunshots. The jury viewed the surveillance camera video recording, as well as still photographs therefrom, which showed Chavez was the only person matching that description. Therefore, Eddie Lopez’s identification of the man in the photograph as his assailant was substantially corroborated by other evidence.

Substantial Evidence to Support Chavez’s Conviction of Second Degree Murder

Chavez contends there is insufficient evidence to support his conviction of the second degree murder of Crook. In particular, he argues there is insufficient evidence to support a finding that he either: (1) directly aided and abetted Gonzalez’s murder of Crook; or (2) aided and abetted an assault with a deadly weapon by Gonzalez and murder was a natural and probable consequence of that assault.

A

Second degree murder is the unlawful killing of a human being with malice aforethought, but without the additional elements required for first degree murder (e.g., willfulness, premeditation, and deliberation). (§ 187, subd. (a); People v. Cravens (2012) 53 Cal.4th 500, 507.) Malice may be either express or implied. (Cravens, at p. 507.) Malice is express when a defendant manifests a deliberate intention to kill another person. (Ibid.) Malice is implied when the killing of another person is proximately caused by an act, the natural and probable consequences of which are dangerous to life, which act was deliberately performed by a person who knows his or her conduct endangers the life of another and acts with conscious disregard for life. (Ibid.)

Under the direct aiding and abetting theory of liability for a crime, a defendant can be found guilty of that crime if he or she knows of the perpetrator’s unlawful purpose and specifically intends to, and does in fact, aid, facilitate, encourage, or instigate the perpetrator’s commission of that crime. (CALCRIM No. 401; People v. McCoy (2001) 25 Cal.4th 1111, 1117.)

Under the natural and probable consequences theory of aiding and abetting a murder, a defendant can be found guilty of murder if he or she aids and abets a crime (i.e., the target crime) and murder (i.e., the nontarget crime) is a natural and probable consequence of that target crime. (CALCRIM No. 403; People v. Prettyman (1996) 14 Cal.4th 248, 261.) As given by the trial court, CALCRIM No. 403 instructs on the natural and probable consequence theory of liability, stating:

“Before you decide whether the defendant is guilty of murder in the second degree, you must decide whether he is guilty of assault with a deadly weapon or assault with force likely to produce great bodily injury other than the crime charged in Count 2.

“To prove that the defendant is guilty of murder in the second degree, the People must prove that:

“1. The defendant is guilty of assault with a deadly weapon or assault with force likely to produce great bodily injury other than the crime charged in Count 2;
“2. During the commission of assault with a deadly weapon or assault with force likely to produce great bodily injury, a coparticipant in that assault committed the crime of murder;

“AND

“3. Under all the circumstances, a reasonable person in the defendant’s position would have known that the commission of the murder was a natural and probable consequence of the commission of the assault.

“A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

“A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the murder was committed for a reason independent of the common plan to commit the assault, then the commission of murder was not a natural and probable consequence of assault.

“To decide whether [the] crime of murder in the second degree was committed, please refer to the separate instructions that I have given you on that crime.

“The People are alleging that the defendant originally intended to aid and abet an assault with a deadly weapon or assault with force likely to produce great bodily injury.

“If you decide that the defendant aided and abetted one of these crimes and that murder in the second degree was a natural and probable consequence of that crime, the defendant is guilty of murder in the second degree. You do not need to agree about which of these crimes the defendant aided and abetted.”

“The natural and probable consequences doctrine is based on the recognition that those who aid and abet [a crime] should be responsible for the harm they have naturally, probably, and foreseeably put in motion.” (People v. Avila (2006) 38 Cal.4th 491, 567.)

Under the natural and probable consequences doctrine, an aider and abettor need not have actually foreseen the nontarget crime; rather, the question is whether, viewed objectively, that the nontarget crime was reasonably foreseeable (i.e., whether a reasonable person in the defendant’s position would have, or should have, known the nontarget crime was a reasonably foreseeable consequence of the target crime he or she aided and abetted). (People v. Medina (2009) 46 Cal.4th 913, 920 (Medina); People v. Mendoza (1988) 18 Cal.4th 1114, 1133 (Mendoza); People v. Nguyen (1993) 21 Cal. App.4th 518, 535 (Nguyen.) To be reasonably foreseeable, the consequence need not have been a strong probability; rather, a possible consequence that might reasonably have been contemplated is sufficient. (Medina, at p. 920; Nguyen, at p. 535.) “A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case [citation] and is a factual issue to be resolved by the jury.” (Medina, at p. 920.)

B

When a defendant challenges the sufficiency of the evidence to support a judgment, we apply the substantial evidence standard of review. Generally, our task “is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (People v. Rodriguez (1999) 20 Cal.4th 1, 11, citing People v. Johnson (1980) 26 Cal.3d 557, 578.) “Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]” (People v. Young (2005) 34 Cal.4th 1149, 1181 (Young).) Accordingly, on appeal we do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (People v. Cochran (2002) 103 Cal.App.4th 8, 13.)

The substantial evidence standard of review involves two steps. “First, one must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all reasonable inferences. [Citation.] Second, one must determine whether the evidence thus marshaled is substantial. While it is commonly stated that our ‘power’ begins and ends with a determination that there is substantial evidence [citation], this does not mean we must blindly seize any evidence in support of the respondent in order to affirm the judgment. . . . [Citation.] ‘[I]f the word “substantial” [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with “any” evidence. It must be reasonable . . . , credible, and of solid value . . . . ’ [Citation.] The ultimate determination is whether a reasonable trier of fact could have found for the respondent based on the whole record.” (Kuhn v. Department of General Services (1994) 22 Cal.App.4th 1627, 1632-1633, Ins. omitted.) The standard of review is the same in cases in which the prosecution relies primarily on circumstantial evidence. (People v. Bean (1988) 46 Cal.3d 919, 932.)

C

Based on our review of the record, we conclude there is substantial evidence to support a finding that Chavez is guilty of the second degree murder of Crook based on the natural and probable consequences doctrine. First, there is
substantial evidence to support a finding that Chavez aided and abetted Gonzalez’s assault with a deadly weapon or assault likely to cause great bodily injury. As the physical altercation began between members of the National City and Tijuana groups, the surveillance camera video recording shows Chavez holding an object in his hand. Based on Eddie Lopez’s testimony that Chavez later chased him with a knife, the jury could reasonably infer the object in Chavez’s hand was a knife. During the fight, Gonzalez and Chavez are seen back-to-back and then face-to-face near the flatbed truck. Gonzalez and Chavez are then seen pacing back and forth next to the truck. Lujan, who was under the truck at the time, testified he saw Gonzalez holding a gun at his side while pacing back and forth. The jury could reasonably infer that Chavez saw Gonzalez’s gun while pacing back and forth with him. As the initial physical altercation ended and members of the groups headed southward from the restaurant, Eddie Lopez chased the Gutierrez brothers holding a beer bottle in his hand. Gonzalez and Chavez also headed in that direction. Gonzalez pointed his gun at Eddie Lopez’s back, while Chavez chased him (Eddie Lopez) holding a knife. Based on that evidence, the jury could reasonably infer Gonzalez and Chavez were acting together, that Gonzalez committed an assault with a deadly weapon or assault likely to cause great bodily injury on Eddie Lopez, and that Chavez intended to, and did, aid and abet that assault. Alternatively stated, there is substantial evidence to support a finding that Chavez knew of Gonzalez’s unlawful purpose (i.e., intent to commit an assault with a deadly weapon or assault likely to cause great bodily injury) and specifically intended to, and did in fact, aid, facilitate, promote, encourage, or instigate Gonzalez’s commission of that assault.13 (CALCRIM No. 401.)

Second, there is substantial evidence to support a finding that the murder of Crook was a natural and probable consequence of the assault on Eddie Lopez that Chavez aided and abetted. The jury could infer that a reasonable person in Chavez’s position should have, or would have, known that murder was a reasonably foreseeable consequence of the assault by Gonzalez that Chavez aided and abetted. (Medina, supra, 46 Cal.4th at p. 920; Mendoza, supra, 18 Cal.4th at p. 1133; Nguyen, supra, 21 Cal.App.4th at p. 535.) Alternatively stated, when Gonzalez assaulted Eddie Lopez by pointing his gun directly at his back, a reasonable person in Chavez’s position would have known that escalation was likely to occur when defendant and five other [gang members] confronted three perceived [rival gang members] with the intention of physically attacking them—even if the attack was originally intended as a fistfight. [Fellow gang member’s] shooting of [rival gang member] was a reasonably foreseeable consequence of the assault defendant aided and abetted.”); People v. Gonzalez (2001) 87 Cal. App.4th 1, 10-11 [fatal shooting during gang-related fistfight was natural and probable consequence of fistfight]; People v. Montes (1999) 74 Cal.App.4th 1050, 1053 [shooting of rival gang member during retreat from fight was natural and probable consequence of gang fight].)

To the extent Chavez argues the natural and probable consequences doctrine applies only in gang-related cases, he is mistaken. Although that doctrine has often been applied in gang-related cases, it can be applied in nongang cases, such as the instant case if all of the elements for its application are proved. Here, there is substantial evidence to support all of the elements for application of the natural and probable consequences doctrine to find Chavez guilty of the second degree murder of Crook. None of the cases cited by Chavez are factually apposite to this case or otherwise persuade us to reach a contrary conclusion.14 (See, e.g., Juan H. v. Allen

13. Contrary to Chavez’s apparent assertion, the target crime of assault with a deadly weapon or assault likely to cause great bodily injury need not have been committed on Crook, as the ultimate murder victim, for the natural and probable consequences doctrine to apply. Accordingly, Gonzalez’s assault on Eddie Lopez may serve as the target crime if the nontarget crime of the murder of Crook was a natural and probable consequence of that assault.

14. Because we conclude there is substantial evidence to support a finding Chavez is guilty of the second degree murder of Crook based on the natural and probable consequences doctrine, we need not, and do not, address the question of whether there is also substantial evidence to support a finding he is guilty of second degree murder based on the alternative theory that he directly aided and abetted Gonzalez’s murder of Crook.
IV

CALCRIM No. 571

Chavez contends the trial court erred by instructing with CALCRIM No. 571 on imperfect self-defense or imperfect defense of another but omitting imperfect defense of Gonzalez.

A

The trial court instructed with CALCRIM No. 571 on imperfect self-defense or imperfect defense of another, stating:

“‘A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense or imperfect defense of another.

“If you conclude the defendant acted in complete self-defense or defense of another, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense or defense of another and imperfect self-defense or imperfect defense of another depends on whether the defendant’s belief in the need to use deadly force was reasonable.

“The defendant acted in imperfect self-defense or imperfect defense of another if:

“1. The defendant actually believed that he or Vincente Roldan was in imminent danger of being killed or suffering great bodily injury;

“AND

“2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger;

“BUT

“3. At least one of those beliefs was unreasonable.

“Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be;

“In evaluating the defendant’s beliefs, consider all the circumstances as they were known and appeared to the defendant.

“Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

“The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense or imperfect defense of another. If the People have not met this burden, you must find the defendant not guilty of murder.” (Italics added.)

B

“[E]ven in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case. [Citations.] The trial court is charged with instructing upon every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant’s theory of the case. [Citations.]” (People v. Montoya (1994) 7 Cal.4th 1027, 1047 (Montoya).) In particular, a trial court must instruct sua sponte on a lesser included offense if the evidence would support that finding. (People v. Leach (1985) 41 Cal.3d 92, 106.) However, a court is not required to so instruct when there is no evidence the offense was less than that charged. (People v. Ghent (1987) 43 Cal.3d 739, 757.)

For a killing to be perfect self-defense and exonerate the defendant completely as a justifiable homicide, “the defendant must actually and reasonably believe in the need to defend.” (People v. Humphrey (1996) 13 Cal.4th 1073, 1082.) However, “[i]f the belief subjectively exists but is objectively unreasonable, there is ‘imperfect self-defense,’ i.e., ‘the defendant is deemed to have acted without malice and cannot be convicted of murder,’ but can be convicted of manslaughter. [Citation.]” (Ibid., fn. omitted.) For either perfect or imperfect self-defense, the fear must be of imminent danger to life or great bodily injury. (Ibid.) “[A] defendant who, with the intent to kill or with conscious disregard for life, unlawfully kills in unreasonable self-defense is guilty of voluntary manslaughter.” (People v. Blakeley (2000) 23 Cal.4th 82, 91.)

“Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant actually but unreasonably believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter.” (In re Christian S. (1994) 7 Cal.4th 768, 771.)

Like imperfect self-defense, “one who kills in imperfect defense of others—in the actual but unreasonable belief he must defend another from imminent danger of death or great bodily injury—is guilty only of manslaughter.” (People v. Randle (2005) 35 Cal.4th 987, 997 (Randle); see People v. Trujigue (2015) 61 Cal.4th 227, 270-271 (Trujigue).) For imperfect defense of another to apply, the defendant must, inter alia, actually believe the immediate use of deadly force was necessary to defend another person against the danger of being killed or suffering great bodily injury. (CALCRIM No. 571.) Furthermore, for imperfect self-defense or imperfect defense of another to apply, the defendant must actually as-
sociate the threat of imminent danger of death or great bodily injury with the victim. *(People v. Minifie* (1996) 13 Cal.4th 1055, 1068-1069 *(Minifie)*.)

C

Chavez asserts the trial court erred by not modifying its instruction with CALCRIM No. 571 on imperfect self-defense or imperfect defense of another to include the possibility of his defense of Gonzalez. However, based on our review of the record, there is insufficient evidence in the record to support such an instruction. Specifically, there is insufficient evidence to support a finding that Chavez acted in the actual, but unreasonable, belief that Gonzalez was in imminent danger of being killed or suffering great bodily injury from Crook.15 (CALCRIM No. 571; *Randle, supra*, 35 Cal.4th at p. 997; *Trujeque, supra*, 61 Cal.4th at pp. 270-271; *Minifie, supra*, 13 Cal.4th at pp. 1068-1069.)

Chavez apparently argues there is evidence to support a finding that he actually believed Crook was holding a glass goblet or other glass object that could be used as a deadly weapon and that when Crook approached Gonzalez from behind, he (Gonzalez) was in imminent danger of being struck by that weapon and being killed or suffering great bodily injury. However, there is insufficient evidence to support a finding that the object Crook was possibly holding at the time he tapped Gonzalez on the shoulder was, or appeared to be, a glass goblet or other glass object. Rather, the evidence supports, at most, a finding Crook was holding a plastic cup at the time he tapped Gonzalez on the shoulder from behind. The surveillance camera video recording, and still photographs taken therefrom, show Crook leaving the restaurant, placing a drink container on the flatbed truck, pushing past Juan Carlos Lopez, and then picking the container back up and heading southward out of the camera’s view. Crook and Lujan approached Gonzalez, who was pointing his gun at Eddie Lopez’s back, from behind and Crook tapped him (Gonzalez) on the shoulder. Gonzalez spun around and shot Crook twice at point-blank range, striking him in the chest near his armpit and in the upper right side of his back.

At trial, Juan Carlos Lopez identified the drink container that Crook placed on the flatbed truck and later picked up as a plastic michelada cup. As the restaurant’s owner, Juan Carlos Lopez had served those drinks almost every day and the cups used were frosted plastic and had a red rim (apparently from chili powder). Although there was testimony that Crook had a shrimp cocktail earlier that evening, the container held by Crook prior to the shooting, as shown in the video recording and still photographs and as identified by Juan Carlos Lopez, was a plastic michelada cup and not the type of glass shrimp cocktail container used by the restaurant. Juan Carlos Lopez described the type of container in which the restaurant served shrimp cocktails as glass with a big base, stem, and wide bowl or cup on top of the stem and weighing about three pounds. He estimated the width of its base as about three and one-half inches and its top bowl or cup as about five inches. He testified it “takes probably two hands to grab it. You can carry it with one, but the size of it is probably about that big [apparently gesturing with his hands].” He testified that the restaurant’s plastic michelada cup and its glass shrimp cocktail cups looked “completely different.”

Our independent review of the video recording and still photographs therefrom confirms that the object that Crook placed on the flatbed truck and later picked up before heading southward could not reasonably be believed to be one of the restaurant’s shrimp cocktail glasses. Its sides are straight, slightly angling inward from top to bottom (i.e., a slight cone shape with a flat bottom). Its shape is entirely inconsistent with the shape of the restaurant’s shrimp cocktail glass, as described by Juan Carlos Lopez, which we interpret, for lack of a better description, as having a top-heavy hourglass shape (i.e., curving or undulating sides) with a narrow stem in the middle. The object held by Crook appears to be frosted and contains a dark liquid. Juan Carlos Lopez testified that it was plastic (i.e., not glass), describing it as a plastic michelada cup, which looks completely different from a shrimp cocktail glass.

Based on all of the evidence in the record, there is insufficient evidence to support a finding that Crook was, or appeared to be, holding a heavy, three-pound shrimp cocktail glass when he approached Gonzalez from behind and tapped him on the shoulder. Accordingly, there likewise is insufficient evidence to support a finding that Chavez saw Crook approach Gonzalez from behind with such a heavy glass object and actually believed Gonzalez was in imminent danger of being struck by that glass object and being killed or suffering great bodily injury. Absent substantial evidence to support that finding, the trial court did not err by not modifying CALCRIM No. 571 to include Chavez’s defense of Gonzalez in its instruction on imperfect defense of another. *(Montoya, supra*, 7 Cal.4th at p. 1047; *Randle, supra*, 35 Cal.4th at p. 997; *Trujeque, supra*, 61 Cal.4th at pp. 270-271; *Minifie, supra*, 13 Cal.4th at pp. 1068-1069.)
GONZALEZ’S APPEAL

V

CALCRIM No. 3471

Gonzalez contends the trial court erred by instructing with CALCRIM No. 3471 on self-defense, but without its optional bracketed language stating that an aggressor who initially uses only nondeadly force regains the right to self-defense when his or her opponent counters with deadly force.

A

The trial court instructed with CALCRIM No. 3471 on the right to self-defense in circumstances of mutual combat or where the defendant was the initial aggressor, stating:

“A person who engages in mutual combat or who starts a fight has a right to self-defense only if:

1. He actually and in good faith tried to stop fighting;

AND

2. He indicated, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped fighting;

AND

3. He gave his opponent a chance to stop fighting.

If the defendant meets these requirements, he then had a right to self-defense if the opponent continued to fight.

A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose.”

In so instructing, the court omitted optional bracketed language from CALCRIM No. 3471, which states:

“However, if the defendant used only nondeadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself/herself with deadly force and was not required to try to stop fighting (or) communicate the desire to stop fighting[,] or give the opponent a chance to stop fighting].”

B

As discussed ante, “even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury’s understanding of the case. [Citations.] The trial court is charged with instructing upon every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant’s theory of the case. [Citations.]” (Montoya, supra, 7 Cal.4th at p. 1047.) Evidence is substantial only if a reasonable jury could find it persuasive. (Young, supra, (2005) 34 Cal.4th at p. 1200.)

C

Gonzalez argues the trial court should have included the bracketed language, quoted ante, when instructing the jury with CALCRIM No. 3471 (i.e., if the jury found he initially used only nondeadly force and Crook responded with sudden and deadly force such that he could not withdraw from the fight, then he (Gonzalez) regained the right to defend himself with deadly force, whether in perfect or imperfect self-defense). However, contrary to Gonzalez’s assertion, substantial evidence did not support the bracketed language the court omitted from CALCRIM No. 3471. The main premise of Gonzalez’s argument is that there is substantial evidence to support a finding that Crook used, or appeared to use, deadly force (i.e., a heavy glass object) against him, but the only substantial evidence of a heavy glass object was regarding the beer bottle thrown by Eddie Lopez at the Gutierrez brothers. That bottle was not thrown at or toward Gonzalez, but was instead thrown in the opposite direction by Eddie Lopez, and Gonzalez was not charged with the murder of Eddie Lopez.

Nevertheless, Gonzalez argues there is substantial evidence to support a finding that the object possibly held by Crook when he (Crook) tapped him on the shoulder was, in fact, a heavy glass object. However, as we discussed in part IV(C) ante and which discussion we incorporate herein, the evidence admitted at trial (including the video recording and still photographs from the surveillance camera and Juan Carlos Lopez’s testimony) does not support a finding that Crook picked up a glass object off of the flatbed truck before heading toward Gonzalez. Instead, he, at most, picked up a plastic michelada cup before heading toward Gonzalez.

At trial, Juan Carlos Lopez, as discussed in section IV(C) ante, described the restaurant’s plastic michelada cups and its glass shrimp cocktail cups and stated they looked “completely different.” Likewise, as discussed in section IV(C) ante, our independent review of the video recording and still photographs therefrom confirms that the object that Crook placed on the flatbed truck and later picked up before heading southward could not reasonably be found to be one of the restaurant’s shrimp cocktail glasses.

We likewise reject Gonzalez’s alternative argument that there is substantial evidence to support a finding the object possibly held by Crook, if not a shrimp cocktail glass, was instead a beer glass with a “waist” in its middle or other similarly shaped goblet or container made of glass and not a plastic michelada cup with straight sides. The evidence discussed ante is inconsistent with such a finding and instead supports
a finding only that the object was a plastic michelada cup, which could not have posed to Gonzalez any real or perceived threat of imminent danger of death or great bodily injury. Gonzalez merely speculates that Crook may have been holding a heavy object made of glass when he approached Gonzalez from behind. His suggested interpretation of the object on the flatbed truck shown in the video recording and still photographs from the surveillance camera is not supported by our independent viewing of that evidence.

Accordingly, based on our review of the record and relevant evidence, there is insufficient evidence to support a finding that Crook was holding, or appeared to be holding, a heavy shrimp cocktail glass, glass goblet, or other object that appeared to be made of glass when he approached Gonzalez from behind and tapped him on the shoulder. Absent substantial evidence supporting such a finding, there was insufficient evidence to support a finding Gonzalez actually believed Crook posed an imminent danger of death or great bodily injury to him or others that would justify Gonzalez’s use of perfect or imperfect self-defense by shooting Crook. Accordingly, we conclude the trial court did not err by omitting the bracketed language from CALCRIM No. 3471, which would have allowed the jury to find Gonzalez regained his right to defend himself if, inter alia, it found Crook used, or appeared to use, deadly force against him. (Montoya, supra, 7 Cal.4th at p. 1047.)

VI

CALCRIM No. 3472

Gonzalez contends the trial court erred by instructing with CALCRIM No. 3472 but not modifying it with language stating that a person who provokes a fight with an intent to use nondeadly force regains the right to self-defense when his or her opponent counters with deadly force.

A

Per the prosecution’s request, the trial court instructed with CALCRIM No. 3472, without modification, as follows: “A person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force.” Gonzalez did not object to that instruction.

B

As discussed ante, “even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury’s understanding of the case. [Citations.] The trial court is charged with instructing upon every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant’s theory of the case. [Citations.]” (Montoya, supra, 7 Cal.4th at p. 1047.) Evidence is substantial only if a reasonable jury could find it persuasive. (Young, supra, 34 Cal.4th at p. 1200.)

C

Gonzalez argues the trial court erred by instructing with CALCRIM No. 3472, as quoted ante, without modifying it to include language permitting him to use perfect or imperfect self-defense if he initially used nondeadly force and Crook responded with deadly force. Alternatively stated, he argues the court should have modified CALCRIM No. 3472 to state those defenses are not available if he provoked the fight and created the circumstances that legally justified Crook’s use of force. (Cf. People v. Enraca (2012) 53 Cal.4th 735, 761; People v. Ramirez (2015) 233 Cal.App.4th 940, 947-952; People v. Frandsen (2011) 196 Cal.App.4th 266, 272; People v. Vásquez (2006) 136 Cal.App.4th 1176, 1179-1180.)

However, as with CALCRIM No. 3471 discussed ante, we conclude the trial court did not err by omitting language modifying CALCRIM No. 3472 to allow for Gonzalez’s possible perfect or imperfect self-defense if he provoked a fight with nondeadly force and Crook responded with deadly force (i.e., Gonzalez then regained the right to perfect or imperfect self-defense), because substantial evidence does not support a finding that Crook responded, or appeared to Gonzalez to respond, with deadly force. As we discussed in part V(C) ante, there is insufficient evidence to support a finding that Crook was holding, or appeared to be holding, a heavy shrimp cocktail glass, glass goblet, or other object that appeared to be made of glass when he approached Gonzalez from behind and tapped him on the shoulder. Absent substantial evidence supporting such a finding, there was insufficient evidence to support a finding Gonzalez actually believed Crook posed an imminent danger of death or great bodily injury to him or others (i.e., used, or appeared to use, deadly force) that would justify Gonzalez’s perfect or imperfect self-defense by shooting Crook. Accordingly, we conclude the trial court did not err by instructing with CALCRIM No. 3472 but not modifying it with language stating that a person who provokes a fight with an intent to use nondeadly force regains the right to perfect or imperfect self-defense when his or her opponent counters with deadly force. (Montoya, supra, 7 Cal.4th at p. 1047.) Alternatively stated, the court did not err in instructing the jury with an unmodified version of CALCRIM No. 3472 in the circumstances of this case. 17

16. Gonzalez further speculates that the broken glass found by police near the scene may have been from a glass goblet or other glass object held by Crook. However, National City Police Detective Alejandro Garcia testified that the “broken bottle” or broken glass that he saw was located in front of a vacant building at 330 Highland Avenue that was two stores away from the most southward area where blood drops, presumably from Crook, were found (i.e., in front of a bakery) and therefore that broken glass was not photographed. Therefore, it cannot reasonably be inferred that the broken glass found by police was from a glass object held by Crook at the time of the incident.

17. Assuming arguendo the trial court erred by giving CALCRIM No. 3472 or not modifying its language as Gonzalez asserts, “the error is merely technical and not grounds for reversal” (People v. Eulian (2016) 247 Cal.App.4th 1324, 1335) because, based on the evidence
VII

Admission of Evidence on Gonzalez’s Death Threat and Denial of His Motion for Mistrial

Gonzalez contends the trial court abused its discretion under Evidence Code section 352 by admitting the testimony of Juan Carlos Lopez regarding the death threat he (Gonzalez) made to dissuade him from testifying at trial and also abused its discretion by denying his motion for mistrial based on admission of that evidence.

A

In the course of discussing the parties’ pretrial in limine motions, Gonzalez’s counsel raised the issue of a report disclosed by the prosecution regarding its investigator’s interview of Julio Martinez in which he (Martinez) stated that while he was in jail with Gonzalez, Gonzalez asked him to convey to Juan Carlos Lopez a threat not to come to court and indicated he knew his (Juan Carlos Lopez’s) family. Gonzalez’s counsel asked the trial court to preclude the prosecution from presenting Martinez’s testimony. The prosecutor stated she intended to offer Martinez’s testimony as relevant to Gonzalez’s consciousness of guilt based on his attempt to dissuade Juan Carlos Lopez from testifying. She made an offer of proof regarding Martinez’s expected testimony, stating:

“[W]hat happened is [Martinez] was in custody with Mr. Gonzalez April 16th or 20th[, 2015], the last time we were here. . . .

“And what [Martinez] says is he and Mr. Gonzalez were chitchatting and it came about that they realized they both knew Juan Carlos Lopez.

“At that time, Mr. Gonzalez told [Martinez] that could he get in touch with Mr. Lopez and basically tell him not to come to court, that he knew where he lived and where his children went to school and so forth, and then reiterated that he better not come to court and testify. He also referenced that Mr. Lopez had already testified at [his] preliminary hearing.

“[Martinez] got out of custody within about 48 hours of that conversation and immediately contacted Mr. Lopez and Mr. Lopez’s cousin, who he is married to. And Mr. Lopez received a couple of text messages. Mr. Lopez called [Martinez] back and [Martinez] relayed the conversation he had with Mr. Gonzalez.”

The trial court tentatively ruled Martinez could testify, subject to a further objection.

In her direct examination of Juan Carlos Lopez, the prosecutor asked him whether he was nervous about testifying. He replied, “Yes.” She asked him whether he had discomfort with talking to police and coming to court to testify regarding the incident. He replied, “Yes.” When she asked why he had such discomfort, Gonzalez’s counsel objected on grounds of relevancy.

At a sidebar conference outside of the jury’s presence, Gonzalez’s counsel stated he did not know “exactly what [Juan Carlos Lopez] is going to say. There were a lot of threats going back and forth . . . . He could say something so highly prejudicial and inflammatory that would result in a mistrial.” The prosecutor made an offer of proof regarding how Juan Carlos Lopez was expected to testify, stating: “[H]e feels discomfort from both sides. He’s expressed to police, I think in prior statements and certainly to me, that he feels pressure from the neighborhood, because everybody feels like since he’s the person that knows everybody that he should be the one to provide information on the one hand. On the other hand, he feels threatened by Mr. Gonzalez because of that phone call that we discussed earlier in our motions in limine. So I think he is going to express that he feels like he’s getting it from all sides.” (Italics added.) Gonzalez’s counsel restated he did not know what Juan Carlos Lopez was going to say.

The trial court stated:

“I don’t know how to do [an Evidence Code section] 402 [hearing] on a witness. . . . I think it all comes in. . . . [I]t is my understanding that Mr. Gonzalez didn’t directly talk to him, and so if he felt pressure, it wasn’t directly from Mr. Gonzalez. . . . Right now it is not like he is going to say he heard it from Mr. Gonzalez.”

The prosecutor stated that Juan Carlos Lopez had expressed fear of Gonzalez as a result of the threat that Martinez told him about. She stated: “His boy, oldest boy goes to school with Mr. Gonzalez [s] eldest daughter, and unbeknownst to him they are very good friends . . . .” Both Gonzalez’s counsel and Chavez’s counsel submitted on the matter, stating they needed to cross-examine Juan Carlos Lopez to show he was pressured to come up with a story. The court implicitly ruled the prosecutor could question Juan Carlos Lopez on the specifics of his discomfort in testifying.

In the presence of the jury, the prosecutor continued her questioning of Juan Carlo Lopez as follows:

“Q. Mr. Lopez, we were talking a bit about your discomfort in testifying . . . . Would you prefer not to testify here in court today?

“A. Yes.

“Q. And is it fair to say you’re here because we subpoe-naed you?
"A. Correct.
"Q. Why would you prefer not to testify?

"A. Most recently, the death threats.
"Q. Do you fear for your safety?

"A. Yes.
"Q. And that of your family?

"A. More my family than mine.
"Q. And you said, ‘most recently.’ At the beginning or onset of this case, did you have different concerns?

"A. Similar. I felt like it was coming—I don’t know where it was coming from.
"Q. Fears for your safety?

"A. Correct.
"Q. Did you feel pressure from the neighborhood?

"A. Yes.
"Q. You mentioned there was a recent threat; is that right?

"A. Correct.
"Q. And was it a threat in regards to testifying?

"A. Yes. [¶] . . . [¶]

"Q. Did you receive a message urging you not to testify?

"A. Yes.
"Q. Who gave you that message?

"A. A gentleman by the name of Julio.
"Q. And how do you know Julio?

"A. I’ve known him for quite some time. He’s related to my brother’s wife. [¶] . . . [¶]

"Q. Did he tell you the content of that threat?

"A. Yes.

"Q. What did he tell you?

"[Gonzalez’s counsel:] Objection, your honor. I call[s] for hearsay.

"THE COURT: And, ladies and gentlemen, I’m going to allow this information in . . . for a limited purpose. It is not for the truth of really what was said. It is for the impact on the person that heard it. Whether the words were true or not, this is just for how Mr. Lopez reacted. [¶] So go ahead. [¶] . . . [¶]

"Q [by the prosecutor]. What did he tell you?

"A. He told me that he had recently got a DUI and he was incarcerated. And while incarcerated he was . . . housed or in the same cell as Mr. Gonzalez. And Mr. Gonzalez somehow through their conversation came up why one or the other was inside or incarcerated, and it came out that Julio knew me. And [Gonzalez] said, do me a favor. When you get out, make sure you tell him not to testify or I’m going to kill his family and him.

"Q. What effect did this have on you?

"A. On me, personally, I have to use whatever resources I have to protect my family. [¶] On my family, it’s taken a toll.

"Q. Has it caused worry and concern for you?

"A. Yes.

"Q. And worry and concern for you specifically about testifying?

"A. Correct.

The prosecutor then questioned Juan Carlos Lopez about the restaurant’s surveillance camera and the instant incident.

During a recess in the jury’s absence, the trial court discussed with counsel Juan Carlos Lopez’s testimony and stated: “I have to say that . . . I shouldn’t have been surprised by the detail with which Mr. Lopez gave the conversation he had with his friend, but part of my ruling, besides what we already have on the record, was in anticipation that the person who actually made the call that was in the cell [i.e., Martinez] was going to come in and testify in detail, which is I think we had a conversation before [the] trial started, so that [Gonzalez’s counsel] would have an opportunity to cross-examine him on any conversation with Mr. Gonzalez.” Gonzalez’s counsel stated:

“I never imagined for a second that a hearsay statement of that nature, which can’t be sanitized under any cir-
Based on those concerns, Gonzalez's counsel moved for a mistrial. The court took the motion under submission and suggested that Gonzalez's counsel could file a written motion.

Gonzalez's counsel subsequently filed a written motion for mistrial, arguing Juan Carlos Lopez's testimony regarding Gonzalez's death threat was inadmissible hearsay and, in particular, should not have been admitted as relevant to Juan Carlos Lopez's then-existing state of mind. He also argued the trial court abused its discretion under Evidence Code section 352 by admitting that testimony without an adequate limiting instruction and, in any event, no admonition or instruction to the jury could have cured the prejudice caused by Juan Carlos Lopez's testimony. Accordingly, he argued Gonzalez was denied his constitutional right to a fair trial.

The prosecutor opposed the mistrial motion, arguing Juan Carlos Lopez's testimony (and Martinez's follow-up testimony) was highly relevant to his credibility because of his inconsistent statements about the incident and the shooter's identity, his initial denial that the video recording existed, his possible edits to that recording, and his change in demeanor when asked on direct examination who the shooter was.

The trial court denied Gonzalez's motion for mistrial, stating that Juan Carlos Lopez's testimony was relevant to his credibility and to explain his "strong physical reaction" when asked on direct examination who the shooter was. The court acknowledged that when Juan Carlos Lopez testified about the details of Gonzalez's threat, the court was not anticipating that testimony but nevertheless knew about that threat because it was discussed before trial. The court referred to its admonition or limiting instruction and also stated Juan Carlos Lopez's testimony about Gonzalez's threat was not so prejudicial as to warrant a mistrial because Martinez was expected to testify regarding that threat anyway.

The prosecution subsequently presented testimony by Martinez regarding the details of the death threat that Gonzalez asked him to, and he (Martinez) did, convey to Juan Carlos Lopez. In particular, Martinez testified that while they were in custody together, Gonzalez asked him to relay a message to Juan Carlos Lopez to not show up in court and that he (Juan Carlos Lopez) was being a "snitch." Gonzalez told Martinez he knew Juan Carlos Lopez's family, knew where they lived, and where Juan Carlos Lopez's children went to high school, specifying it by name. Gonzalez stated he "didn't want to kill them," so Juan Carlos Lopez should not come to court. Martinez later conveyed Gonzalez's threat to Juan Carlos Lopez.

B

Gonzalez asserts the trial court abused its discretion under Evidence Code section 352 when it admitted the testimony of Juan Carlos Lopez regarding Gonzalez's death threat. In particular, he argues the court failed to exercise its discretion under Evidence Code section 352 and, in any event, no reasonable judge would have admitted that testimony without sanitizing its undue prejudicial effect. He argues the court's error violated his constitutional rights to due process and a fair trial, requiring reversal of his convictions.

Evidence Code section 352 provides that a "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . (b) create substantial danger of undue prejudice, of confusing the issues, or misleading the jury." The term "prejudice," within the meaning of Evidence Code section 352, is not simply damage to the defense that naturally flows from relevant and highly probative evidence, but is instead an emotional reaction that inflames the jurors' emotions, motivating them to have a bias against, or to prejudice, an individual based on evidence that has only slight probative value or even expressly state it has done so. (People v. Williams (1997) 16 Cal.4th 153, 213 (Williams)). Nevertheless, the record must show the trial court understood and fulfilled its duty to weigh the prejudicial effect of evidence against its probative value or even expressly state it has done so. (People v. Williams (1997) 16 Cal.4th 153, 213 (Williams)).

On appeal, we apply the abuse of discretion standard in reviewing a trial court's ruling on the admissibility of evidence, including an Evidence Code section 352 objection to evidence. (People v. Cox (2003) 30 Cal.4th 916, 955.) We will reverse a trial court's ruling only if the record shows the court acted in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (People v. Williams (2008) 43 Cal.4th 584, 634-635; People v. Rodriguez (1999) 20 Cal.4th 1, 9-10.)

Based on our review of the record, we conclude the trial court did not abuse its discretion under Evidence Code section 352 by admitting Juan Carlos Lopez's testimony regarding Gonzalez's threat and giving its limiting instruction on that testimony. First, we reject Gonzalez's assertion that the court was uninformed and therefore could not, and did not, weigh the possible prejudicial effect of that testimony against its probative value under Evidence Code section 352. At the
sidebar conference on Gonzalez’s objection to Juan Carlos Lopez’s testimony on why he was uncomfortable testifying in court, his counsel stated he did not know “exactly what [Juan Carlos Lopez] is going to say. There were a lot of threats going back and forth . . . . He could say something so highly prejudicial and inflammatory that would result in a mistrial.” In so doing, he implicitly raised the issue of whether Juan Carlos Lopez’s testimony would be unduly prejudicial under Evidence Code section 352 and objected to that testimony on that ground. The prosecutor then made an offer of proof that Juan Carlos Lopez was expected to testify, inter alia, regarding Gonzalez’s threat against him that was conveyed by Martinez, who also was expected to testify regarding that threat as discussed before trial and whose testimony was tentatively ruled as admissible by the court. The court implicitly ruled the prosecutor could question Juan Carlos Lopez on the specifics of his discomfort in testifying, including Gonzalez’s threat. In so doing, the court implicitly overruled Gonzalez’s Evidence Code section 352 objection to Juan Carlos Lopez’s expected testimony, including his testimony regarding Gonzalez’s threat, presumably weighing the probative value of that expected testimony against its potential prejudicial effect and finding it was not unduly prejudicial. (Williams, supra, 16 Cal.4th at p. 213 “[W]hen ruling on [an Evidence Code] section 352 motion, a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so.”)

Contrary to Gonzalez’s assertion, there is no affirmative evidence in the record showing the court was either unaware of its discretion under Evidence Code section 352 to exclude that testimony or did not exercise that discretion. Rather, the record shows the court understood and fulfilled its responsibilities under Evidence Code section 352. (Williams, supra, 16 Cal.4th at p. 213.) To the extent Gonzalez asserts the trial court did not exercise its Evidence Code section 352 discretion because it failed to conduct an Evidence Code section 402 hearing on the expected testimony of Juan Carlos Lopez and therefore lacked “informed” discretion, we disagree. Gonzalez does not cite any authority showing a court must conduct an Evidence Code section 402 hearing before it may exercise “informed” discretion under Evidence Code section 352 and admit certain potentially prejudicial testimony. Furthermore, although Gonzalez refers to the court’s comment that it “did not know how” to conduct an Evidence Code section 402 hearing on a witness’s expected testimony, we presume the court was experienced in conducting Evidence Code section 402 hearings generally and therefore would have been able to conduct an appropriate Evidence Code section 402 hearing regarding the admissibility of Juan Carlos Lopez’s expected testimony on Gonzalez’s threat had Gonzales’s counsel requested one and/or had the court deemed such a hearing necessary or appropriate for it to exercise its Evidence Code section 352 discretion. In any event, the record supports an inference that the court found such a hearing was unnecessary, given the prosecutor’s subsequent offer of proof that summarized Juan Carlos Lopez’s expected testimony on Gonzalez’s threat and other reasons for being uncomfortable with testifying in court, and exercised its Evidence Code section 352 discretion to admit that testimony. Although his testimony ultimately was in greater detail than that described by the prosecutor, the court nevertheless exercised its discretion by admitting that testimony.

Second, we reject Gonzalez’s assertion that the trial court abused its Evidence Code section 352 discretion by admitting Juan Carlos Lopez’s testimony regarding his (Gonzalez’s) threat. The court could have found Juan Carlos Lopez’s expected testimony was highly relevant to his state of mind and credibility regarding his description of the incident and identification of Gonzalez as the shooter. Evidence of threats against a witness or fears of retaliation for testifying is relevant to the witness’s credibility. (People v. Guerra (2006) 37 Cal.4th 1067, 1142 (“evidence that [witness] feared retaliation for testifying against defendant was [properly] offered for the nonhearsay purpose of explaining inconsistencies in portions of her testimony”); People v. Burgener (2003) 29 Cal.4th 833, 869 (“Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness’s fear is likewise relevant to her credibility and is well within the discretion of the trial court.”). In light of the inconsistencies in Juan Carlos Lopez’s previous statements and possible involvement in hiding and/or editing the surveillance camera video recording and his distressed appearance while identifying Gonzalez in court as the shooter, the court reasonably concluded his testimony regarding the threat from Gonzalez was highly relevant to his state of mind and credibility.

The court could also have found any prejudice from that expected testimony would not be undue because the prosecutor planned to present similar testimony by Martinez regarding Gonzalez’s threat, as discussed before trial. Contrary to Gonzalez’s assertion, the expected testimony by Martinez regarding the threat did not necessarily make Juan Carlos Lopez’s testimony regarding that threat unduly cumulative such that the court abused its discretion by admitting it. In particular, Juan Carlos Lopez’s testimony was distinctly relevant to show his state of mind and credibility, whereas Martinez’s testimony was relevant to Gonzalez’s consciousness of guilt as well as providing evidentiary support for Juan Carlos Lopez’s testimony regarding Gonzalez’s threat.

Furthermore, the trial court could have concluded any prejudice from the admission of Juan Carlos Lopez’s testimony regarding Gonzalez’s threat could be minimized by a limiting instruction or admonition. Weighing the highly probative value of the expected testimony of Juan Carlos Lopez

18. The prosecutor stated, inter alia, that she expected Juan Carlos Lopez to testify that he “feels threatened by Mr. Gonzalez because of that phone call that we discussed earlier in our motions in limine [referring to Martinez’s expected testimony regarding Gonzalez’s threat].”
regarding Gonzalez’s threat against its potential prejudicial effect, the court could reasonably conclude that expected testimony was not unduly prejudicial under Evidence Code section 352 and allow him to testify regarding Gonzalez’s threat. In so doing, we conclude the court did not abuse its discretion under Evidence Code section 352. To the extent Gonzalez argues the court should have “sanitized” Juan Carlos Lopez’s testimony by limiting the details of the nature or extent of Gonzalez’s threat or otherwise, we are not persuaded the court was required to do so in the circumstances of this case and the cases Gonzalez cites do not hold a trial court errs if it does not so do. (Cf. People v. Mendoza (2011) 52 Cal.4th 1056, 1083-1087 [trial court did not abuse its discretion by limiting witness’s testimony regarding threat to reduce its possible prejudicial effect]; People v. Wharton (1991) 53 Cal.3d 522, 597-598 [trial court did not abuse its discretion by limiting witness’s testimony to prosecution’s offer of proof].)

Assuming arguendo the trial court abused its discretion under Evidence Code section 352 by allowing Juan Carlos Lopez to testify regarding Gonzalez’s threat, we nevertheless would conclude that error was not prejudicial. First, immediately after Juan Carlos Lopez began testifying about Gonzalez’s threat in greater detail than the court expected, the court gave a limiting instruction to minimize any possible prejudicial effect. The court admonished the jury: “I’m going to allow this information in . . . for a limited purpose. It is not for the truth of really what was said. It is for the impact on the person that heard it. Whether the words were true or not, this is just for how Mr. Lopez reacted.” Absent affirmative evidence in the record showing otherwise, we presume the jury followed the court’s instruction and considered Juan Carlos Lopez’s testimony regarding Gonzalez’s threat only for its impact on him (i.e., his state of mind and credibility) and not for its truth (i.e., whether Gonzalez did, in fact, threaten him). (People v. Waidla (2000) 22 Cal.4th 690, 725.) Accordingly, we conclude the court’s limiting instruction cured or minimized, if not eliminated, any possible prejudicial effect of his testimony.

Furthermore, as anticipated, Martinez subsequently testified, without objection by Gonzalez, regarding Gonzalez’s threat against Juan Carlos Lopez and his family that he (Martinez) conveyed to Juan Carlos Lopez and so testified in as much, or greater, detail as did Juan Carlos Lopez. Unlike Juan Carlos Lopez’s testimony regarding Gonzalez’s threat, Martinez’s testimony regarding that threat was admitted for the truth of the matter asserted and was relevant to show Gonzalez’s consciousness of guilt. (People v. Valdez (2012) 55 Cal.4th 81, 135, fn. 32; People v. Slocum (1975) 52 Cal.App.3d 867, 887.) Therefore, even had the trial court excluded Juan Carlos Lopez’s testimony about Gonzalez’s threat, it is not reasonably probable Gonzalez would have obtained a more favorable verdict. (People v. Watson (1956) 46 Cal.2d 818, 836 (Watson.) Even under the less forgiving standard for federal constitutional error, we conclude any error in admitting Juan Carlos Lopez’s testimony regarding Gonzalez’s threat was harmless beyond a reasonable doubt. (Chapman, supra, 386 U.S. at p. 24.) Accordingly, contrary to Gonzalez’s assertion, any error under Evidence Code section 352 by the trial court in admitting Juan Carlos Lopez’s testimony regarding his (Gonzalez’s) threat does not require reversal of his convictions.

C

Gonzalez also asserts the trial court abused its discretion by denying his motion for mistrial based on the court’s purported abuse of discretion in admitting Juan Carlos Lopez’s testimony regarding his (Gonzalez’s) threat. “A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.” (People v. Haskett (1982) 30 Cal.3d 841, 854.) “A motion for a mistrial should be granted when ‘ “a [defendant’s] chances of receiving a fair trial have been irreparably damaged.’ ” “ “ (People v. Collins (2010) 49 Cal.4th 175, 198-199 (Collins).) On appeal, we apply the abuse of discretion standard in reviewing a trial court’s denial of a motion for mistrial. (People v. Davis (2005) 36 Cal.4th 510, 553 (Davis); People v. Cox (2003) 30 Cal.4th 916, 953.)

In denying Gonzalez’s motion for a mistrial, the trial court concluded Juan Carlos Lopez’s testimony regarding Gonzalez’s threat was relevant to his credibility and was not so prejudicial as to warrant a mistrial because Martinez was expected to testify regarding that threat anyway and it gave an admonition or limiting instruction. Based on our review of the record, we conclude the court did not abuse its discretion by denying Gonzalez’s motion for mistrial. (Davis, supra, 36 Cal.4th at p. 553; Cox, supra, 30 Cal.4th at p. 953.) As we discussed ante, the court did not abuse its discretion under Evidence Code section 352 by admitting Juan Carlos Lopez’s testimony regarding Gonzalez’s threat. Furthermore, as we discussed ante, assuming arguendo the court so erred, that error was not prejudicial under any standard of prejudice. (Watson, supra, 46 Cal.2d at p. 836; Chapman, supra, 386 U.S. at p. 24.) Contrary to Gonzalez’s assertion, the admission of Juan Carlos Lopez’s testimony regarding Gonzalez’s threat did not result in a miscarriage of justice or deny him his constitutional right to a fair trial. (People v. Collins, supra, 49 Cal.4th at pp. 198-199.)

VIII

Alternative Contentions

Gonzalez alternatively contends that if his counsel did not adequately request the trial court to exercise its Evidence Code section 352 discretion to exclude and/or sanitize Juan Carlos Lopez’s testimony regarding his threat, adequately request an Evidence Code section 402 hearing, or request
that the court sanitize that testimony by limiting it to the prosecutor’s offer of proof, he was denied his constitutional right to effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; Strickland v. Washington (1984) 466 U.S. 668, 684-685.) However, we do not base our disposition of this appeal on any errors by Gonzalez’s counsel and, in any event, any such asserted errors were not prejudicial (i.e., it is not reasonably probable Gonzalez would have obtained a more favorable verdict had his counsel not made those errors). (Strickland, at pp. 687-694.) Accordingly, we reject Gonzalez’s alternative contentions.19

IX

Senate Bill No. 620 Retroactivity

Gonzalez contends 2017 Senate Bill No. 620, which amended section 12022.53, subdivision (h), as of January 1, 2018, should be applied retroactively to his nonfinal judgment and therefore the matter should be remanded for resentencing to allow the trial court to exercise its new discretion to strike or dismiss the 25-year-to-life sentence 12022.53 firearm enhancement that it originally imposed on him pursuant to the prior version of section 12022.53.

A

After the parties filed their briefs and oral argument was set in this matter, Gonzalez filed a motion for leave to file a supplemental brief on the issue of whether newly enacted Senate Bill No. 620 should be applied retroactively to his nonfinal judgment. We granted that motion and accepted for filing his supplemental brief that argued Senate Bill No. 620 should be applied retroactively to nonfinal judgments, including the judgment in his case, and the matter should be remanded for resentencing to allow the trial court to exercise its discretion to strike or dismiss the section 12022.53 firearm enhancement that it imposed at his sentencing. The People filed a respondent’s brief, conceding that Senate Bill No. 620 should be applied retroactively to all nonfinal judgments, but arguing remand for resentencing was unnecessary because the record clearly shows the trial court would not exercise its discretion to strike or dismiss that section 12022.53 firearm enhancement in the circumstances of this case.

Although section 3 generally provides that no Penal Code provision applies to acts committed before its passage provided the judgment is not yet final before the effective date of the statute. (Estrada, supra, 63 Cal.2d at pp. 742, 744-745.) Estrada stated: “When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.” (Id. at p. 745.) Although section 3 generally provides that no Penal Code statute “is retroactive, unless expressly so declared,” “Estrada concluded that general rule of construction did not apply where it can be discerned from the language of the statute and other factors that the Legislature intended the amended

Appeal. We now grant his request and take judicial notice of the documents relating to Senate Bill No. 620’s legislative history. (Evid. Code, § 452, subs. (a), (c).)

B

At the time of Gonzalez’s murder offense, conviction, and sentencing, the former version of section 12022.53 required the trial court to impose a consecutive enhancement of 25 years to life for the jury’s true finding on the allegation that he personally and intentionally discharged a firearm in committing the murder. (Former § 12022.53, subsds. (d), (h)).20

On October 11, 2017, the Governor signed Senate Bill No. 620, which became effective on January 1, 2018. (Stats. 2017, ch. 682, § 2.) Senate Bill No. 620 amended section 12022.53, subdivision (h) to now provide: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Stats. 2017, ch. 682, § 2.) Gonzalez argues that because his judgment is not yet final, amended section 12022.53, subdivision (h) should be applied retroactively to his case under In re Estrada (1965) 63 Cal.2d 740 (Estrada) and People v. Francis (1969) 71 Cal.2d 66 (Francis). The People agree that amended section 12022.53, subdivision (h) should apply retroactively to all nonfinal judgments, but argue remand for resentencing is unnecessary because the record clearly shows the trial court would not exercise its discretion to strike or dismiss that section 12022.53 enhancement in the circumstances of this case.

In Estrada, the California Supreme Court held that a statute that reduces the punishment for an offense will generally apply retroactively to any case in which the judgment is not yet final before the effective date of the statute. (Estrada, supra, 63 Cal.2d at pp. 742, 744-745.) Estrada stated: “When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.” (Id. at p. 745.) Although section 3 generally provides that no Penal Code statute “is retroactive, unless expressly so declared,” “Estrada concluded that general rule of construction did not apply where it can be discerned from the language of the statute and other factors that the Legislature intended the amended

19. Likewise, because we conclude the trial court did not err as Gonzalez asserts, there is no cumulative prejudice from any such purported errors that requires reversal of his convictions. (Cf. People v. Anderson (2001) 25 Cal.4th 543, 606; People v. Botin (1998) 18 Cal.4th 297, 335.)

20. Former section 12022.53, subdivision (h) provided: “Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.”
statute to apply to all judgments not yet final. (Estrada at pp. 746, fn. 1, 747.) Therefore, “where the amending statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed.” (Id. at p. 748.)

In Francis, the California Supreme Court extended the Estrada rule to a statute that modified the punishment for possession of marijuana, which formerly had been strictly a felony offense, to permit a trial court to treat that offense as a misdemeanor instead of a felony. (Francis, supra, 69 Cal.2d at pp. 75-76.) Francis concluded that the amended statute giving the trial court discretion to impose either a felony sentence or a misdemeanor sentence applied retroactively “because the Legislature has determined that the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances.” (Id. at p. 76.)

The court recently described its Estrada rule, stating: “The Estrada rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.” (People v. Conley (2016) 63 Cal.4th 646, 657.)

In its amicus brief, the San Diego County District Attorney argues that the California Supreme Court’s decision in People v. Brown (2012) 54 Cal.4th 314 (Brown) narrowed the holdings in Estrada and Francis and precluded retroactive application of amended section 12022.53, subdivision (h) to the nonfinal judgment in this case. In Brown, the court considered whether the 2010 amendment to section 4019, temporarily increasing conduct credits for prisoners in local custody, should be applied retroactively. (Brown, at pp. 317-318.) Finding no indicia showing that the Legislature intended amended section 4019 to apply retroactively, Brown concluded that section 3’s presumption of prospective application of statutes controlled and precluded retroactive application of the amended statute. (Id. at pp. 319-323.) In so doing, the court distinguished Estrada, which dealt with a statute mitigating punishment for a particular crime, from amended section 4019, which dealt with conduct credits in a custodial setting and not the punishment for a crime. (Id. at pp. 323-325.) Brown stated: “Estrada is today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule’s application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments.” (Id. at p. 324.)

Citing that language and other language from Brown, the San Diego County District Attorney argues that Brown, in effect, limited the Estrada rule and, in particular, Francis’s interpretation and application of that rule and therefore Francis does not support retroactive application of amended section 12022.53 to the nonfinal judgment in this case.

However, in People v. Superior Court (Lara) (2018) 4 Cal.5th 299 (Lara), the California Supreme Court recently reaffirmed its reasoning in Estrada and Francis in holding that Proposition 57, which reduced the possible punishment for juveniles, applies retroactively to punishment of juvenile defendants whose judgments are not yet final. (Lara, at pp. 303, 307-309.) “Proposition 57 prohibits prosecutors from charging juveniles with crimes directly in adult court. Instead, they must commence the action in juvenile court. If the prosecution wishes to try the juvenile as an adult, the juvenile court must conduct what we call a ‘transfer hearing’ to determine whether the matter should remain in juvenile court or be transferred to adult court. Only if the juvenile court transfers the matter to adult court can the juvenile be tried and sentenced as an adult. (Welf. & Inst. Code, § 707, subd. (a).)” (Lara, at p. 303.) Lara stated:

“Proposition 57’s effect is different from the statutory changes in Estrada . . . and Francis . . . . Proposition 57 did not ameliorate the punishment, or possible punishment, for a particular crime; rather, it ameliorated the possible punishment for a class of persons, namely juveniles. But the same inference of retroactivity should apply.” (Id. at p. 308.)

The court explained: “Proposition 57 is an ‘ameliorative change[,] to the criminal law’ that we infer the legislative body intended ‘to extend as broadly as possible.’ [Citation.] Nothing in Proposition 57 itself or the ballot materials rebuts this inference.” (Id. at p. 309.) The court distinguished its case from the circumstances in Brown, which addressed an amended statute affecting only good behavior credits in a custodial setting. (Id. at p. 311.) Proposition 57 does not address future conduct or provide incentives for good behavior, but instead may affect a juvenile’s effective sentence or juvenile disposition for past criminal conduct. (Ibid.) The court noted that it stated in Brown that Estrada is properly understood “as informing the rule’s [section 3 default rule of prospective operation] in a specific context by articulating the reasonable presumption that a legislative act mitigating punishment for a particular criminal offense is intended to apply to all nonfinal judgments.” (Ibid.) Explaining that language in Brown, Lara stated: “[W]e did not mean to state, and could not have held as binding precedent, that under no other circumstances, no matter how similar to Estrada, and how different from Brown, could Estrada’s inference in favor of retroactivity apply.” (Ibid.) Lara noted that even Brown itself recognized that the amended statute in that case was not analogous to the amended statute in Estrada. (Id. at p. 312.) Lara concluded: “[T]he provisions of Proposition 57 at issue are analogous to the Estrada situation, and Estrada’s logic does apply. Brown presents no impediment to invoking Estrada’s inference in this case.” (Ibid.) Accordingly, the court held that Proposition...
57 applied retroactively to all nonfinal criminal judgments involving juvenile defendants.21 (Lara, at pp. 303-304.)

Based on the California Supreme Court’s reaffirmance in Lara of its reasoning in Estrada and Francis, we conclude, contrary to the San Diego County District Attorney’s position, that the reasoning and holdings in those cases remain valid today and were not restricted or overruled by Brown. In fact, Lara confirms, if not expands, Estrada’s approach to retroactivity by applying Proposition 57, which, in effect, reduced the possible punishment for juveniles, retroactively to punishment of juvenile defendants whose judgments are not yet final.

Applying the reasoning and holdings in Estrada and Francis to the instant statute amended by Senate Bill No. 620 in this case (i.e., § 12022.53, subd. (h)), we conclude that the amended statute’s provision giving the trial court discretion under section 1385 to strike or dismiss a section 12022.53 firearm enhancement reduces the possible punishment for certain qualifying offenses involving the personal use of a firearm. Therefore, amended section 12022.53, subdivision (h) is similar to the amended statute in Francis that gave the trial court discretion to sentence a defendant for possession of marijuana either as a felony or as a misdemeanor. In both situations, the amended statute gave the trial court sentencing discretion that it did not have under the prior statute and, in effect, reduced the possible punishment for an offense or offenses. Because amended section 12022.53 does not contain any express savings clause and there is nothing in its legislative history indicating it was intended to apply only prospectively, we conclude that Francis is controlling authority and requires the retroactive application of amended section 12022.53, subdivision (h) to all nonfinal judgments. (People v. Robbins (2018) 19 Cal.App.5th 660 (Robbins); Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455 (“Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.”).) Robbins stated: “There is nothing in the language of section 12022.53, subdivision (h), or in the broader language of the Senate Bill, indicating the Legislature intended the subdivision to be only prospective. [Citation.] Accordingly, we conclude section 12022.53, subdivision (h), may be applied in the instant case because (1) it vests the trial court with authority to lower defendant’s sentence, and (2) defendant’s sentence was not final at the time the subdivision became effective.” (Robbins, at p. 679.) We agree with Robbins and conclude amended section 12022.53, subdivision (h), applies to all nonfinal judgments.

C

Notwithstanding our conclusion ante that section 12022.53, subdivision (h) as amended by Senate Bill No. 620, applies retroactively to all nonfinal judgments, we conclude, contrary to Gonzalez’s assertion, that demand for resentencing is not required in the circumstances of this case. Under People v. Gutierrez (1996) 48 Cal.App.4th 1894, 1896 (Gutierrez), we need not remand a case if the record shows the trial court “would not . . . have exercised its discretion to lessen the sentence” even if it had known it had that discretion. In Gutierrez, the court cited the maximum sentence imposed by the trial court, as well as the court’s comments at sentencing, as support for its conclusion that “no purpose would be served” by a remand for resentencing. (Ibid.)

At Gonzalez’s sentencing, the trial court expressed its concern regarding his criminal history, his “senseless” shooting of Crook, and his use of a gun while he (Gonzalez) was out on bail on a previous gun charge. The court stated:

“I have gone through . . . the probation report and considered the factors in aggravation and mitigation. And, unfortunately, there really were no factors in mitigation in this crime. You have a lengthy criminal history. You obviously have been in front of me and been very polite and never caused any trouble in court, but looking back at your criminal history, it’s lengthy. There [are] pre-prison sentences, multiple convictions for domestic violence. And I’m struck by the fact you are out on bail for a gun charge and when you are out on bail you arm yourself, and here we are today with the senseless murder of Mr. Crook. I take that all into consideration when determining whether it’s appropriate to consider concurrent sentences for some of these, as opposed to consecutive sentences. [W]ith no factors in mitigation and the loss of Mr. Crook, I don’t find any reason to run any of the [sentences for the] crimes concurrently.”

Accordingly, the court imposed a term of 15 years to life for count 1, with a consecutive enhancement of 25 years to life under section 12022.53, subdivision (d) for a total indeterminate term of 40 years to life in prison. It also imposed a total determinate term of seven years eight months for count 2, the section 12022.1, subdivision (b) enhancement, and Gonzalez’s three prior prison prior convictions.

Based on the trial court’s comments at Gonzalez’s sentencing, we conclude, as the People argue, that the record clearly shows the court would not exercise its new discretion under Senate Bill No. 620 to strike or dismiss the section 12022.53 enhancement if we were to remand the matter for

21. We agree with our concurring and dissenting colleague that although the Supreme Court has variously characterized the Estrada/Francis rule as both a “presumption” and an “inference,” in Lara the court expresses a preference for the latter terminology, and we adhere to that in our descriptions here. (Lara, supra, 4 Cal.5th at p. 508, fn. 5; but see People v. De Hoyos (Mar. 12, 2018, S228230) __ Cal.5th __ [2018 Cal. Lexis 1496].) But the nomenclature makes little or no functional difference in the context of statutory interpretation, which presents a clear question of law for the court. Estrada and Francis dictate that where a statutory amendment actually or potentially reduces punishment for a crime, in the absence of other evidence we either infer or presume a legislative intent that the amendment will apply retroactively to all cases not final on appeal. We then look to any other available evidence to discern a contrary legislative intent.
resentencing. (Gutierrez, supra, 48 Cal.App.4th at p. 1896.) In particular, the court noted Gonzalez had a lengthy criminal history and no mitigating factors. Most importantly, Gonzalez was out on bail on a pending gun charge when he armed himself with a gun and committed the “senseless murder” of Crook. Given those egregious circumstances and the trial court’s imposition of the maximum sentence possible, we conclude the court would not exercise its new discretion to strike or dismiss the section 12022.53 enhancement if we were to remand the matter for resentencing. Because no purpose would be served by a remand for resentencing, we decline to order a remand for resentencing and affirm the court’s imposition of the section 12022.53 enhancement. (Gutierrez, at p. 1896.)

**DISPOSITION**

The judgments are affirmed. The superior court is directed to issue a new minute order nunc pro tunc reflecting its imposition of a consecutive two-year term for Gonzalez’s conviction on count 2. The superior court clerk is directed to prepare an amended abstract of judgment reflecting the imposition of a consecutive two-year term for Gonzalez’s conviction on count 2 and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

NARES, J.

I CONCUR: DATO, J.

BENKE, J., Concurring and dissenting.

I concur with my colleagues on the issue of retroactivity of Penal Code section 12022.53, subdivision (h). However, I do so by way of application of the inference recently recognized by our Supreme Court in People v. Superior Court (Lara) (2018) 4 Cal.5th 299, 308, footnote 5 (Lara). Based on what I believe to be guidance in Lara, I would abandon application of a “presumption” of retroactivity in Penal Code statutes that reduce sentences. On the question of remand, unlike the majority, I would give the trial court the opportunity to exercise its sentencing discretion. On all remaining issues, I agree with my colleagues.

Relying on In re Estrada (1965) 63 Cal.2d 740 (Estrada), People v. Brown (2012) 54 Cal.4th 314 (Brown), and recent case law, my colleagues conclude section 12022.53, subdivision (h) must be applied retroactively. These cases, and apparently the majority as well, conclude that in all nonfinal cases, in the absence of evidence to the contrary, courts may presume the Legislature intends a statutory amendment reducing criminal punishment apply retroactively. This is where I part company with my colleagues. There is no such presumption, either in the Penal Code or in the governing law provided to us by the Supreme Court. Indeed, with respect to penal statutes, even those reducing in general the punishment for crimes, our analysis must begin with the contrary presumption. Section 3 clearly states, “No part of (the Penal Code) is retroactive, unless expressly so declared.”

“The language of section 3 erects a strong presumption of prospective operation, codifying the principle that, ‘in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.’ [Citations.] Accordingly, ‘a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.’” (Brown, at p. 324.)

Neither section 12022.53 nor subdivision (h) contain language expressly stating the statute is to be applied retroactively, stated: “Unless there is evidence to the contrary, courts presume that the Legislature intends for a statutory amendment reducing criminal punishment to apply retroactively in cases that are not yet final on appeal. [Citations.] This presumption is applied not only to amendments reducing a criminal penalty, but also to amendments giving the trial court discretion to impose a lesser penalty. [Citation.]” (Robbins, supra, 19 Cal.App.5th at p. 678.) The majority cite Robbins with approval and rely upon it. (Maj. opn., at p. 69.)

Section 12022.53, subdivision (h) contains no such provision, hence there is no presumption of prospective application involved in Lara. Rather, Lara begins with a discussion concerning the ameliorative effects expressly intended for juveniles in the whole of the Welfare and Institutions Code. (Lara, supra, 4 Cal.5th at p. 307, citing Estrada, supra, 63 Cal.2d at p. 744.) The court thus finds there is a clear and express legislative intent to credit juveniles with all available reform benefits. Therefore, the court notes that Estrada is not on point because it applies to the question of retroactivity of penal statutes. The rationale of Estrada, however, does apply. As footnote 5 instructs, Estrada’s rationale as to whether the Legislature intends that a statute reducing sentences is applied retroactively, depends on the evidence drawn from all of the circumstances surrounding passage of the new statute. (Lara, at p. 308, fn. 5.)

26. The court in Brown recognized that language in Estrada, if literally or broadly applied, was inconsistent with the principles embodied in section 3. (Brown, supra, 54 Cal.4th at pp. 324-325.) Accordingly, in Brown, the court expressly limited the scope of Estrada: “Estrada is today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule’s application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments.” (Brown, at p. 324.) In Brown, the court went on to hold that a temporary increase in good conduct credits an inmate could earn under former section 4019 was not outside the mandate of section 3 and therefore would not be applied retroactively. (Brown, at p. 325.) The credits were not mitigation of the punishment for a particular criminal offense and thus did not on their face suggest the Legislature intended that they apply to all nonfinal judgments. (Ibid.; see In re Pedro T. (1994) 8 Cal.4th 1041, 1045 “[t]o ordain when an amendment lessens the punishment for a crime, one may reasonably infer the Legislature has determined imposition of a lesser punishment on offenders thereafter will sufficiently serve the public interests.”)

22. Further statutory references are to the Penal Code unless otherwise indicated.


24. In Robbins, the court, which did not have the benefit of Lara,
tively. Therefore, in the absence of evidence to the contrary, the presumption to be applied is that section 12022.53, subdivision (h) is prospective. We may overcome this presumption only by examination of the Legislature’s intent in enacting the new statute.27

The California Supreme Court recently addressed the application of Estrada. As the court explains in Lara, “We have occasionally referred to Estrada as reflecting a ‘presumption.’ (E.g., [People v.] Conley [(2016)] 63 Cal.4th 646) at p. 656; [Brown, supra,] 54 Cal.4th . . . [at p.] 324.) We meant this to convey that ordinarily it is reasonable to infer for purposes of statutory construction the Legislature intended a reduction in punishment to apply retroactively.” (Lara, supra, 4 Cal.5th at p. 308, fn. 5; see People v. DeHoyos (Mar. 12, 2018, S228230) __Cal.5th__ [2018 Cal. Lexis 1496].)

The language of footnote 5 in Lara is significant and merits our careful consideration. “A presumption is an assumption of a fact that the law requires to be made from another fact or group of facts found or otherwise established in an action. A presumption is not evidence.” (Evid. Code, § 600, subd. (a), italics added.) In contrast, an inference is only a “deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in an action.” (Id., subd. (b); see Morton v. Manhattan Lunch Co. (1940) 41 Cal.App.2d 70, 72 [an inference is a form of indirect evidence].) Thus, for me, the court’s terminology marks an important clarification in the way Estrada is to be applied, and avoids any conflict with section 3. Because, in light of Lara, it is now clear Estrada simply recognized a permissible evidentiary inference, Lara expressly limits the reach of Estrada; it does not, as my colleagues suggest, expand Estrada. (See Evid. Code, § 600; maj. opn. at p. 69.)

At this point, especially in light of Lara, I do not think it is appropriate to restrict our analysis to application of a presumption that ameliorative changes in penal statutes must be applied retroactively. Rather, when, as here, a criminal defendant argues he or she is entitled to the benefit of new legislation, we must begin with the contrary presumption, expressly set forth in section 3, that unless there is express language to the contrary, statues are prospective only. If there is any ambiguity in the new enactment with respect to retroactivity, we then resolve that ambiguity by resort to familiar rules of statutory history and construction, including the inference found by the court in Estrada, supra, 63 Cal.2d at page 745. (See Brown, supra, 54 Cal.4th at pp. 324-325.)

27. The Supreme Court has been at some pains to emphasize for us that the question of whether a statute is to be given retrospective application is a matter of legislative intent. (See In re Pedro T., supra, 8 Cal.4th at pp. 1046-1047; People v. Nasalga, supra, 12 Cal.4th at pp. 793-794; People v. Conley (2016) 63 Cal.4th 646, 657-659 (Conley); Brown, supra, 54 Cal.4th at p. 324; Lara, supra, 4 Cal.5th at p. 308.) Indeed, in Estrada itself, the court emphasized: “The problem,” we explained, “is one of trying to ascertain the legislative intent—did the Legislature intend the old or new statute to apply?” (Estrada, supra, 63 Cal.2d at p. 744.)

Turning to Senate Bill No. 620 (SB 620), I note the discretion section 12022.53, subdivision (h) now provides trial courts is not a certain reduction in punishment. However, provisions which give trial courts discretion to reduce a sentence previously required by the Penal Code are nonetheless changes which benefit offenders who committed particular offenses or engaged in particular conduct and, as in Estrada, manifest an intent by the Legislature that such offenders be given the benefit of that discretion in all cases which are not yet final. (People v. Francis (1969) 71 Cal.2d 66, 76.) “[T]here is such an inference because the Legislature has determined that the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances.” (Ibid.) In sum then, the very discretion now provided by section 12022.53, subdivision (h) creates an inference the Legislature intended that in cases not yet final, offenders subject to the firearm enhancement set forth in section 12022.53 be given the benefit of that discretion. (Francis, at p. 76.)

The discretion which the Legislature provided trial courts is not the only indication the Legislature intended retrospective application of SB 620. Section 12022.53, subdivision (h) states that “[t]he authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Italics added.) By its express terms, this provision extends the benefits of SB 620 to defendants who have exhausted their rights to appeal and for whom a judgment of conviction has been entered but who have obtained collateral relief by way of a state or federal habeas proceeding. This extension of SB 620 is a further expression by the Legislature of its understanding that the new version of section 12022.53, subdivision (h) would also be applied to all cases which were not final at the time it became effective. It is difficult to perceive a rationale for giving relief to a defendant whose judgment might be several years old, but who was a successful habeas litigant and provide no relief to a defendant whose conviction was entered in a trial court as recently as December 29, 2017. We assume the Legislature was well aware of this unfair result if the statute was not retroactive.

In sum, it is not necessary or legally sound to employ a presumption that is at odds with section 3. The Legislature, in enacting SB 620 has made it clear it intended and expected that its provisions would be applied to all cases pending at the time it became effective and, thus, it is outside the general rule set forth in section 3. (See Brown, supra, 54 Cal.4th at p. 325.)

Finally, I part company with my colleagues on the question of whether this case should be remanded. I believe it should. Given the multiple offenses at issue here, and the discretion available, I would give the trial court the opportunity to exercise that discretion with respect to defendant’s firearm enhancement.

BENKE, Acting P. J.