Oklahoma Statutes Citationized

Title 22. Criminal Procedure

Chapter 25 - Miscellaneous Provisions

Postconviction DNA Act

Section 1373.2 - Eligibility and Procedures for Postconviction DNA Testing

Cite as: O.S. §, __ __

A. Notwithstanding any other provision of law concerning postconviction relief, a person convicted of a violent felony crime or who has received a sentence of twenty-five (25) years or more and who asserts that he or she did not commit such crime may file a motion in the sentencing court requesting forensic DNA testing of any biological material secured in the investigation or prosecution attendant to the challenged conviction. Persons eligible for testing shall include any and all of the following:

1. Persons currently incarcerated, civilly committed, on parole or probation or subject to sex offender registration;

2. Persons convicted on a plea of not guilty, guilty or nolo contendere;

3. Persons deemed to have provided a confession or admission related to the crime, either before or after conviction of the crime; and

4. Persons who have discharged the sentence for which the person was convicted.

B. A convicted person may request forensic DNA testing of any biological material secured in the investigation or prosecution attendant to the conviction that:

1. Was not previously subjected to DNA testing; or

2. Although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous DNA test.

C. The motion requesting forensic DNA testing shall be accompanied by an affidavit sworn to by the convicted person containing statements of fact in support of the motion.

D. Upon receipt of the motion requesting forensic DNA testing, the sentencing court shall provide a copy of the motion to the attorney representing the state and require the attorney for the state to file a response within sixty (60) days of receipt of service or longer, upon good cause shown. The response shall include an inventory of all the evidence related to the case, including the custodian of such evidence.

E. A guardian of a convicted person may submit motions for the convicted person under the provisions of this act and shall be entitled to counsel as otherwise provided to a convicted person pursuant to this act.

Historical Data

Laws 2013, HB 1068, c. 317, § 3, eff. November 1, 2013.

Citationizer© Summary of Documents Citing This Document

Cite Name	***Level***

Oklahoma Court of Criminal Appeals Cases

Cite	*Name*	*Level*
2014 OK CR 16, 337 P.3d 763,	*STATE ex rel. SMITH v. NEUWIRTH*	*Discussed*
2015 OK CR 3, 343 P.3d 1282,	*WATSON v. STATE*	*Discussed at Length*
2016 OK CR 22, 387 P.3d 947,	*FLOWERS v. STATE*	*Discussed at Length*

Citationizer: Table of Authority

Cite	***Name***	***Level***

None Found.

Oklahoma Statutes Citationized

Title 74. State Government

Chapter 5 - State Bureau of Investigation

Section 150.27a - Establishment of OSBI DNA Offender Database

Cite as: 74 O.S. § 150.27a (OSCN 2019)

A. There is hereby established within the Oklahoma State Bureau of Investigation the OSBI Combined DNA Index System (CODIS) Database for the purpose of collecting and storing blood or saliva samples and DNA profiles, analyzing and typing of the genetic markers contained in or derived from DNA, and maintaining the records and samples of DNA of individuals:

1. Convicted of any felony offense;

2. Required to register pursuant to the Sex Offenders Registration Act;

3. Subject to the availability of funds, eighteen (18) years of age or older arrested for the commission of a felony under the laws of this state or any other jurisdiction, upon being booked into a jail or detention facility. Provided, the DNA sample shall not be analyzed and shall be destroyed unless one of the following conditions has been met:

a. the arrest was made upon a valid felony arrest or warrant,

b. the person has appeared before a judge or magistrate judge who made a finding that there was probable cause for the arrest,

c. the person posted bond or was released prior to appearing before a judge or magistrate judge and then failed to appear for a scheduled hearing, or

d. the DNA sample was provided as a condition of a plea agreement; and

4. Subject to the availability of funds, convicted of a misdemeanor offense of assault and battery, domestic abuse, stalking, possession of a controlled substance prohibited under Schedule IV of the Uniform Controlled Dangerous Substances Act, outraging public decency, resisting arrest, escaping or attempting to escape, eluding a police officer, Peeping Tom, pointing a firearm, threatening an act of violence, breaking and entering a dwelling place, destruction of property, negligent homicide, or causing a personal injury accident while driving under the influence of any intoxicating substance, or, upon arrest, any alien unlawfully present under federal immigration law.

The purpose of this database is the detection or exclusion of individuals who are subjects of the investigation or prosecution of sex-related crimes, violent crimes, or other crimes in which biological evidence is recovered, and such information shall be used for no other purpose.

B. Any DNA specimen taken in good faith by the Department of Corrections, its employees or contractors, the county sheriff, its employees or contractors or a peace officer, and submitted to the OSBI may be included, maintained, and kept by the OSBI in a database for criminal investigative purposes despite the specimen having not been taken in strict compliance with the provisions of this section or Section 991a of Title 22 of the Oklahoma Statutes.

C. Upon the request to OSBI by the federal or state authority having custody of the person, any individual who was convicted of violating laws of another state or the federal government, but is currently incarcerated or residing in Oklahoma, shall submit to DNA profiling for entry of the data into the OSBI DNA Offender Database. This provision shall only apply when such federal or state conviction carries a requirement of sex offender registration or DNA profiling. The person to be profiled shall pay a fee of One Hundred Fifty Dollars ($150.00) to the OSBI.

D. The OSBI CODIS Database is specifically exempt from any statute requiring disclosure of information to the public. The information contained in the database is privileged from discovery and inadmissible as evidence in any civil court proceeding. The information in the database is confidential and shall not be released to the public. Any person charged with the custody and dissemination of information from the database shall not divulge or disclose any such information except to federal, state, county or municipal law enforcement or criminal justice agencies. Any person violating the provisions of this section upon conviction shall be deemed guilty of a misdemeanor punishable by imprisonment in the county jail for not more than one (1) year.

E. The OSBI shall promulgate rules concerning the collection, storing, expungement and dissemination of information and samples for the OSBI CODIS Database. The OSBI shall determine the type of equipment, collection procedures, and reporting documentation to be used by the Department of Corrections, a county sheriff's office or a law enforcement agency in submitting DNA samples to the OSBI in accordance with Section 991a of Title 22 of the Oklahoma Statutes. The OSBI shall provide training to designated employees of the Department of Corrections, a county sheriff's office and a law enforcement agency in the proper methods of performing the duties required by this section.

F. The OSBI CODIS Database may include secondary databases and indexes including, but not limited to:

1. Forensic index database consisting of unknown evidence samples;

2. Suspect index database consisting of samples taken from individuals as a result of criminal investigations;

3. Convicted offender index database authorized pursuant to subsection A of this section; and

4. Missing persons and unidentified remains index or database consisting of DNA profiles from unidentified remains and relatives of missing persons.

G. 1. Any person convicted of a felony offense who is in custody shall provide a blood or saliva sample prior to release.

2. Subject to the availability of funds, any person convicted of a misdemeanor offense of assault and battery, domestic abuse, stalking, possession of a controlled substance prohibited under Schedule IV of the Uniform Controlled Dangerous Substances Act, outraging public decency, resisting arrest, escaping or attempting to escape, eluding a police officer, Peeping Tom, pointing a firearm, threatening an act of violence, breaking and entering a dwelling place, destruction of property, negligent homicide, or causing a personal injury incident while driving under the influence of any intoxicating substance who is in custody shall provide a blood or saliva sample prior to release.

3. Every person who is convicted of a felony offense whose sentence does not include a term of incarceration

shall provide a blood or saliva sample as a condition of sentence.

4. Subject to the availability of funds, every person who is convicted of a misdemeanor offense of assault and battery, domestic abuse, stalking, possession of a controlled substance prohibited under Schedule IV of the Uniform Controlled Dangerous Substances Act, outraging public decency, resisting arrest, escape or attempting to escape, eluding a police officer, Peeping Tom, pointing a firearm, threatening an act of violence, breaking and entering a dwelling place, destruction of property, negligent homicide, or causing a personal injury accident while driving under the influence of any intoxicating substance whose sentence does not include a term of incarceration shall provide a blood or saliva sample as a condition of sentence.

5. Subject to the availability of funds, any person eighteen (18) years of age or older who is arrested for the commission of a felony under the laws of this state or any other jurisdiction shall, upon being booked into a jail or detention facility, submit to DNA testing for law enforcement identification purposes. Provided, the DNA sample shall not be analyzed and shall be destroyed unless one of the following conditions has been met:

a. the arrest was made upon a valid felony arrest or warrant,

b. the person has appeared before a judge or magistrate judge who made a finding that there was probable cause for the arrest,

c. the person posted bond or was released prior to appearing before a judge or magistrate judge and then failed to appear for a scheduled hearing, or

d. the DNA sample was provided as a condition of a plea agreement.

Historical Data

Laws 1994, HB 2151, c. 40, § 2; Amended by Laws 1996, SB 1007, c. 153, § 3, emerg. eff. May 7, 1996; Amended by Laws 1997, HB 1729, c. 260, § 10, eff. November 1, 1997 (superseded document available); Amended by Laws 2001, HB 1426, c. 88, § 2, eff. November 1, 2001; Amended by Laws 2001, SB 753, c. 225, § 3, emerg. eff. July 1, 2001 (superseded document available); Amended by Laws 2002, SB 1537, c. 235, § 4, emerg. eff. May 9, 2002 (superseded document available); Amended by Laws 2004, SB 1190, c. 61, § 1, emerg. eff. April 6, 2004 (repealed by Laws 2005, HB 2060, c. 1, § 129, emerg. eff. March 15, 2005); Amended by Laws 2004, SB 1374, c. 143, § 4, eff. November 1, 2004 (superseded document available); Amended by Laws 2005, HB 2060, c. 1, § 128, emerg. eff. March 15, 2005 (superseded document available); Amended by Laws 2005, SB 646, c. 441, § 5, eff. January 1, 2006 (superseded document available); Amended by Laws 2009, SB 1102, c. 218, § 3, emerg. eff. May 19, 2009 (superseded document available); Amended by Laws 2016, HB 2275, c. 181, § 3, eff. November 1, 2016 (superseded document available); Amended by Laws 2017, HB 1609, c. 194, § 3, eff. November 1, 2017 (superseded document available); Amended by Laws 2019. SB 184, c. 374, § 2, eff. November 1, 2019 (superseded document available).

Citationizer© Summary of Documents Citing This Document

Cite Name	*Level*	
Oklahoma Attorney General's Opinions		
Cite	*Name*	*Level*
2016 OK AG 8,	*Question Submitted by: Director Stan Florence, Oklahoma State Bureau of Investigation*	*Discussed at Length*
Oklahoma Court of Criminal Appeals Cases		

Cite Name	Level	
Cite	Name	Level
2009 OK CR 31, 223 P.3d 980,	SANCHEZ v. STATE	Discussed
Title 57. Prisons and Reformatories		
Cite	Name	Level
57 O.S. 530.1,	Assessment and Reception of Inmates - Duties of Department of Corrections	Cited

Citationizer: Table of Authority

Cite Name	Level	
Title 74. State Government		
Cite	Name	Level
74 O.S. 150.27a,	Establishment of OSBI DNA Offender Database	Cited
74 O.S. 150.27a,	Establishment of OSBI DNA Offender Database	Cited
74 O.S. 150.27a,	Establishment of OSBI DNA Offender Database	Cited
74 O.S. 150.27a,	Establishment of OSBI DNA Offender Database	Cited
74 O.S. 150.27a,	Establishment of OSBI DNA Offender Database	Cited
74 O.S. 150.27a,	Establishment of OSBI DNA Offender Database	Cited

Section-14 Health Services	OP-140401	Page: 1	Effective Date: 10/30/2019
DNA Testing	ACA Standards: 2-CO-1F-07		
Scott Crow, Interim Director Oklahoma Department of Corrections	Signature on File		

DNA Testing

The Oklahoma Department of Corrections (ODOC) is responsible for collecting samples for DNA testing from inmates and submitting the samples to the Oklahoma State Bureau of Investigation (OSBI) in accordance with state law. (2-CO-1F-07)

I. Testing of Inmates

The following inmates/offenders are subject to DNA testing.

A. Criteria for DNA Testing

1. Any inmate who has been convicted of a felony offense, or has received a delayed sentence, and is incarcerated or in the custody of ODOC after July 1, 1996, will be required to provide a blood or saliva sample for DNA testing prior to their release.

2. Any offender who receives a suspended sentence after January 1, 2006, and is not sentenced to a term of confinement, will provide a blood or saliva sample as a condition of such sentence (Oklahoma Statute Title 22 and Title 57).

3. Any inmate/offender who has previously submitted a blood or saliva sample for DNA testing, and for whom a valid sample is on file with the OSBI at the time of their sentencing, will not be required to submit to another sample.

4. Any offender who receives a deferred sentence for an offense that does not require registration as a sex offender, and is supervised by Probation and Parole or the Community Sentencing Program, and is ordered by the court to submit to DNA testing, will be required to submit to testing within 30 days of said order.

5. Any offender who receives a deferred sentence for a sex offender registration offense and is required to register as a sex offender must submit to DNA testing in accordance with OP-020307 entitled "Sex

and Violent Crime Offender Registration."

II. DNA Testing Procedures

A. Time Limits

1. Any inmate who is convicted of an offense that requires DNA testing after July 1, 1996 and is sentenced to a term of incarceration will be tested within ten days of receipt at the assessment and reception center. DNA samples collected will be mailed to the OSBI within ten days of collection.

2. Any offender who is convicted of an offense that requires DNA testing after July 1, 1996 and is sentenced to probation will be required to submit to testing within 30 days of sentencing to ODOC or to the county sheriff, as directed by the court. Inmates sentenced to a term of incarceration in a county jail will submit to testing at the jail, by the county's sheriff. DNA samples collected will be mailed to the OSBI within ten days of collection.

3. Offenders subject to DNA testing and who are not received at the assessment and reception center will be required to pay a fee of $15 to ODOC, payable by cashier's check or money order.

B. Collection Process

1. Collection kits will be supplied by the OSBI. Sample collection for DNA testing will be conducted by an employee or contractor of ODOC, or by an employee/contractor of the county sheriff's department or any peace officer directed by the court.

2. Designated employees or contractors will receive an instructional packet that will show how to obtain the sample, prepare the sample and where to send the sample. The instructional packet will be supplied by the OSBI.

3. All samples collected will be submitted to the OSBI DNA Laboratory at the following address:

Oklahoma State Bureau of Investigation
Criminalistic Service Division
800 East 2nd Street
Edmond, Oklahoma 73034
ATTENTION: DNA Laboratory

4. Prior to release from custody by discharge, parole, or transfer to any alternative to incarceration program, the inmate's current facility will ensure that a sample has been obtained and submitted to the OSBI in accordance with this procedure.

5. When an offender is received for community supervision, the OSBI database will be searched by the appropriate staff person to determine if a sample has been previously collected. If a sample is required and has not been submitted, a sample will be collected and submitted to the OSBI in accordance with this procedure.

6. The inmate's/offender's fingerprint will be obtained and imprinted on the sample collection card, prior to sample collection.

7. The following guidelines will be adhered to when a DNA blood or saliva sample is collected:

   a. The person obtaining the sample is responsible for preserving it on the sample collection card or in the appropriate sample collection tube/container.

   b. The person collecting the saliva sample will place it in the appropriate sample collection tube/container.

   c. The person collecting the sample will label it immediately after it is collected. The label will include the information required by the OSBI.

8. Any use of force necessary to collect the DNA sample, will be in accordance with OP-050108 entitled "Use of Force Standards and Reportable Incidents."

III. OMS DNA Information Requirements

If DNA is required, appropriate staff at the Assessment Reception Centers or Probation and Parole will ensure that "DNA required" and "DNA tested" are entered in the Personal Information section of OMS.

IV. References

Policy Statement No. P-140100 entitled "Inmate Medical, Mental Health and Dental Care"

OP-020307 entitled "Sex and Violent Crime Offender Registration"

OP-050108 entitled "Use of Force Standards and Reportable Incidents"

22 O.S. § 991a

57 O.S. § 581 et seq

74 O.S. § 150.27

74 O.S. §150.27a

Shaffer v Saffle, 198 F3d 1180 (10 cir 1998)

V. Action

The chief medical officer is responsible for compliance with this procedure.

The director of Health Services is responsible for the annual review and revisions.

Any exceptions to this procedure will require prior written approval from the agency director.

This procedure is effective as indicated.

Replaced: Operations Memorandum No. OP-140401 entitled "DNA Testing" dated April 25, 2018

Distribution: Policy and Operations Manual
Agency Website

133 S.Ct. 1958
186 L.Ed.2d 1
81 USLW 4343

MARYLAND, Petitioner
v.
Alonzo Jay KING, Jr.

No. 12–207.

Supreme Court of the United States

Argued Feb. 26, 2013.
Decided June 3, 2013.

Negative Treatment Reconsidered
West's Ann.Md.Code, Public Safety, § 2–504(a)(3)

[133 S.Ct. 1962]

Syllabus*

After his 2009 arrest on first- and second-degree assault charges, respondent King was processed through a Wicomico County, Maryland, facility, where booking personnel used a cheek swab to take a DNA sample pursuant to the Maryland DNA Collection Act (Act). The swab was matched to an unsolved 2003 rape, and King was charged with that crime. He moved to suppress the DNA match, arguing that the Act violated the Fourth Amendment, but the Circuit Court Judge found the law constitutional. King was convicted of rape. The Maryland Court of Appeals set aside the conviction, finding unconstitutional the portions of the Act authorizing DNA collection from felony arrestees.

Held : When officers make an arrest supported by probable cause to hold for a serious offense and 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. Pp. 1966 – 1980.

(a) DNA testing may "significantly improve both the criminal justice system and police investigative practices," *District Attorney's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 55, 129 S.Ct. 2308, 174 L.Ed.2d 38, by making it "possible to determine whether a biological tissue matches a suspect with near certainty," *id.,* at 62, 129 S.Ct. 2308. Maryland's Act authorizes law enforcement authorities to collect DNA samples from, as relevant here, persons charged with violent crimes, including first-degree assault. A sample may not be added to a database before an individual is arraigned, and it must be destroyed if, *e.g.,* he is not convicted. Only identity information may be added to the database. Here, the officer collected a DNA sample using the common "buccal swab" procedure, which is quick and painless,

[133 S.Ct. 1963]

requires no "surgical intrusio[n] beneath the skin," *Winston v. Lee,* 470 U.S. 753, 760, 105 S.Ct. 1611, 84 L.Ed.2d 662, and poses no threat to the arrestee's "health or safety," *id.,* at 763, 105 S.Ct. 1611. Respondent's identification as the rapist resulted in part through the operation of the Combined DNA Index System (CODIS), which connects DNA laboratories at the local, state, and national level, and which standardizes the points of comparison, *i.e.,* loci, used in DNA analysis. Pp. 1966 – 1969.

(b) The framework for deciding the issue presented is well established. Using a buccal swab inside a person's cheek to obtain a DNA

sample is a search under the Fourth Amendment. And the fact that the intrusion is negligible is of central relevance to determining whether the search is reasonable, "the ultimate measure of the constitutionality of a governmental search," *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 652, 115 S.Ct. 2386, 132 L.Ed.2d 564. Because the need for a warrant is greatly diminished here, where the arrestee was already in valid police custody for a serious offense supported by probable cause, the search is analyzed by reference to "reasonableness, not individualized suspicion," *Samson v. California,* 547 U.S. 843, 855, n. 4, 126 S.Ct. 2193, 165 L.Ed.2d 250, and reasonableness is determined by weighing "the promotion of legitimate governmental interests" against "the degree to which [the search] intrudes upon an individual's privacy," *Wyoming v. Houghton,* 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408. P. 1970.

(c) In this balance of reasonableness, great weight is given to both the significant government interest at stake in the identification of arrestees and DNA identification's unmatched potential to serve that interest. Pp. 1970 – 1977.

(1) The Act serves a well-established, legitimate government interest: the need of law enforcement officers in a safe and accurate way to process and identify persons and possessions taken into custody. "[P]robable cause provides legal justification for arresting a [suspect], and for a brief period of detention to take the administrative steps incident to arrest," *Gerstein v. Pugh,* 420 U.S. 103, 113–114, 95 S.Ct. 854, 43 L.Ed.2d 54; and the "validity of the search of a person incident to a lawful arrest" is settled, *United States v. Robinson,* 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427. Individual suspicion is not necessary. The "routine administrative procedure [s] at a police station house incident to booking and jailing the suspect" have different origins and different constitutional justifications than, say, the search of a place not incident to arrest, *Illinois v. Lafayette,* 462 U.S. 640, 643, 103 S.Ct. 2605, 77 L.Ed.2d 65, which depends on the "fair probability that contraband or evidence of a crime will be found in a particular place," *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527. And when probable cause exists to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving those interests. First, the government has an interest in properly identifying "who has been arrested and who is being tried." *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.,* 542 U.S. 177, 191, 124 S.Ct. 2451, 159 L.Ed.2d 292. Criminal history is critical to officers who are processing a suspect for detention. They already seek identity information through routine and accepted means: comparing booking photographs to sketch artists' depictions, showing mugshots to potential witnesses, and comparing fingerprints against electronic databases of known criminals and unsolved crimes. The only difference between DNA analysis and fingerprint

[133 S.Ct. 1964]

databases is the unparalleled accuracy DNA provides. DNA is another metric of identification used to connect the arrestee with his or her public persona, as reflected in records of his or her actions that are available to the police. Second, officers must ensure that the custody of an arrestee does not create inordinate "risks for facility staff, for the existing detainee population, and for a new detainee." *Florence v. Board of Chosen Freeholders of County of Burlington,* 566 U.S. ----, ----, 132 S.Ct. 1510, 182 L.Ed.2d 566. DNA allows officers to know the type of person being detained. Third, "the Government has a substantial interest in ensuring that persons accused of crimes are available for trials." *Bell v. Wolfish,* 441 U.S. 520, 534, 99 S.Ct. 1861, 60 L.Ed.2d 447. An arrestee may be more inclined to flee if he

thinks that continued contact with the criminal justice system may expose another serious offense. Fourth, an arrestee's past conduct is essential to assessing the danger he poses to the public, which will inform a court's bail determination. Knowing that the defendant is wanted for a previous violent crime based on DNA identification may be especially probative in this regard. Finally, in the interests of justice, identifying an arrestee as the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned. Pp. 1970 – 1975.

(2) DNA identification is an important advance in the techniques long used by law enforcement to serve legitimate police concerns. Police routinely have used scientific advancements as standard procedures for identifying arrestees. Fingerprinting, perhaps the most direct historical analogue to DNA technology, has, from its advent, been viewed as a natural part of "the administrative steps incident to arrest." *County of Riverside v. McLaughlin,* 500 U.S. 44, 58, 111 S.Ct. 1661, 114 L.Ed.2d 49. However, DNA identification is far superior. The additional intrusion upon the arrestee's privacy beyond that associated with fingerprinting is not significant, and DNA identification is markedly more accurate. It may not be as fast as fingerprinting, but rapid fingerprint analysis is itself of recent vintage, and the question of how long it takes to process identifying information goes to the efficacy of the search for its purpose of prompt identification, not the constitutionality of the search. Rapid technical advances are also reducing DNA processing times. Pp. 1974 – 1977.

(d) The government interest is not outweighed by respondent's privacy interests. Pp. 1977 – 1980.

(1) By comparison to the substantial government interest and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is minimal. Reasonableness must be considered in the context of an individual's legitimate privacy expectations, which necessarily diminish when he is taken into police custody. *Bell, supra,* at 557, 99 S.Ct. 1861. Such searches thus differ from the so-called special needs searches of, *e.g.,* otherwise law-abiding motorists at checkpoints. See *Indianapolis v. Edmond,* 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333. The reasonableness inquiry considers two other circumstances in which particularized suspicion is not categorically required: "diminished expectations of privacy [and a] minimal intrusion." *Illinois v. McArthur,* 531 U.S. 326, 330, 121 S.Ct. 946, 148 L.Ed.2d 838. An invasive surgery may raise privacy concerns weighty enough for the search to require a warrant, notwithstanding the arrestee's diminished privacy expectations, but a buccal swab, which involves a brief and minimal intrusion with "virtually no risk, trauma, or pain," *Schmerber v. California,* 384 U.S. 757, 771, 86 S.Ct. 1826, 16 L.Ed.2d 908, does not increase the indignity already attendant to

[133 S.Ct. 1965]

normal incidents of arrest. Pp. 1977 – 1979.

(2) The processing of respondent's DNA sample's CODIS loci also did not intrude on his privacy in a way that would make his DNA identification unconstitutional. Those loci came from noncoding DNA parts that do not reveal an arrestee's genetic traits and are unlikely to reveal any private medical information. Even if they could provide such information, they are not in fact tested for that end. Finally, the Act provides statutory protections to guard against such invasions of privacy. Pp. 1979 – 1980.

425 Md. 550, 42 A.3d 549, reversed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and THOMAS, BREYER, and ALITO, JJ., joined. SCALIA, J., filed a dissenting opinion, in

which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined.

Katherine Winfree, Baltimore, MD, for Petitioner.

Michael R. Dreeben, for the United States as amicus curiae, by special leave of the Court, supporting the Petitioner.

Kannon K. Shanmugam, Washington, DC, for Respondent.

Douglas F. Gansler, Attorney General of Maryland, Katherine Winfree, Chief Deputy Attorney General, Counsel of Record, Brian S. Kleinbord, Robert Taylor, Jr., Assistant Attorneys General, Mary Ann Rapp Ince, Daniel J. Jawor, Carrie J. Williams, Assistant Attorneys General, Office of the Attorney General, Baltimore, MD, for Petitioner.

Paul B. DeWolfe, Public Defender, Stephen B. Mercer, Chief Attorney, Forensics Division Office of the Public Defender, Baltimore, MD, Kannon K. Shanmugam, Counsel of Record, James M. McDonald, Kristin A. Feeley, David M. Horniak, Williams & Connolly LLP, Washington, DC, for Respondent.

Justice KENNEDY delivered the opinion of the Court.

In 2003 a man concealing his face and armed with a gun broke into a woman's home in Salisbury, Maryland. He raped her. The police were unable to identify or apprehend the assailant based on any detailed description or other evidence they then had, but they did obtain from the victim a sample of the perpetrator's DNA.

In 2009 Alonzo King was arrested in Wicomico County, Maryland, and charged with first- and second-degree assault for menacing a group of people with a shotgun. As part of a routine booking procedure for serious offenses, his DNA sample was taken by applying a cotton swab or filter paper—known as a buccal swab—to the inside of his cheeks. The DNA was found to match the DNA taken from the Salisbury rape victim. King was tried and convicted for the rape. Additional DNA samples were taken from him and used in the rape trial, but there seems to be no doubt that it was the DNA from the cheek sample taken at the time he was booked in 2009 that led to his first having been linked to the rape and charged with its commission.

The Court of Appeals of Maryland, on review of King's rape conviction, ruled that the DNA taken when King was booked for the 2009 charge was an unlawful seizure because obtaining and using the cheek swab was an unreasonable search of the person. It set the rape conviction aside. This Court granted certiorari and now reverses

[133 S.Ct. 1966]

the judgment of the Maryland court.

I

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

On July 13, 2009, King's DNA record was uploaded to the Maryland DNA database, and three weeks later, on August 4, 2009, his DNA profile was matched to the DNA sample collected in the unsolved 2003 rape case. Once the DNA was matched to King, detectives presented the forensic evidence to a grand jury, which indicted him for the rape. Detectives obtained a search warrant and

took a second sample of DNA from King, which again matched the evidence from the rape. He moved to suppress the DNA match on the grounds that Maryland's DNA collection law violated the Fourth Amendment. The Circuit Court Judge upheld the statute as constitutional. King pleaded not guilty to the rape charges but was convicted and sentenced to life in prison without the possibility of parole.

In a divided opinion, the Maryland Court of Appeals struck down the portions of the Act authorizing collection of DNA from felony arrestees as unconstitutional. The majority concluded that a DNA swab was an unreasonable search in violation of the Fourth Amendment because King's "expectation of privacy is greater than the State's purported interest in using King's DNA to identify him." 425 Md. 550, 561, 42 A.3d 549, 556 (2012). In reaching that conclusion the Maryland Court relied on the decisions of various other courts that have concluded that DNA identification of arrestees is impermissible. See, *e.g., People v. Buza,* 129 Cal.Rptr.3d 753 (App.2011) (officially depublished); *Mario W. v. Kaipio,* 228 Ariz. 207, 265 P.3d 389 (App.2011).

Both federal and state courts have reached differing conclusions as to whether the Fourth Amendment prohibits the collection and analysis of a DNA sample from persons arrested, but not yet convicted, on felony charges. This Court granted certiorari, 568 U.S. ----, 133 S.Ct. 594, 184 L.Ed.2d 390 (2012), to address the question. King is the respondent here.

II

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

A

The current standard for forensic DNA testing relies on an analysis of the chromosomes located within the nucleus of all human cells. "The DNA material in chromosomes is composed of 'coding' and 'noncoding'

[133 S.Ct. 1967]

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

Many of the patterns found in DNA are shared among all people, so forensic analysis focuses on "repeated DNA sequences scattered throughout the human genome," known as "short tandem repeats" (STRs). *Id.,* at 147–148. The alternative possibilities for the size and frequency of these STRs at any given point along a strand of DNA are known

as "alleles," *id.*, at 25; and multiple alleles are analyzed in order to ensure that a DNA profile matches only one individual. Future refinements may improve present technology, but even now STR analysis makes it "possible to determine whether a biological tissue matches a suspect with near certainty." *Osborne, supra,* at 62, 129 S.Ct. 2308.

The Act authorizes Maryland law enforcement authorities to collect DNA samples from "an individual who is charged with ... a crime of violence or an attempt to commit a crime of violence; or ... burglary or an attempt to commit burglary." Md. Pub. Saf. Code Ann. § 2–504(a)(3)(i) (Lexis 2011). Maryland law defines a crime of violence to include murder, rape, first-degree assault, kidnaping, arson, sexual assault, and a variety of other serious crimes. Md. Crim. Law Code Ann. § 14–101 (Lexis 2012). Once taken, a DNA sample may not be processed or placed in a database before the individual is arraigned (unless the individual consents). Md. Pub. Saf. Code Ann. § 2–504(d)(1) (Lexis 2011). It is at this point that a judicial officer ensures that there is probable cause to detain the arrestee on a qualifying serious offense. If "all qualifying criminal charges are determined to be unsupported by probable cause ... the DNA sample shall be immediately destroyed." § 2–504(d)(2)(i). DNA samples are also destroyed if "a criminal action begun against the individual ... does not result in a conviction," "the conviction is finally reversed or vacated and no new trial is permitted," or "the individual is granted an unconditional pardon." § 2–511(a)(1).

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

Respondent's DNA was collected in this case using a common procedure known as a "buccal swab." "Buccal cell collection involves wiping a small piece of filter paper or a cotton swab similar to a Q-tip against the inside cheek of an individual's

[133 S.Ct. 1968]

mouth to collect some skin cells." Butler 86. The procedure is quick and painless. The swab touches inside an arrestee's mouth, but it requires no "surgical intrusio[n] beneath the skin," *Winston v. Lee,* 470 U.S. 753, 760, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985), and it poses no "threa[t] to the health or safety" of arrestees, *id.*, at 763, 105 S.Ct. 1611.

B

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

audits to evaluate compliance with the federal standards for scientifically rigorous DNA testing. Butler 270.

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

All 50 States require the collection of DNA from felony convicts, and respondent does not dispute the validity of that practice. See Brief for Respondent 48. Twenty-eight States and the Federal Government have adopted laws similar to the Maryland Act authorizing the collection of DNA from some or all arrestees. See Brief for State of California et al. as *Amici Curiae* 4, n. 1 (States Brief) (collecting state statutes). Although those statutes vary in their particulars, such as what charges require a DNA sample, their similarity means that this case implicates more than the specific Maryland law. At issue is a standard, expanding technology already in widespread use throughout the Nation.

III

A

Although the DNA swab procedure used here presents a question the Court has not yet addressed, the framework for deciding the issue is well established. The Fourth Amendment, binding on the States by the Fourteenth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." It can be agreed that using a

[133 S.Ct. 1969]

buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search. Virtually any "intrusio[n] into the human body," *Schmerber v. California,* 384 U.S. 757, 770, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), will work an invasion of " 'cherished personal security' that is subject to constitutional scrutiny," *Cupp v. Murphy,* 412 U.S. 291, 295, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973) (quoting *Terry v. Ohio,* 392 U.S. 1, 24–25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). The Court has applied the Fourth Amendment to police efforts to draw blood, see *Schmerber, supra* ;*Missouri v. McNeely,* 569 U.S. ----, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), scraping an arrestee's fingernails to obtain trace evidence, see *Cupp,supra,* and even to "a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis," *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).

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

B

To say that the Fourth Amendment applies here is the beginning point, not the end of the analysis. "[T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Schmerber, supra,* at 768, 86 S.Ct. 1826. "As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.' " *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 652, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). In giving content to the inquiry whether an intrusion is reasonable, the Court has preferred "some quantum of individualized suspicion ... [as] a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States v. Martinez–Fuerte,* 428 U.S. 543, 560–561, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (citation and footnote omitted).

In some circumstances, such as "[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *Illinois v. McArthur,* 531 U.S. 326, 330, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001). Those circumstances diminish the need for a warrant, either because "the public interest is such that neither a warrant nor probable cause is required," *Maryland v. Buie,* 494 U.S. 325, 331, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), or because an individual is already on notice, for instance because of his employment, see *Skinner,supra,* or the conditions of his release from government custody, see *Samson v. California,* 547 U.S. 843, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006), that some reasonable police intrusion on his privacy is to be expected. The need for a warrant is perhaps least when the search involves no discretion that could properly be limited by the "interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer."

[133 S.Ct. 1970]

Treasury Employees v. Von Raab, 489 U.S. 656, 667, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989).

The instant case can be addressed with this background. The Maryland DNA Collection Act provides that, in order to obtain a DNA sample, all arrestees charged with serious crimes must furnish the sample on a buccal swab applied, as noted, to the inside of the cheeks. The arrestee is already in valid police custody for a serious offense supported by probable cause. The DNA collection is not subject to the judgment of officers whose perspective might be "colored by their primary involvement in 'the often competitive enterprise of ferreting out crime.' " *Terry, supra,* at 12, 88 S.Ct. 1868 (quoting *Johnson v. United States,* 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948)). As noted by this Court in a different but still instructive context involving blood testing, "[b]oth the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them.... Indeed, in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate." *Skinner, supra,* at 622, 109 S.Ct. 1402. Here, the search effected by the buccal swab of respondent falls within the category of cases this Court has analyzed by reference to the proposition that the "touchstone of the Fourth Amendment is reasonableness, not individualized suspicion." *Samson, supra,* at 855, n. 4, 126 S.Ct. 2193.

Even if a warrant is not required, a search is not beyond Fourth Amendment

scrutiny; for it must be reasonable in its scope and manner of execution. Urgent government interests are not a license for indiscriminate police behavior. To say that no warrant is required is merely to acknowledge that "rather than employing a *per se* rule of unreasonableness, we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." *McArthur, supra,* at 331, 121 S.Ct. 946. This application of "traditional standards of reasonableness" requires a court to weigh "the promotion of legitimate governmental interests" against "the degree to which [the search] intrudes upon an individual's privacy." *Wyoming v. Houghton,* 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999). An assessment of reasonableness to determine the lawfulness of requiring this class of arrestees to provide a DNA sample is central to the instant case.

IV
A

The legitimate government interest served by the Maryland DNA Collection Act is one that is well established: the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody. It is beyond dispute that "probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein v. Pugh,* 420 U.S. 103, 113–114, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). Also uncontested is the "right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested." *Weeks v. United States,* 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 652 (1914), overruled on other grounds, *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). "The validity of the search of a person incident to a lawful arrest has been regarded as settled from

[133 S.Ct. 1971]

its first enunciation, and has remained virtually unchallenged." *United States v. Robinson,* 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). Even in that context, the Court has been clear that individual suspicion is not necessary, because "[t]he constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search." *Michigan v. DeFillippo,* 443 U.S. 31, 35, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979).

The "routine administrative procedure[s] at a police station house incident to booking and jailing the suspect" derive from different origins and have different constitutional justifications than, say, the search of a place, *Illinois v. Lafayette,* 462 U.S. 640, 643, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983); for the search of a place not incident to an arrest depends on the "fair probability that contraband or evidence of a crime will be found in a particular place," *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The interests are further different when an individual is formally processed into police custody. Then "the law is in the act of subjecting the body of the accused to its physical dominion." *People v. Chiagles,* 237 N.Y. 193, 197, 142 N.E. 583, 584 (1923) (Cardozo, J.). When probable cause exists to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving those interests.

First, "[i]n every criminal case, it is known and must be known who has been arrested and who is being tried." *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.,* 542 U.S. 177, 191, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004). An individual's identity is more than just his name or Social Security number, and the government's interest in identification goes beyond ensuring that the

proper name is typed on the indictment. Identity has never been considered limited to the name on the arrestee's birth certificate. In fact, a name is of little value compared to the real interest in identification at stake when an individual is brought into custody. "It is a well recognized aspect of criminal conduct that the perpetrator will take unusual steps to conceal not only his conduct, but also his identity. Disguises used while committing a crime may be supplemented or replaced by changed names, and even changed physical features." *Jones v. Murray*, 962 F.2d 302, 307 (C.A.4 1992). An "arrestee may be carrying a false ID or lie about his identity," and "criminal history records ... can be inaccurate or incomplete." *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. ----, ----, 132 S.Ct. 1510, 1521, 182 L.Ed.2d 566 (2012).

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

[133 S.Ct. 1972]

comparison of the arrestee's fingerprints against electronic databases of known criminals and unsolved crimes. In this respect the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides.

The task of identification necessarily entails searching public and police records based on the identifying information provided by the arrestee to see what is already known about him. The DNA collected from arrestees is an irrefutable identification of the person from whom it was taken. Like a fingerprint, the 13 CODIS loci are not themselves evidence of any particular crime, in the way that a drug test can by itself be evidence of illegal narcotics use. A DNA profile is useful to the police because it gives them a form of identification to search the records already in their valid possession. 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. See Tr. of Oral Arg. 19. DNA is another metric of identification used to connect the arrestee with his or her public persona, as reflected in records of his or her actions that are available to the police. Those records may be linked to the arrestee by a variety of relevant forms of identification, including name, alias, date and time of previous convictions and the name then used, photograph, Social Security number, or CODIS profile. These data, found in official records, are checked as a routine matter to produce a more comprehensive record of the suspect's complete identity. Finding occurrences of the arrestee's CODIS profile in outstanding cases is consistent with this common practice. It uses a different form of identification than a name or fingerprint, but its function is the same.

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

Florence,supra, at ----, 132 S.Ct., at 1518. DNA identification can provide untainted information to those charged with detaining suspects and detaining the property of any felon. For these purposes officers must know the type of person whom they are detaining, and DNA allows them to make critical choices about how to proceed.

"Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere. Identity may prove particularly important in [certain cases, such as] where the police are investigating what appears to be a domestic assault. Officers called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Hiibel, supra,* at 186, 124 S.Ct. 2451.

Recognizing that a name alone cannot address this interest in identity, the Court has approved, for example, "a visual inspection for certain tattoos and other signs of gang affiliation as part of the intake process," because "[t]he identification and isolation of gang members before they are admitted protects everyone." *Florence, supra,* at ----, 132 S.Ct., at 1519.

Third, looking forward to future stages of criminal prosecution, "the Government has a substantial interest in ensuring that

[133 S.Ct. 1973]

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

Fourth, an arrestee's past conduct is essential to an assessment of the danger he poses to the public, and this will inform a court's determination whether the individual should be released on bail. "The government's interest in preventing crime by arrestees is both legitimate and compelling." *United States v. Salerno,* 481 U.S. 739, 749, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). DNA identification of a suspect in a violent crime provides critical information to the police and judicial officials in making a determination of the arrestee's future dangerousness. This inquiry always has entailed some scrutiny beyond the name on the defendant's driver's license. For example, Maryland law requires a judge to take into account not only "the nature and circumstances of the offense charged" but also "the defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community." 1 Md. Rules 4–216(f)(1)(A), (C) (2013). Knowing that the defendant is wanted for a previous violent crime based on DNA identification is especially probative of the court's consideration of "the danger of the defendant to the alleged victim, another person, or the community." Rule 4–216(f)(1)(G); see also 18 U.S.C. § 3142 (2006 ed. and Supp. V) (similar requirements).

This interest is not speculative. In considering laws to require collecting DNA from arrestees, government agencies around the Nation found evidence of numerous cases in which felony arrestees would have been identified as violent through DNA identification matching them to previous crimes but who later committed additional crimes because such identification was not used to detain them. See Denver's Study on Preventable Crimes (2009) (three examples), online at http:// www. denverda. org/ DNA_ Documents/ Denver% 27s% 20Preventable% 20Crimes% 20Study.pdf (all Internet materials as visited May 31, 2013, and available in Clerk of Court's case file); Chicago's Study on Preventable Crimes (2005) (five examples), online at http:// www. denverda. org/ DNA_ Documents/ Arrestee_ Database/ Chicago% 20Preventable% 20CrimesFinal.pdf; Maryland Study on Preventable Crimes (2008) (three examples), online at http:// www. denverda. org/ DNA_ Documents/ Maryland DNA arrestee study. pdf.

Present capabilities make it possible to complete a DNA identification that provides information essential to determining whether a detained suspect can be released pending trial. See, *e.g.*, States Brief 18, n. 10 ("DNA identification database samples have been processed in as few as two days in California, although around 30 days has been average"). Regardless of when the initial bail decision is

[133 S.Ct. 1974]

made, release is not appropriate until a further determination is made as to the person's identity in the sense not only of what his birth certificate states but also what other records and data disclose to give that identity more meaning in the whole context of who the person really is. And even when release is permitted, the background identity of the suspect is necessary for determining what conditions must be met before release is allowed. If release is authorized, it may take time for the conditions to be met, and so the time before actual release can be substantial. For example, in the federal system, defendants released conditionally are detained on average for 112 days; those released on unsecured bond for 37 days; on personal recognizance for 36 days; and on other financial conditions for 27 days. See Dept. of Justice, Bureau of Justice Statistics, Compendium of Federal Justice Statistics 45 (NCJ–213476, Dec. 2006) online at http:// bjs. gov/ content/ pub/ pdf/ cfjs 04. pdf. During this entire period, additional and supplemental data establishing more about the person's identity and background can provide critical information relevant to the conditions of release and whether to revisit an initial release determination. The facts of this case are illustrative. Though the record is not clear, if some thought were being given to releasing the respondent on bail on the gun charge, a release that would take weeks or months in any event, when the DNA report linked him to the prior rape, it would be relevant to the conditions of his release. The same would be true with a supplemental fingerprint report.

Even if an arrestee is released on bail, development of DNA identification revealing the defendant's unknown violent past can and should lead to the revocation of his conditional release. See 18 U.S.C. § 3145(a) (providing for revocation of release); see also States Brief 11–12 (discussing examples where bail and diversion determinations were reversed after DNA identified the arrestee's violent history). Pretrial release of a person charged with a dangerous crime is a most serious responsibility. It is reasonable in all respects for the State to use an accepted database to determine if an arrestee is the object of suspicion in other serious crimes, suspicion that may provide a strong incentive for the arrestee to escape and flee.

Finally, in the interests of justice, the identification of an arrestee as the perpetrator of some heinous crime may have the salutary

effect of freeing a person wrongfully imprisoned for the same offense. "[P]rompt [DNA] testing ... would speed up apprehension of criminals before they commit additional crimes, and prevent the grotesque detention of ... innocent people." J. Dwyer, P. Neufeld, & B. Scheck, Actual Innocence 245 (2000).

Because proper processing of arrestees is so important and has consequences for every stage of the criminal process, the Court has recognized that the "governmental interests underlying a station-house search of the arrestee's person and possessions may in some circumstances be even greater than those supporting a search immediately following arrest." *Lafayette,* 462 U.S., at 645, 103 S.Ct. 2605. Thus, the Court has been reluctant to circumscribe the authority of the police to conduct reasonable booking searches. For example, "[t]he standards traditionally governing a search incident to lawful arrest are not ... commuted to the stricter *Terry* standards." *Robinson,* 414 U.S., at 234, 94 S.Ct. 467. Nor are these interests in identification served only by a search of the arrestee himself. "[I]nspection of an arrestee's personal property may assist the police in ascertaining or verifying his identity."

[133 S.Ct. 1975]

Lafayette, supra, at 646, 103 S.Ct. 2605. And though the Fifth Amendment's protection against self-incrimination is not, as a general rule, governed by a reasonableness standard, the Court has held that "questions ... reasonably related to the police's administrative concerns ... fall outside the protections of *Miranda* [*v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)] and the answers thereto need not be suppressed." *Pennsylvania v. Muniz,* 496 U.S. 582, 601–602, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990).

B

DNA identification represents an important advance in the techniques used by law enforcement to serve legitimate police concerns for as long as there have been arrests, concerns the courts have acknowledged and approved for more than a century. Law enforcement agencies routinely have used scientific advancements in their standard procedures for the identification of arrestees. "Police had been using photography to capture the faces of criminals almost since its invention." S. Cole, Suspect Identities 20 (2001). Courts did not dispute that practice, concluding that a "sheriff in making an arrest for a felony on a warrant has the right to exercise a discretion ..., [if] he should deem it necessary to the safe-keeping of a prisoner, and to prevent his escape, or to enable him the more readily to retake the prisoner if he should escape, to take his photograph." *State ex rel. Bruns v. Clausmier,* 154 Ind. 599, 601, 603, 57 N.E. 541, 542 (1900). By the time that it had become "the daily practice of the police officers and detectives of crime to use photographic pictures for the discovery and identification of criminals," the courts likewise had come to the conclusion that "it would be [a] matter of regret to have its use unduly restricted upon any fanciful theory or constitutional privilege." *Shaffer v. United States,* 24 App.D.C. 417, 426 (1904).

Beginning in 1887, some police adopted more exacting means to identify arrestees, using the system of precise physical measurements pioneered by the French anthropologist Alphonse Bertillon. Bertillon identification consisted of 10 measurements of the arrestee's body, along with a "scientific analysis of the features of the face and an exact anatomical localization of the various scars, marks, &c., of the body." Defense of the Bertillon System, N.Y. Times, Jan. 20, 1896, p. 3. "[W]hen a prisoner was brought in, his photograph was taken according to the Bertillon system, and his body measurements were then made. The measurements were made ... and noted down on the back of a card

or a blotter, and the photograph of the prisoner was expected to be placed on the card. This card, therefore, furnished both the likeness and description of the prisoner, and was placed in the rogues' gallery, and copies were sent to various cities where similar records were kept." *People ex rel. Jones v. Diehl,* 53 A.D. 645, 646, 65 N.Y.S. 801, 802 (1900). As in the present case, the point of taking this information about each arrestee was not limited to verifying that the proper name was on the indictment. These procedures were used to "facilitate the recapture of escaped prisoners," to aid "the investigation of their past records and personal history," and "to preserve the means of identification for ... future supervision after discharge." *Hodgeman v. Olsen,* 86 Wash. 615, 619, 150 P. 1122, 1124 (1915); see also *McGovern v. Van Riper,* 137 N.J. Eq. 24, 33–34, 43 A.2d 514, 519 (Ch.1945) ("[C]riminal identification is said to have two main purposes: (1) The identification of the accused as the person who committed the crime for which he is being held; and, (2) the identification of the accused as the same person who has been previously charged with, or

[133 S.Ct. 1976]

convicted of, other offenses against the criminal law").

Perhaps the most direct historical analogue to the DNA technology used to identify respondent is the familiar practice of fingerprinting arrestees. From the advent of this technique, courts had no trouble determining that fingerprinting was a natural part of "the administrative steps incident to arrest." *County of Riverside v. McLaughlin,* 500 U.S. 44, 58, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). In the seminal case of *United States v. Kelly,* 55 F.2d 67 (C.A.2 1932), Judge Augustus Hand wrote that routine fingerprinting did not violate the Fourth Amendment precisely because it fit within the accepted means of processing an arrestee into custody:

"Finger printing 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 of the criminal laws. It is known to be a very certain means devised by modern science to reach the desired end, and has become especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification.

.....

"We find no ground in reason or authority for interfering with a method of identifying persons charged with crime which has now become widely known and frequently practiced." *Id.,* at 69–70.

By the middle of the 20th century, it was considered "elementary that a person in lawful custody may be required to submit to photographing and fingerprinting as part of routine identification processes." *Smith v. United States,* 324 F.2d 879, 882 (C.A.D.C.1963) (Burger, J.) (citations omitted).

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

photographic identification or even one who has undertaken the more arduous task of altering his fingerprints cannot escape the revealing power of his DNA.

The respondent's primary objection to this analogy is that DNA identification is not as fast as fingerprinting, and so it should not be considered to be the 21st-century equivalent. See Tr. of Oral Arg. 53. But rapid analysis of fingerprints is itself of recent vintage. The FBI's vaunted Integrated Automated Fingerprint Identification System (IAFIS) was only "launched on July 28, 1999. Prior to this time, the processing of ... fingerprint submissions was largely a manual, labor-intensive process, taking weeks or months to process a single submission." Federal Bureau of Investigation, Integrated Automated Fingerprint Identification System, online at http:// www. fbi. gov/ about- us/ cjis/ fingerprints_ biometrics/ iafis/ iafis. It was not the advent of this technology that rendered fingerprint analysis constitutional in a single moment. The question of how long it takes to process identifying information obtained from a valid search goes only to the efficacy of the search for its purpose of prompt identification, not the constitutionality of the search. Cf. *Ontario v. Quon*, 560 U.S. ----, ----, 130 S.Ct. 2619, 2632, 177 L.Ed.2d 216 (2010). Given the importance of DNA in the identification of police records pertaining to arrestees

[133 S.Ct. 1977]

and the need to refine and confirm that identity for its important bearing on the decision to continue release on bail or to impose of new conditions, DNA serves an essential purpose despite the existence of delays such as the one that occurred in this case. Even so, the delay in processing DNA from arrestees is being reduced to a substantial degree by rapid technical advances. See, *e.g.*, Attorney General DeWine Announces Significant Drop in DNA Turnaround Time (Jan. 4, 2013) (DNA processing time reduced from 125 days in 2010 to 20 days in 2012), online at http:// ohio attorney general. gov/ Media/ News- Releases/ January- 2013/ Attorney- General- De Wine- Announces- Significant- Drop; Gov. Jindal Announces Elimination of DNA Backlog, DNA Unit Now Operating in Real Time (Nov. 17, 2011) (average DNA report time reduced from a year or more in 2009 to 20 days in 2011), online at http:// www. gov. state. la. us/ index. cfm? md= newsroom& tmp= detail& article ID= 3102. And the FBI has already begun testing devices that will enable police to process the DNA of arrestees within 90 minutes. See Brief for National District Attorneys Association as *Amicus Curiae* 20–21; Tr. of Oral Arg. 17. An assessment and understanding of the reasonableness of this minimally invasive search of a person detained for a serious crime should take account of these technical advances. Just as fingerprinting was constitutional for generations prior to the introduction of IAFIS, DNA identification of arrestees is a permissible tool of law enforcement today. New technology will only further improve its speed and therefore its effectiveness. And, as noted above, actual release of a serious offender as a routine matter takes weeks or months in any event. By identifying not only who the arrestee is but also what other available records disclose about his past to show who he is, the police can ensure that they have the proper person under arrest and that they have made the necessary arrangements for his custody; and, just as important, they can also prevent suspicion against or prosecution of the innocent.

In sum, there can be little reason to question "the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution." 3 W. LaFave, Search and Seizure § 5.3(c), p. 216 (5th ed. 2012). To that end, courts have confirmed that the

Fourth Amendment allows police to take certain routine "administrative steps incident to arrest— *i.e.*, ... book[ing], photograph[ing], and fingerprint[ing]." *McLaughlin*, 500 U.S., at 58, 111 S.Ct. 1661. DNA identification of arrestees, of the type approved by the Maryland statute here at issue, is "no more than an extension of methods of identification long used in dealing with persons under arrest." *Kelly*, 55 F.2d, at 69. In the balance of reasonableness required by the Fourth Amendment, therefore, the Court must give great weight both to the significant government interest at stake in the identification of arrestees and to the unmatched potential of DNA identification to serve that interest.

V

A

By comparison to this substantial government interest and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is a minimal one. True, a significant government interest does not alone suffice to justify a search. The government interest must outweigh the degree to which the search invades an individual's legitimate expectations of privacy. In considering

[133 S.Ct. 1978]

those expectations in this case, however, the necessary predicate of a valid arrest for a serious offense is fundamental. "Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place." *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). "[T]he legitimacy of certain privacy expectations vis-á-vis the State may depend upon the individual's legal relationship with the State." *Vernonia School Dist. 47J*, 515 U.S., at 654, 115 S.Ct. 2386.

The reasonableness of any search must be considered in the context of the person's legitimate expectations of privacy. For example, when weighing the invasiveness of urinalysis of high school athletes, the Court noted that "[l]egitimate privacy expectations are even less with regard to student athletes.... Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford." *Id.*, at 657, 115 S.Ct. 2386. Likewise, the Court has used a context-specific benchmark inapplicable to the public at large when "the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively," *Skinner*, 489 U.S., at 627, 109 S.Ct. 1402, or when "the 'operational realities of the workplace' may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts," *Von Raab*, 489 U.S., at 671, 109 S.Ct. 1384.

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

In this critical respect, the search here at issue differs from the sort of programmatic searches of either the public at large or a particular class of regulated but otherwise law-abiding citizens that the Court has previously labeled as " 'special needs' " searches. *Chandler v. Miller*, 520 U.S. 305, 314, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997).

When the police stop a motorist at a checkpoint, see *Indianapolis v. Edmond,* 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000), or test a political candidate for illegal narcotics, see *Chandler, supra,* they intrude upon substantial expectations of privacy. So the Court has insisted on some purpose other than "to detect evidence of ordinary criminal wrongdoing" to justify these searches in the absence of individualized suspicion. *Edmond, supra,* at 38, 121 S.Ct. 447. Once an individual has been arrested on probable cause for a dangerous offense that may require detention before trial, however, his or her expectations of privacy and freedom from police scrutiny are reduced. DNA identification like that at issue here thus does not require consideration of any unique needs that would be required to justify searching the average citizen. The special needs cases, though in full accord with the result reached here, do not have a direct bearing on the issues presented in this case, because unlike the search of a citizen who has not been suspected of a wrong, a detainee has a reduced expectation of privacy.

[133 S.Ct. 1979]

The reasonableness inquiry here considers two other circumstances in which the Court has held that particularized suspicion is not categorically required: "diminished expectations of privacy [and] minimal intrusions." *McArthur,* 531 U.S., at 330, 121 S.Ct. 946. This is not to suggest that any search is acceptable solely because a person is in custody. Some searches, such as invasive surgery, see *Winston,* 470 U.S. 753, 105 S.Ct. 1611, or a search of the arrestee's home, see *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), involve either greater intrusions or higher expectations of privacy than are present in this case. In those situations, when the Court must "balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable," *McArthur, supra,* at 331, 121 S.Ct. 946, the privacy-related concerns are weighty enough that the search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.

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

B

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

First, as already noted, the CODIS loci come from noncoding parts of the DNA that do not reveal the genetic traits of the arrestee. While science can always progress further, and those progressions may have Fourth Amendment consequences, alleles at the CODIS loci "are not at present revealing information beyond identification." Katsanis & Wagner, Characterization of the Standard and Recommended CODIS Markers, 58 J. Forensic Sci. S169, S171 (2013). The argument that the testing at issue in this case reveals any private medical information at all is open to dispute.

And even if non-coding alleles could provide some information, they are not in fact tested for that end. It is undisputed that law

enforcement officers analyze DNA for the sole purpose of generating a unique identifying number against which future samples may be matched. This parallels a similar safeguard based on actual practice in the school drug-testing context, where the Court deemed it "significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic." *Vernonia School Dist. 47J,* 515 U.S., at 658, 115 S.Ct. 2386. If in the future police analyze samples to determine, for instance, an arrestee's predisposition for a particular disease or other hereditary factors not relevant to identity, that case would present additional privacy concerns not present here.

Finally, the Act provides statutory protections that guard against further invasion of privacy. As noted above, the Act requires that "[o]nly DNA records that

[133 S.Ct. 1980]

directly relate to the identification of individuals shall be collected and stored." Md. Pub. Saf. Code Ann . § 2–505(b)(1). No purpose other than identification is permissible: "A person may not willfully test a DNA sample for information that does not relate to the identification of individuals as specified in this subtitle." § 2–512(c). This Court has noted often that "a 'statutory or regulatory duty to avoid unwarranted disclosures' generally allays ... privacy concerns." *NASA v. Nelson,* 562 U.S. ––––, ––––, 131 S.Ct. 746, 750, 178 L.Ed.2d 667 (2011) (quoting *Whalen v. Roe,* 429 U.S. 589, 605, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977)). The Court need not speculate about the risks posed "by a system that did not contain comparable security provisions." *Id.,* at 606, 97 S.Ct. 869. In light of the scientific and statutory safeguards, once respondent's DNA was lawfully collected the STR analysis of respondent's DNA pursuant to CODIS procedures did not amount to a significant invasion of privacy that would render the DNA identification impermissible under the Fourth Amendment.

* * *

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

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

It is so ordered.

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

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

upon a justifying motive apart from the investigation of crime.

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

I

A

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

[133 S.Ct. 1981]

Virginia Constitution declared that "general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed," or to search a person "whose offence is not particularly described and supported by evidence," "are grievous and oppressive, and ought not be granted." Va. Declaration of Rights § 10 (1776), in 1 B. Schwartz, The Bill of Rights: A Documentary History 234, 235 (1971). The Maryland Declaration of Rights similarly provided that general warrants were "illegal." Md. Declaration of Rights § XXIII (1776), in *id.*, at 280, 282.

In the ratification debates, Antifederalists sarcastically predicted that the general, suspicionless warrant would be among the Constitution's "blessings." Blessings of the New Government, Independent Gazetteer, Oct. 6, 1787, in 13 Documentary History of the Ratification of the Constitution 345 (J. Kaminski & G. Saladino eds. 1981). "Brutus" of New York asked why the Federal Constitution contained no provision like Maryland's, Brutus II, N.Y. Journal, Nov. 1, 1787, in *id.*, at 524, and Patrick Henry warned that the new Federal Constitution would expose the citizenry to searches and seizures "in the most arbitrary manner, without any evidence or reason." 3 Debates on the Federal Constitution 588 (J. Elliot 2d ed. 1854).

Madison's draft of what became the Fourth Amendment answered these charges by providing that the "rights of the people to be secured in their persons ... from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause ... or not particularly describing the places to be searched." 1 Annals of Cong. 434–435 (1789). As ratified, the Fourth Amendment's Warrant Clause forbids a warrant to "issue" except "upon probable cause," and requires that it be "particula[r]" (which is to say, *individualized*) to "the place to be searched, and the persons or things to be seized." And we have held that, even when a warrant is not constitutionally necessary, the Fourth Amendment's general prohibition of "unreasonable" searches imports the same requirement of individualized suspicion. See *Chandler v. Miller*, 520 U.S. 305, 308, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997).

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

yes—but only because the Government's need to "regulat[e] the conduct of railroad employees to ensure safety" is distinct from "normal law enforcement." *Skinner, supra,* at 620, 109 S.Ct. 1402. So too we have approved suspicionless searches in public schools—but only because there the government acts in furtherance of its "responsibilities ... as guardian and tutor of children entrusted to its care." *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 665, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995).

So while the Court is correct to note (*ante,* at 1969 – 1970) that there are instances in which we have permitted searches without individualized suspicion, "[i]n none of these cases ... did we indicate approval of a [search] whose primary

[133 S.Ct. 1982]

purpose was to detect evidence of ordinary criminal wrongdoing." *Indianapolis v. Edmond,* 531 U.S. 32, 38, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). That limitation is crucial. It is only when a governmental purpose aside from crime-solving is at stake that we engage in the free-form "reasonableness" inquiry that the Court indulges at length today. To put it another way, both the legitimacy of the Court's method and the correctness of its outcome hinge entirely on the truth of a single proposition: that the primary purpose of these DNA searches is something other than simply discovering evidence of criminal wrongdoing. As I detail below, that proposition is wrong.

B

The Court alludes at several points (see *ante,* at 1970 – 1971, 1978 – 1979) to the fact that King was an arrestee, and arrestees may be validly searched incident to their arrest. But the Court does not really *rest* on this principle, and for good reason: The objects of a search incident to arrest must be either (1) weapons or evidence that might easily be destroyed, or (2) evidence relevant to the crime of arrest. See *Arizona v. Gant,* 556 U.S. 332, 343–344, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009); *Thornton v. United States,* 541 U.S. 615, 632, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) (SCALIA, J., concurring in judgment). Neither is the object of the search at issue here.

The Court hastens to clarify that it does not mean to approve invasive surgery on arrestees or warrantless searches of their homes. *Ante,* at 1978 – 1979. That the Court feels the need to disclaim these consequences is as damning a criticism of its suspicionless-search regime as any I can muster. And the Court's attempt to distinguish those hypothetical searches from this real one is unconvincing. We are told that the "privacy-related concerns" in the search of a home "are weighty enough that the search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." *Ante,* at 1979. But why are the "privacy-related concerns" not also "weighty" when an intrusion into the *body* is at stake? (The Fourth Amendment lists "persons" *first* among the entities protected against unreasonable searches and seizures.) And could the police engage, without any suspicion of wrongdoing, in a "brief and ... minimal" intrusion into the home of an arrestee—perhaps just peeking around the curtilage a bit? See *ante,* at 1979. Obviously not.

At any rate, all this discussion is beside the point. No matter the degree of invasiveness, suspicionless searches are *never* allowed if their principal end is ordinary crime-solving. A search incident to arrest either serves other ends (such as officer safety, in a search for weapons) or is not suspicionless (as when there is reason to believe the arrestee possesses evidence relevant to the crime of arrest).

Sensing (correctly) that it needs more, the Court elaborates at length the ways that the search here served the special purpose of "identifying" King. [1] But that

[133 S.Ct. 1983]

seems to me quite wrong—unless what one means by "identifying" someone is "searching for evidence that he has committed crimes unrelated to the crime of his arrest." At points the Court does appear to use "identifying" in that peculiar sense—claiming, for example, that knowing "an arrestee's past conduct is essential to an assessment of the danger he poses." *Ante,* at 1973. If identifying someone means finding out what unsolved crimes he has committed, then identification is indistinguishable from the ordinary law-enforcement aims that have never been thought to justify a suspicionless search. Searching every lawfully stopped car, for example, might turn up information about unsolved crimes the driver had committed, but no one would say that such a search was aimed at "identifying" him, and no court would hold such a search lawful. I will therefore assume that the Court means that the DNA search at issue here was useful to "identify" King in the normal sense of that word—in the sense that would identify the author of Introduction to the Principles of Morals and Legislation as Jeremy Bentham.

1

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

King was arrested on April 10, 2009, on charges unrelated to the case before us. That same day, April 10, the police searched him and seized the DNA evidence at issue here. What happened next? Reading the Court's opinion, particularly its insistence that the search was necessary to know "who [had] been arrested," *ante,* at 1971, one might guess that King's DNA was swiftly processed and his identity thereby confirmed—perhaps against some master database of known DNA profiles, as is done for fingerprints. After all, was not the suspicionless search here crucial to avoid "inordinate risks for facility staff" or to "existing detainee population," *ante,* at 1972? Surely, then— *surely*—the State of Maryland got cracking on those grave risks immediately, by rushing to identify King with his DNA as soon as possible.

Nothing could be further from the truth. Maryland officials did not even begin the process of testing King's DNA that day. Or, actually, the next day. Or the day after that. And that was for a simple reason: Maryland law forbids them to do so. A "DNA sample collected from an individual charged with a crime ... *may not* be tested or placed in the statewide DNA data base system prior to the first scheduled arraignment date." Md. Pub. Saf. Code Ann. § 2–504(d)(1) (Lexis 2011) (emphasis added). And King's first appearance in court was not until three days after his arrest. (I suspect, though, that they did not wait three days to ask his name or take his fingerprints.)

This places in a rather different light the Court's solemn declaration that the search here was necessary so that King could be identified at "every stage of the criminal process." *Ante,* at 1974. I hope that the Maryland officials who read the Court's opinion do not take it seriously. Acting on the Court's misperception of Maryland law could lead to jail time. See Md. Pub. Saf. Code Ann. § 2–512(c)–(e) (punishing by up to five years' imprisonment anyone who obtains or tests DNA information except as provided by statute). Does the Court really believe that Maryland did not know whom it was arraigning? The Court's response is to imagine that release on bail could take so long

that the DNA results are returned in time, or perhaps that bail

[133 S.Ct. 1984]

could be revoked if the DNA test turned up incriminating information. *Ante,* at 1973 – 1974. That is no answer at all. If the purpose of this Act is to assess "whether [King] should be released on bail," *ante,* at 1973, why would it *possibly* forbid the DNA testing process to *begin* until King was arraigned? Why would Maryland resign itself to simply hoping that the bail decision will drag out long enough that the "identification" can succeed before the arrestee is released? The truth, known to Maryland and increasingly to the reader: this search had nothing to do with establishing King's identity.

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

A more specific description of exactly what happened at this point illustrates why, by definition, King could not have been *identified* by this match. The FBI's DNA database (known as CODIS) consists of two distinct collections. FBI, CODIS and NDIS Fact Sheet, http:// www. fbi. gov/ about- us/ lab/ codis/ codis- and- ndis- fact- sheet (all Internet materials as visited May 31, 2013, and available in Clerk of Court's case file). One of them, the one to which King's DNA was submitted, consists of DNA samples taken from known convicts or arrestees. I will refer to this as the "Convict and Arrestee Collection." The other collection consists of samples taken from crime scenes; I will refer to this as the "Unsolved Crimes Collection." The Convict and Arrestee Collection stores "no names or other personal identifiers of the offenders, arrestees, or detainees." *Ibid.* Rather, it contains only the DNA profile itself, the name of the agency that submitted it, the laboratory personnel who analyzed it, and an identification number for the specimen. *Ibid.* This is because the submitting state laboratories are expected *already* to know the identities of the convicts and arrestees from whom samples are taken. (And, of course, they do.)

Moreover, the CODIS system works by checking to see whether any of the samples in the Unsolved Crimes Collection match any of the samples in the Convict and Arrestee Collection. *Ibid.* That is sensible, if what one wants to do is solve those cold cases, but note what it requires: that the identity of the people whose DNA has been entered in the Convict and Arrestee Collection *already be known.*[2] If one wanted to identify someone in custody using

[133 S.Ct. 1985]

his DNA, the logical thing to do would be to compare that DNA against the Convict and Arrestee Collection: to search, in other words, the collection that could be used (by checking back with the submitting state agency) to identify people, rather than the collection of evidence from unsolved crimes, whose

perpetrators are by definition unknown. But that is not what was done. And that is because this search had nothing to do with identification.

In fact, if anything was "identified" at the moment that the DNA database returned a match, it was not King—his identity was already known. (The docket for the original criminal charges lists his full name, his race, his sex, his height, his weight, his date of birth, and his address.) Rather, what the August 4 match "identified" was *the previously-taken sample from the earlier crime*. That sample was genuinely mysterious to Maryland; the State knew that it had probably been left by the victim's attacker, but nothing else. King was not identified by his association with the sample; rather, the sample was identified by its association with King. The Court effectively destroys its own "identification" theory when it acknowledges that the object of this search was "to see what [was] already known about [King]." King was who he was, and volumes of his biography could not make him any more or any less King. No minimally competent speaker of English would say, upon noticing a known arrestee's similarity "to a wanted poster of a previously unidentified suspect," *ante,* at 1972, that the *arrestee* had thereby been identified. It was the previously unidentified suspect who had been identified—just as, here, it was the previously unidentified rapist.

2

That taking DNA samples from arrestees has nothing to do with identifying them is confirmed not just by actual practice (which the Court ignores) but by the enabling statute itself (which the Court also ignores). The Maryland Act at issue has a section helpfully entitled "Purpose of collecting and testing DNA samples." Md. Pub. Saf. Code Ann. § 2–505. (One would expect such a section to play a somewhat larger role in the Court's analysis of the Act's purpose—which is to say, at least *some* role.) That provision lists five purposes for which DNA samples may be tested. By this point, it will not surprise the reader to learn that the Court's imagined purpose is not among them.

Instead, the law provides that DNA samples are collected and tested, as a matter of Maryland law, "as part of an official investigation into a crime." § 2–505(a)(2). (Or, as our suspicionless-search cases would put it: for ordinary law-enforcement purposes.) That is certainly how everyone has always understood the Maryland Act until today. The Governor of Maryland, in commenting on our decision to hear this case, said that he was glad, because "[a]llowing law enforcement to collect DNA samples ... is absolutely critical to our efforts to continue driving down crime," and "bolsters our efforts to resolve open investigations and bring them to a resolution." Marbella, Supreme Court Will Review Md. DNA Law, Baltimore Sun, Nov. 10, 2012, pp. 1, 14. The attorney general of Maryland remarked that he "look[ed] forward to the opportunity to defend this important crime-fighting tool," and praised the DNA database for helping to "bring to justice violent perpetrators." *Ibid.* Even this Court's order staying the decision below states that the statute "provides a valuable tool for investigating unsolved crimes and thereby helping to remove violent offenders from the general population"—with, unsurprisingly, no mention of identity.

[133 S.Ct. 1986]

567 U.S. ——, ——, 133 S.Ct. 1, 3, 183 L.Ed.2d 667 (2012) (ROBERTS, C.J., in chambers).

More devastating still for the Court's "identification" theory, the statute *does* enumerate two instances in which a DNA sample may be tested for the purpose of identification: "to help identify *human remains,*" § 2–505(a)(3) (emphasis added), and "to help identify *missing individuals,*" § 2–505(a)(4) (emphasis added). No mention

of identifying arrestees. *Inclusio unius est exclusio alterius*. And note again that Maryland forbids using DNA records "for any purposes other than those specified"—it is actually a crime to do so. § 2–505(b)(2).

The Maryland regulations implementing the Act confirm what is now monotonously obvious: These DNA searches have nothing to do with identification. For example, if someone is arrested and law enforcement determines that "a convicted offender Statewide DNA Data Base sample already exists" for that arrestee, "the agency is not required to obtain a new sample." Code of Md. Regs., tit. 29, § 05.01.04(B)(4) (2011). But how could the State know if an arrestee has already had his DNA sample collected, if the point of the sample is to identify who he is? Of course, if the DNA sample is instead taken in order to investigate crimes, this restriction makes perfect sense: Having previously placed an identified someone's DNA on file to check against available crime-scene evidence, there is no sense in going to the expense of taking a new sample. Maryland's regulations further require that the "individual collecting a sample ... verify the identity of the individual from whom a sample is taken by name and, if applicable, State identification (SID) number." § 05.01.04(K). (But how?) And after the sample is taken, it continues to be identified *by* the individual's name, fingerprints, etc., see § 05.01.07(B)—rather than (as the Court believes) being used *to identify* individuals. See § 05.01.07(B)(2) ("Records and specimen information shall *be identified by* ... [the] [n]ame of the donor" (emphasis added)).

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

II

The Court also attempts to bolster its identification theory with a series of inapposite analogies. See *ante*, at 1974 – 1977.

Is not taking DNA samples the same, asks the Court, as taking a person's photograph? No—because that is not a Fourth Amendment search at all. It does not involve a physical intrusion onto the person, see *Florida v. Jardines*, 569 U.S. 1, ––––, 133 S.Ct. 1409, 1413–1414, 185 L.Ed.2d 495 (2013), and we have never held that merely taking a person's photograph invades any recognized "expectation of privacy," see *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Thus, it is unsurprising that the cases the Court cites as authorizing photo-taking do not even mention the Fourth Amendment. See *State ex rel. Bruns v. Clausmier*, 154 Ind. 599, 57 N.E. 541 (1900) (libel),

[133 S.Ct. 1987]

Shaffer v. United States, 24 App.D.C. 417 (1904) (Fifth Amendment privilege against self-incrimination).

But is not the practice of DNA searches, the Court asks, the same as taking "Bertillon" measurements—noting an arrestee's height, shoe size, and so on, on the back of a photograph? No, because that system was not, in the ordinary case, used to solve unsolved crimes. It is possible, I suppose, to imagine situations in which such measurements might be useful to generate leads. (If witnesses described a very tall burglar, all the "tall man" cards could then be pulled.) But the obvious primary purpose of

such measurements, as the Court's description of them makes clear, was to verify that, for example, the person arrested today is the same person that was arrested a year ago. Which is to say, Bertillon measurements were *actually* used as a system of identification, and drew their primary usefulness from that task.[3]

It is on the fingerprinting of arrestees, however, that the Court relies most heavily. *Ante,* at 1975 – 1977. The Court does not actually say whether it believes that taking a person's fingerprints is a Fourth Amendment search, and our cases provide no ready answer to that question. Even assuming so, however, law enforcement's post-arrest use of fingerprints could not be more different from its post-arrest use of DNA. Fingerprints of arrestees are taken primarily to identify them (though that process sometimes solves crimes); the DNA of arrestees is taken to solve crimes (and nothing else). Contrast CODIS, the FBI's nationwide DNA database, with IAFIS, the FBI's Integrated Automated Fingerprint Identification System. See FBI, Integrated Automated Fingerprint Identification System, http:// www. fbi. gov/ about- us/ cjis/ fingerprints_ biometrics/ iafis/ iafis (hereinafter *IAFIS*).

Fingerprints	DNA Samples
The "average response time for an electronic criminal fingerprint submission is about 27 minutes." *IAFIS* .	DNA analysis can take months—far too long to be useful for identifying someone.
IAFIS includes detailed identification information, including "criminal histories; mug shots; scars and tattoo personal identifiers of the offenders, photos; physical characteristics like arrestees, or detainees." See CODIS height, weight, and hair and eye color."	CODIS contains "[n]o names or other and NDIS Fact Sheet.
"Latent prints" recovered from crime scenes are not systematically compared against the database of known fingerprints, since that requires further forensic work.[4]	The entire *point* of the DNA database is to check crime scene evidence against the profiles of arrestees and convicts as they come in.

[133 S.Ct. 1988]

The Court asserts that the taking of fingerprints was "constitutional for generations prior to the introduction" of the FBI's rapid computer-matching system. *Ante,* at 1977. This bold statement is bereft of citation to authority because there is none for it. The "great expansion in fingerprinting came before the modern era of Fourth Amendment jurisprudence," and so we were never asked to decide the legitimacy of the practice. *United States v. Kincade,* 379 F.3d 813, 874 (C.A.9 2004) (Kozinski, J., dissenting). As fingerprint databases expanded from convicted criminals, to arrestees, to civil servants, to immigrants, to everyone with a driver's license, Americans simply "became accustomed to having our fingerprints on file in some government database." *Ibid.* But it is wrong to suggest that this was uncontroversial at the time, or that this Court blessed universal fingerprinting for

"generations" before it was possible to use it effectively for identification.

The Court also assures us that "the delay in processing DNA from arrestees is being reduced to a substantial degree by rapid technical advances." *Ante,* at 1977. The idea, presumably, is that the snail's pace in this case is atypical, so that DNA is now readily usable for identification. The Court's proof, however, is nothing but a pair of press releases—each of which turns out to undercut this argument. We learn in them that reductions in backlog have enabled Ohio and Louisiana crime labs to analyze a submitted DNA sample in twenty days.[5] But that is *still longer* than the *eighteen* days that Maryland needed to analyze King's sample, once it worked its way through the State's labyrinthine bureaucracy. What this illustrates is that these times do not take into account the many other sources of delay. So if the Court means to suggest that Maryland is unusual, that may be right—it may qualify in this context as a paragon of efficiency. (Indeed, the Governor of Maryland was hailing the elimination of that State's backlog more than five years ago. See Wheeler, O'Malley Wants to Expand DNA Testing, Baltimore Sun, Jan. 11, 2008, p. 5B.) Meanwhile, the Court's holding will result in the dumping of a large number of arrestee samples—many from minor offenders—onto an already overburdened system: Nearly one-third of Americans will be arrested for some offense by age 23. See Brame, Turner, Paternoster, & Bushway, Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample, 129 Pediatrics 21 (2011).

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

[133 S.Ct. 1989]

identification; but whether it *was used for identification here.*

Today, it can fairly be said that fingerprints really are used to identify people—so well, in fact, that there would be no need for the expense of a separate, wholly redundant DNA confirmation of the same information. What DNA adds—what makes it a valuable weapon in the law-enforcement arsenal—is the ability to solve unsolved crimes, by matching old crime-scene evidence against the profiles of people whose identities are already known. That is what was going on when King's DNA was taken, and we should not disguise the fact. Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches. The Fourth Amendment must prevail.

* * *

The Court disguises the vast (and scary) scope of its holding by promising a limitation it cannot deliver. The Court repeatedly says that DNA testing, and entry into a national DNA registry, will not befall thee and me, dear reader, but only those arrested for "serious offense[s]." *Ante,* at 1979 – 1980; see also *ante,* at 1965, 1969 – 1970, 1972 – 1973, 1974, 1976 – 1977, 1977, 1977 – 1978 (repeatedly limiting the analysis to "serious offenses"). I cannot imagine what principle could possibly justify this limitation, and the Court does not attempt to suggest any. If one believes that DNA will "identify" someone arrested for assault, he must believe that it

will "identify" someone arrested for a traffic offense. This Court does not base its judgments on senseless distinctions. At the end of the day, *logic will out*. When there comes before us the taking of DNA from an arrestee for a traffic violation, the Court will predictably (and quite rightly) say, "We can find no significant difference between this case and *King*." Make no mistake about it: As an entirely predictable consequence of today's decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason.

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

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

I therefore dissent, and hope that today's incursion upon the Fourth Amendment,

[133 S.Ct. 1990]

like an earlier one,[6] will some day be repudiated.

Notes:

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

[1] The Court's insistence (*ante,* at 1978) that our special-needs cases "do not have a direct bearing on the issues presented in this case" is perplexing. Why spill so much ink on the special need of identification if a special need is not required? Why not just come out and say that any suspicionless search of an arrestee is allowed if it will be useful to solve crimes? The Court does not say that because most Members of the Court do not believe it. So whatever the Court's major premise—the opinion does not really contain what you would call a rule of decision—the *minor* premise is "this search was used to identify King." The incorrectness of that minor premise will therefore suffice to demonstrate the error in the Court's result.

[2] By the way, this procedure has nothing to do with exonerating the wrongfully convicted, as the Court soothingly promises. See *ante,* at 1974. The FBI CODIS database includes DNA from *unsolved* crimes. I know of no indication (and the Court cites none) that it also includes DNA from all—or even any—crimes whose perpetrators have already been convicted.

3. Puzzlingly, the Court's discussion of photography and Bertillon measurements repeatedly cites state cases (such as *Clausmier*) that were decided before the Fourth Amendment was held to be applicable to the States. See *Wolf v. Colorado,* 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949); *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Why the Court believes them relevant to the meaning of that Amendment is therefore something of a mystery.

4. See, *e.g.,* FBI, Privacy Impact Assessment: Integrated Automated Fingerprint Identification System (IAFIS)/Next Generation Identification (NGI) Repository for Individuals of Special Concern (RISC), http:// www. fbi. gov/ foia/ privacy- impact- assessments/ iafis- ngi- risc (searches of the "Unsolved Latent File" may "take considerably more time").

5. See Attorney General DeWine Announces Significant Drop in DNA Turnaround Time (Jan. 4, 2013), http:// ohio attorney general. gov/ Media/ News– Releases/ January– 2013/ Attorney– General– De Wine– Announces– Significant– Drop; Gov. Jindal Announces Elimination of DNA Backlog (Nov. 17, 2011), http:// www. gov. state. la. us/ index. cfm? md= newsroom& tmp = detail& article ID= 3102.

6. Compare, *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) (suspicionless search of a car permitted upon arrest of the driver), with *Arizona v. Gant,* 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (on second thought, no).

MARSHALL v. STATE

2010 OK CR 8

232 P.3d 467

Case Number: F-2008-1170

Decided: 05/13/2010

BILLY GENE MARSHALL, Appellant -vs- STATE OF OKLAHOMA, Appellee

Cite as: 2010 OK CR 8, 232 P.3d 467

OPINION

LUMPKIN, JUDGE:

¶1 Appellant Billy Gene Marshall was tried by jury and convicted of First Degree Murder (21 O.S.Supp. 2004, § 701.7) and First Degree Robbery (21 O.S. 2001, § 797), After Former Conviction of Two or More Felonies, Case No. CF-2006-2922, in the District Court of Tulsa County. The jury recommended as punishment life imprisonment without the possibility of parole for the murder conviction and life imprisonment for the robbery. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.

¶2 Appellant was convicted of the brutal murder and robbery of seventy-one year old Alonzo Tibbs, Jr. Mr. Tibbs, also referred to as the decedent, was a retired employee of American Airlines and worked part time as a salesman for Prepaid Legal. He lived with his girlfriend of eleven years, Jennifer Jones Garrett, on
North Hartford Avenue

in Tulsa, Oklahoma. To those he knew, the decedent was more than willing to loan money in times of need.

¶3 On June 14, 2006, Ms. Garrett left for work at approximately 7:20 a.m. Mr. Tibbs was up and planned to wash and wax his Cadillac that morning. He was to meet Ms. Garrett later that day at her place of work and exchange vehicles. When he had not shown up by one oclock, Ms. Garrett began phoning Mr. Tibbs. She called him several times on his cell phone and on the house phone. She never received an answer. Ms. Garrett left work after 5:00 p.m., and attempted to locate Mr. Tibbs by calling his cell phone and his friends. She arrived home at approximately 6:00 p.m., to find the front door of her home ajar. She thought it unusual as the front door was usually either wide open or completely shut. Upon entering the house, she called out for Mr. Tibbs. Receiving no response, she walked toward the bedroom. She saw the decedents legs on the bedroom floor and called out his name. Again receiving no response, she called the police.

¶4 The police arrived to find Mr. Tibbs had been beaten to death. There was a large amount of blood in the bedroom with blood spatter and blood transfer all over the bedroom. The screen to the bedroom window had been pushed out and was lying on the grass outside of the house. The window itself was open.

¶5 Mr. Tibbs suffered injuries from twelve blows to the head from a blunt instrument. His face had been beaten to a bloody pulp. The right side of his forehead was caved in due to extensive skull fractures caused by the blows. The state medical examiner determined the cause of death was blunt head trauma and that his injuries were consistent with being attacked with a hammer. Mr. Tibbs also suffered small scrapes, tears or lacerations on his fingers, suggesting the possibility of defensive injuries. Mr. Tibbs wallet, which he always kept in his pants pocket, was missing.

¶6 Mr. Tibbs was last seen alive on June 14 at approximately 11:30 a.m. when his neighbor Glen Humphrey saw him washing his Cadillac. The two men spoke briefly and Mr. Tibbs said he was not feeling well. Mr. Humphrey thought it was probably due to the heat and suggested Mr. Tibbs go inside and lay down. The men concluded their conversation and Mr. Humphrey left with Mr. Tibbs still outside.

¶7 Between 11:30 a.m. and noon that day, Nathaniel Jacobs, Sr., a next door neighbor to Mr. Tibbs, noticed the trunk to Mr. Tibbs Cadillac was open but Mr. Tibbs was not around the car. Mr. Jacobs had never seen that happen before. He thought that something was wrong somewhere as his dog had been barking in the direction of Tibbs house around noon that day. At approximately 3:30 p.m., Mr. Jacobs returned from an errand to find the car trunk was still open. Mr. Jacobs knocked on the front door of Tibbs home but received no answer. Looking inside the large picture window, he saw flies inside the house. Finding all of this unusual, Mr. Jacobs told his wife who called Mr. Tibbs home phone. She received only a voice recording. Mr. Jacobs left for another errand but soon returned unable to get the vision of the flies out of his mind. When he returned to Mr. Tibbs house and looked in the window a second time, the flies had increased. Again, no one came to the door when Mr. Jacobs knocked. He closed the trunk to Mr. Tibbs car as he left.

¶8 On June 14, 2006, an arrest warrant was issued for Appellant for the May 30 robbery of the J & J Bargain Depot in Tulsa. The store clerk, Ms. Washington, had been attacked by a black man armed with two hammers. Detectives received an anonymous tip that Appellant was involved in the robbery. As a result, a photographic lineup was prepared and Ms. Washington identified Appellant as the man who attacked her and robbed the store.

¶9 Based upon similarities between the J & J robbery and the robbery/murder of Mr. Tibbs, Appellant was arrested for Mr. Tibbs murder on June 15. He was with his girlfriend Sheila Jones. Ms. Jones later told police that she and Appellant had lived across the street from Mr. Tibbs from September 2005 until January 2006. She said Appellant and Mr. Tibbs were acquaintances and that Appellant had borrowed money from Mr. Tibbs. Ms. Jones and Appellant moved twice before ending up at 4204 N. Frankfort where they lived at the time of Mr. Tibbs murder. Ms. Jones was employed, but Appellant was not. She gave Appellant money to repay the loan from Mr. Tibbs but she did not know if he ever actually paid Mr. Tibbs. She also gave Appellant money to pay the rent but he never paid the landlord and she did not know what happened to the money.

¶10 On the day of the murder, Appellant, dressed in a white t-shirt and jeans, left about 9:00 a.m. saying he was going to make a hustle. Ms. Jones understood this to mean Appellant was selling tires to make money. Appellant returned to his house between 1:00 and 1:30 that afternoon to take Ms. Jones to work. However, he had changed clothes and was wearing a striped shirt and shorts he said he got from his brother.

¶11 That night, Ms. Jones saw a story on the news about a body found at a house on
46th Street

and
North Hartford Avenue

. When she told Appellant, he identified the location as Mr. Tibbs home and said the last time he saw Tibbs, he was talking to a hooker.

¶12 The next day, June 15, Ms. Jones drove by Mr. Tibbs home on her way to work. She noticed a lot of cars at the house and wondered if they were having a family reunion or a funeral or something. Appellant who was with her in the car, told her to go on, it was only the police and that was where they found the dead man. Ms. Jones drove on to her sisters home nearby and that was where Appellant was apprehended.

¶13 After police searched her house on North Frankfort, Ms. Jones conducted her own search. She found the striped shirt, shorts, and shoes Appellant wore the afternoon of the murder. Ms. Jones informed police, who returned with a search warrant and seized the items. Ms. Jones also gave the police information about a house at 1524 E. 51st Place North

where she and Appellant had lived until mid May 2006, between the time they lived on
Hartford Avenue

and North Frankfort. They had been evicted for failure to pay rent and the eviction notice on the door was in Appellants name. Ms. Jones had moved everything out of the house except for a twin bed, some clothing and trash. When the police arrived at the house on June 15, they found a full trash can next to the refrigerator. In the top of the trash can was some rotten food and several dirty baby diapers. At the bottom of the trash can was a flannel sheet wrapped around several bloody items of clothing. In a bedroom closet police found a tool kit containing a small hammer.

¶14 Ms. Jones later identified the cloth the items were wrapped in as her grandsons receiving blanket. Inside the blanket were found bloody socks, which Ms. Jones identified as the type of tube sock worn by Appellant. A lottery receipt and Prepaid Legal brochure with blood on them were also found inside the blanket. Additionally, a black t-shirt and bloody pair of jeans containing a wallet in the front pocket were found. The wallet contained Mr. Tibbs identification but no money. Ms. Jones identified the black t-shirt and jeans as items she had purchased for Appellant.

¶15 The socks and jeans subsequently tested positive for blood and DNA testing showed matches for Appellant and Mr. Tibbs. Concerning the socks, a comparison with Mr. Tibbs known DNA could not exclude him as a donor and the probability of selecting an African-American at random who could have contributed the DNA was 1 in 950 trillion. Appellant could not be excluded as a DNA donor but a statistical value could not be reported.

¶16 Blood on Appellants jeans was tested and DNA from both Mr. Tibbs and Appellant was found. Mr. Tibbs could not be excluded as a major donor of the DNA with the probability of selecting at random an African-American who could have contributed the information as 1 in 950 trillion. Appellant could not be excluded as a minor contributor of the DNA in the sample with the probability of selecting at random an African-American who could have contributed the sample as 1 in 14 million.

¶17 When interviewed by police, Appellant admitted going by the decedents home the morning of the murder and seeing Mr. Tibbs washing his Cadillac. Appellant claimed he spent the morning of the murder helping his half-brother, William Mayberry, cleaning gutters at a daycare on
51st Street

. Appellant said he saw three people in the area of Mr. Tibbs home that morning. He claimed they were known as Showboat, Moses, and a hooker.

¶18 The police were unable to locate any of the people named by Appellant. William Mayberry testified that he saw Appellant some time prior to the time of the murder and they visited for about 20 minutes. However, he could not remember if the day was June 14 or another day. He did remember though that Appellant did not help him clean out gutters on June 14. Appellants niece, Sasha Mayberry, testified that she saw Appellant the day after the murder and that he was acting weird. She asked him if he had anything to do with the murder the day before, and he walked away without responding to her question.

¶19 Appellant chose not to testify at trial. Instead he presented a stipulation which read, Corporal Stout would testify that on June 16, 2006, he talked to Debra Mayberry, and she said Billy Marshall came to her house on Wednesday June 14, 2006. Additional facts will be set forth as necessary.

¶20 In his first proposition of error, Appellant contends he was denied a fair trial when Mr. Jonathan Wilson of the Tulsa Police Department Forensic Laboratory was allowed to testify as a substitute for Dr. Valerie Fuller regarding the DNA testing she had conducted. Appellant asserts Mr. Wilsons testimony violated Oklahoma statutory law and the Confrontation Clause of the United States Constitution.

¶21 Dr. Valerie Fuller conducted the forensic testing of the bloody clothing in this case, but by the time of trial had gone to Iraq to set up a lab facility and teach DNA testing procedures to Baghdad police officers. Prior to trial, defense counsel requested a continuance specifically noting Dr. Fullers absence and arguing her absence denied Appellant his right of cross-examination. The continuance was denied and Mr. Wilson was permitted to testify in Dr. Fullers place as an expert witness testifying on the basis of the work of a colleague.

¶22 The trial court found that Mr. Wilson was fully qualified as an expert in DNA analysis. Mr. Wilson had worked with Dr. Fuller on prior occasions and had previously reviewed her work. He testified that in this case he conducted a technical review of Dr. Fullers report, reviewing all case files, notes and worksheets to make sure the proper procedures were followed, the data which was generated was reflective of the work conducted, and that the statements and conclusions in the report could be verified by the results obtained.

¶23 Mr. Wilson testified he found one difference in Dr. Fullers statistical analysis regarding the minor contributor of the DNA found on jeans belonging to Appellant. He found one transposed number and corrected it by issuing a corrected report prior to trial. Dr. Fullers report and Mr. Wilsons corrected report were both admitted into evidence.

¶24 A trial courts ruling admitting or excluding evidence is reviewed on appeal for an abuse of discretion. *Williams v. State,* 2001 OK CR 9, ¶ 94, 22 P.3d 702, 724. An abuse of discretion has been defined as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Love v. State*, 1998 OK CR 32, ¶ 2, 960 P.2d 368, 369.

¶25 In *McCarty v. State*, 1998 OK CR 61, ¶ 88, 977 P.2d 1116, 1137-1138, this Court upheld the admission of testimony from the Chief Medical Examiner concerning an autopsy which he did not personally perform.[1] This Court found the Chief Medical Examiner was qualified to testify as to the matters shown in the autopsy and that any questions regarding his testimony went to the weight and credibility of the testimony, not its admissibility. This Court relied on 63 O.S.1991, § 935 *et.seq.*, setting forth the duties of the Chief Medical Examiner which included appearing in court to testify, and on 12 O.S.1991, § 2703.[2] This Court held that pursuant to § 2703, an autopsy report constitutes facts or data of a type reasonably relied upon by the Chief Medical Examiner as an expert in forming opinions or inferences upon a subject and was therefore admissible evidence. *Id.,* 1998 OK CR 61, ¶ 89, 977 P.2d at 1137.

¶26 Since *McCarty* was decided, the United States Supreme Court issued *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). In that case, the Supreme Court found that reports or certificates of analysis prepared by analysts at the state crime laboratory showing the results of the forensic analysis on a seized controlled substance and prepared for use in a criminal prosecution were testimonial evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The Supreme Court further held that [a]bsent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to be confronted with the analysts at trial. *Id.,* 129 S.Ct. at 2532 *citing Crawford,* 541 U.S. at 54, 124 S.Ct. 1354 (emphasis in original). The Supreme Court reiterated the non-exclusive class of statements which are testimonial in nature which included affidavits that declarants would reasonably expect to be used prosecutorially. *Id.,* 129 S.Ct. at 2531-2532. Because there was no showing that the analysts were unavailable to testify at trial and that Melendez-Diaz had a prior opportunity to cross-examine them, the Supreme Court held that the admission of the certificates alone violated the defendants rights under the Confrontation Clause.

¶27 Under the circumstances of this case, there is little doubt that Dr. Fullers report was prepared for use in a criminal trial. Therefore, it falls under the category of testimonial evidence subject to the demands of the Confrontation Clause. *See Melendez-Diaz,* 129 S.Ct. at 2531-2532.

¶28 Our analysis does not end here. Dr. Fuller did not testify at the preliminary hearing in this case. The DNA report she prepared was stipulated to by the defense for purposes of preliminary hearing only. Therefore, Appellant did not have an opportunity prior to trial to cross-examine Dr. Fuller or her findings in the DNA report.

¶29 At trial, Mr. Wilson testified solely to the findings of Dr. Fullers DNA report. He was repeatedly asked whether Dr. Fuller had a finding regarding a specific item of evidence. Mr. Wilson answered those questions by reading from Dr. Fullers report. Mr. Wilson did not offer his own opinions concerning the DNA findings. Under these circumstances, Appellants rights under the Confrontation Clause were violated as he was denied the opportunity to confront and cross-examine Dr. Fuller in order to test her competence and the accuracy of her findings.[3] *See Wood v. State,* 299 S.W.3d 200, 213 (Tex.App.-Austin,2009)(finding autopsy reports were testimonial evidence and testimony by expert as to autopsy findings, who was not present at the autopsy, denied the defendant his constitutional right to confront the expert who conducted the autopsy); *Commonwealth v. Avila*, 912 N.E.2d 1014, 1027-1028 (Mass. 2009) (finding error to allow testimony about findings in an autopsy by expert who did not conduct autopsy because the autopsy findings were inadmissible hearsay and they violated the Confrontation Clause).[4]

¶30 While Rules of Evidence cannot trump the Sixth Amendment, *Crawford*, 541 U.S. at 61, 124 S.Ct. at 1370, *Melendez-Diaz* does not do away with 12 O.S.2001, § 2703. [A]s a matter of expert opinion testimony, a physicians reliance on reports prepared by other medical professionals is plainly justified in light of the custom and practice of the medical profession. Doctors routinely rely on observations reported by other doctors ... and it is unrealistic to expect a physician, as a condition precedent to offering opinion testimony to have performed every test, procedure, and examination himself). *Avila*, 912 N.E.2d at 1028-1029. However, § 2703 must be read in conjunction with the Confrontation Clause. This requires the expert witnesss testimony must be confined to his or her own opinions and the expert must be available for cross-examination.

¶31 In accordance with *Melendez-Diaz*, we find the trial court abused its discretion in allowing Mr. Wilson to testify to the findings of Dr. Fuller contained in Dr. Fullers DNA report. However, violations of the Confrontation Clause are subject to harmless error analysis. *Livingston v. State,* 1995 OK CR 68, ¶ 17, 907 P.2d 1088, 1093; *Bartell v. State*, 1994 OK CR 59, 881 P.2d 92, 99. Therefore, we must determine, in context of the other evidence presented, whether the error in admitting Mr. Wilsons testimony regarding the DNA evidence was harmless beyond a reasonable doubt. *Id.*

¶32 In this case that means looking at the evidence without consideration of the DNA evidence. This other evidence showed that Appellant knew the decedent and until six months before the murder, had lived across the street from him. Appellant was unemployed and was frequently short of money. Appellant had borrowed money from the decedent in the past. Ms. Jones, Appellants girlfriend, gave him money to repay the decedent, but she did not know if he ever did. Ms. Jones also gave Appellant money to pay their rent, but Appellant failed to do so.

¶33 The morning of the murder, Appellant told Ms. Jones he was going to make some money, presumably by selling tires. When he returned home that afternoon, he was wearing clothes different from what he had on that morning. He told Jones he got the clothes from his brother with whom he had cleaned out gutters that morning. However, Appellants brother had not seen Appellant that day and had not given him any clothes. The socks and jeans Appellant wore that morning were found bloodied and hidden in the bottom of a trashcan in a house where Appellant lived after he moved from the decedents neighborhood. The decedents wallet was found in Appellants jeans pocket. No money was found in the wallet. Police were subsequently unable to locate any of the people named by Appellant as seen around the decedents home near the time of the murder. Further, the decedents injuries were consistent with being attacked with a hammer. Approximately two weeks prior to the murder, Appellant robbed a store in Tulsa and attacked the clerk with a hammer.

¶34 This evidence, independent of the DNA evidence, sufficiently supports the jurys verdict of first degree murder and first degree robbery. While DNA evidence can be very persuasive evidence for the jury to consider, on appeal we can review the properly admitted evidence to determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *See Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559 (standard of review for sufficiency of evidence). Here, we are satisfied beyond a reasonable doubt that the improperly admitted DNA evidence did not contribute to Appellants conviction or punishment. This is especially true in that defense counsel was able to thoroughly cross-examine the DNA expert and point out weaknesses in the evidence. The expert responded to each question asked and was thoroughly familiar with the evidence and method of testing. It is hard to imagine additional questions that would have been asked if Dr. Fuller had been there in person.

¶35 Appellant raises additional challenges to the DNA evidence. In Proposition One, he asserts the State failed to comply with its obligation under 22 O.S.2001, § 751.1(C)(2) to present as a witness any person, specifically Dr. Fuller, in the chain of custody. In Proposition Two, Appellant asserts that admission of testimony by Mr. Wilson concerning the DNA found on one of the socks retrieved from the trash can for which a statistical analysis was not shown was reversible error. In Proposition Four, he contends the trial court erred in denying his motion for a continuance based in part on Dr. Fullers unavailability to testify at trial. In light of our finding that a Confrontation Clause error occurred in the admission of the DNA evidence but that such error was harmless beyond a reasonable doubt, it is not necessary to further address these separate allegations of error.

¶36 In Proposition Three, Appellant asserts the States presentation of evidence of the J & J Bargain Depot robbery was improper other crimes evidence which warrants reversal of his conviction for a new trial.

¶37 The basic law is well established - when one is put on trial, one is to be convicted - if at all - by evidence which shows one guilty of the offense charged; and proof that one is guilty of other offenses not connected with that for which one is on trial must be excluded. *Lott v. State*, 2004 OK CR 27, ¶¶ 40 - 41, 98 P.3d 318, 334-335, *citing Burks v. State,* 1979 OK CR 10, ¶ 2, 594 P.2d 771, 772, *overruled in part on other grounds, Jones v. State*, 1989 OK CR 7, 772 P.2d 922.

¶38 However, evidence of other crimes is admissible where it tends to establish absence of mistake or accident, common scheme or plan, motive, opportunity, intent, preparation, knowledge and identity. *Id.* To be admissible, evidence of other crimes must be probative of a disputed issue of the crime charged, there must be a visible connection between the crimes, evidence of the other crime(s) must be necessary to support the State's burden of proof, proof of the other crime(s) must be clear and convincing, the probative value of the evidence must outweigh the prejudice to the accused and the trial court must issue contemporaneous and final limiting instructions. *Id.* When other crimes evidence is so prejudicial it denies a defendant his right to be tried only for the offense charged, or where its minimal relevancy suggests the possibility the evidence is being offered to show a defendant is acting in conformity with his true character, the evidence should be suppressed. *Id.* Where, as here, the claim was properly preserved, the State must show on appeal that admission of this evidence did not result in a miscarriage of justice or constitute a substantial violation of a constitutional or statutory right. *Id.*

¶39 The State timely filed a *Burks* notice in this case detailing the evidence to which Appellant now objects and requesting its admission for the purpose of proving identity or common scheme or plan, or any other proper purpose.

¶40 Here, the other crimes evidence involved the use of a distinctive weapon in a distinctive manner. In the J & J robbery, Appellant used a hammer to strike the clerk on the back of the head in order to incapacitate her. An investigating officer testified that in his 35 years as a police officer, he had never seen a hammer used as a weapon in a robbery. Mr. Tibbs was killed by multiple blows to the head with a blunt instrument. While the medical examiner could not definitely say the murder weapon was a hammer, the injuries were consistent with blows from a hammer. Mr. Tibbs wallet was not found in his pants pocket where it was usually kept but in a trash can in a house where Appellant previously lived. The J & J robbery was committed on May 30, 2006, less than five miles from where Mr. Tibbs lived and was murdered on June 14, 2006. Ms. Washington, the J & J store clerk, identified Appellant from a photographic line-up and at the trial in that case. The admission of this evidence is consistent with the analysis and admission of like evidence this Court set out in *Pickens v. State,* 1988 OK CR 35, ¶ 3, 751 P.2d 742, 743, and *Williams v. State*, 2008 OK CR 19, ¶¶ 36-39, 188 P.3d 208, 218-219.

¶41 Evidence of the J & J robbery was properly admitted as probative of the identity of Mr. Tibbs assailant as it tended to prove that it was Appellant who beat Mr. Tibbs to death with a hammer. *See* 12 O.S.2001, § 2403. This probative value was not substantially outweighed by the danger of unfair prejudice in light of the instruction given to the jury limiting their consideration of the evidence. The court actually issued two limiting instructions a verbal one before Ms. Washingtons testimony and a written one at the close of evidence. This instruction has been found to effectively limit the jurys use of other crimes evidence. *See Lafayette v. State,* 1985 OK CR 5, ¶ 15, 694 P.2d 530, 532.

¶42 We note that in this case, the written instruction did not specifically list the identity exception, setting out that the evidence was received on the issue of the defendants alleged motive, opportunity, intent, preparation, common scheme or plan. Counsel did not object to this instruction and we find it does not constitute plain error. The purpose of the limiting instruction was adequately met in instructing the jury that the other crime was not to be considered as proof of guilt or innocence of the charged offense. This proposition of error is denied.[5]

¶43 In his fourth proposition, Appellant contends the trial court erred in denying his motion for a continuance. Filed on October 31, 2008, with trial set to begin on November 3, Appellant requested a continuance based in part on the trial judges reversal of an earlier ruling on the States offer of other crimes evidence and decision to admit the evidence. Appellant argues that since the court made its original ruling excluding the evidence on May 5, 2008, counsel had been lulled into thinking that she would only have to defend her client against the crime that he was actually charged with committing.

¶44 [T]he decision whether to grant or deny a motion for continuance rests within the sound discretion of the trial court and will not be disturbed absent abuse of such discretion. *Ochoa v. State*, 1998 OK CR 41, ¶ 28, 963 P.2d 583, 595. When considering the overruling of a motion for a continuance, we will examine the entire record to ascertain whether or not the appellant suffered any prejudice by the denial. *Id.*

¶45 Appellant has not claimed surprise and the record would not support a finding of surprise as the other crimes evidence admitted at trial was the same evidence offered by the State in its *Burks* notice filed in April 2008. Appellant's argument seems to be that additional time was needed to refute the other crimes evidence. In the motion for a continuance, counsel stated that she needed additional time to subpoena necessary witnesses. However, the necessary witnesses have never been identified. Appellant has not set out anything that trial counsel could have done differently in regards to the other crimes evidence if a continuance had been granted. At trial, defense counsel announced ready for trial with the understanding from the court that she was not waiving her motion for a continuance. However, there is no indication from the record what counsel would have done differently with more time to prepare.

¶46 Further, this case had been pending for two years, while Appellant was in jail, when defense counsel requested the continuance. The case had already been continued twice, once by the court and once by the prosecutor. After a thorough review of the record, we find nothing to indicate Appellant suffered any prejudice by the courts refusal to grant the continuance. The court did not abuse its discretion in denying the continuance, and this proposition is denied.

¶47 In his fifth proposition of error, Appellant argues that the affidavit for the search warrant of
1524 E. 51st Place

lacked probable cause, in part because the affidavit failed to show the unnamed source was reliable. While Appellant filed a motion to suppress the results of the search, he did not object to the evidence when it was admitted at trial. Therefore, he has waived all but plain error review. *Seabolt v. State*, 2006 OK CR 50, ¶ 4, 152 P.3d 235, 237.

¶48 Before addressing Appellant's claim, we must first determine whether he has standing to contest the search. To establish standing, a defendant has the burden of proving that he had a legitimate expectation of privacy in the area searched. *Anderson v. State*, 1999 OK CR 44, ¶ 18, 992 P.2d 407, 417. Only where a defendant has a clear possessory interest in the property searched, does he have standing to object to the constitutionality of that search. *Id.* Appellant and Ms. Jones were evicted from the house on
E. 51st Place

in May 2006, approximately one month before Mr. Tibbs murder. Everything had been moved out except for a twin bed, some clothing and trash. The day the search warrant was executed, the grass in the yard was high and the front door was ajar. Based upon this information, Appellant did not have an expectation of privacy in the house he abandoned.

¶49 Even if Appellant had standing, the affidavit was more than sufficient to support the search. In evaluating the sufficiency of an affidavit for a search warrant, this Court looks to the totality of the circumstances. *Langham v. State,* 1990 OK CR 9, ¶ 6, 787 P.2d 1279, 1281. Under the totality of the circumstances approach, the task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* In order for there to be a valid finding of probable cause enough underlying facts and circumstances must be set forth in the affidavit to enable the magistrate to independently judge the affiant's conclusion that [evidence of the crime] is located where the affiant says it is. *Peninger v. State*, 1991 OK CR 60, ¶ 6, 811 P.2d 609, 611, *quoting Asher v. State*, 1976 OK CR 59, ¶ 19, 546 P.2d 1343, 1347. The duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Langham,* 1990 OK CR 9, ¶ 6, 787 P.2d at 1281. A magistrates finding of probable cause is to be given great deference. *Gregg v. State*, 1992 OK CR 82, ¶ 14, 844 P.2d 867, 874.

¶50 The affidavit in this case was primarily based on information police officers gathered through their own investigation including interviews with the medical examiner, Ms. Jones, Ms. Washington, and the Tulsa Housing Authority. The affidavit stated in part that police officers learned through their own investigation that the deceased died as a result of blunt force trauma to the head, that the injuries appeared to have been caused by a hammer, the deceaseds wallet could not be located at the scene of the murder, and it appeared that someone had rummaged through the deceaseds residence looking for items to steal with robbery as the apparent motive. The affidavit further states that on June 15, 2006, officers observed a green Toyota Camry bearing a Texas license plate near the scene of the murder. Officers stopped the car and found Appellant and Ms. Jones inside. Officers arrested Appellant on an outstanding warrant for the robbery of the J & J Bargain Depot on May 30, 2006. In the J & J robbery, Appellant used a hammer to beat the employee, Ms. Washington, while he robbed the business. During subsequent interviews with Ms. Jones the police learned that Appellant left his home the morning of June 14, 2006, to make some money, that he returned a few hours later dressed in different clothes than when he left the house, statements made by Appellant to Ms. Jones placed him near the murder scene on the day of the murder, Appellant and Ms. Jones had lived across the street from the deceased at one time, Appellant had borrowed money from the deceased in the past, and Appellant owned a hammer which he routinely kept in his car. While searching her home, Ms. Jones found a pair of blood

stained shoes and a pair of bloodstained pants which belonged to Appellant. However, no hammer was found at the residence. Additionally Ms. Jones informed the police that she and Appellant had lived at the house only 3 months, having previously lived at 1524 E. 51st Place, that they were evicted due to their failure to pay rent, that Appellant still had a key to the house on 51st street and routinely went there, although she did not know what he did while he was there. Upon receiving information about the house on
51st Street

, officers went to the house and found it appeared abandoned with the grass extremely overgrown, the front door unlocked and slightly ajar and trash and papers the only items visible from the windows. The affidavit also states that the Tulsa Housing Authority confirmed that Appellant and Ms. Jones used to live in the house on
51st street

and that Appellant had been served with eviction papers.

¶51 In conclusion, the affiant, Detective Felton, stated that he had been involved in homicide investigations for over nine (9) years and that during this time he had learned that persons committing violent crimes will often times discard evidence at abandoned residences connected with the person that committed the violent act.

¶52 Further, in setting out information concerning the J & J robbery, the affidavit states that a furniture store in Tulsa was robbed on May 22, 2006, and the black male suspect used an instrument to cause blunt force trauma to the store employee who suffered critical injuries as a result. The affidavit further states, [r]obbery detectives received information that Billy Gene Marshall committed the robbery as well. (Amended O.R. 26). It is this single reference to an unnamed informant, without any additional information regarding the credibility of the source, which Appellant claims dooms the affidavit.

¶53 Based upon a review of the entire affidavit, we find it was sufficient to provide the magistrate a substantial basis for concluding that probable cause existed to issue the search warrant. The single reference to an unnamed informant does not detract from the wealth of information specific to its source provided in the affidavit. This proposition is denied.

¶54 Appellant alleges in his sixth proposition of error that the trial court abused its discretion by not *sua sponte* instructing the jury to sentence Appellant in the first stage of trial for the first degree murder conviction. The record shows Appellant was convicted of first degree murder and first degree robbery. The trial court proceeded to a second stage where evidence of seven prior felony convictions was admitted pursuant to 21 O.S.Supp.2002, § 51.1. As punishment for the murder conviction, the jury recommended a sentence of life in prison without the possibility of parole.

¶55 We review only for plain error as Appellant did not object to the instructions regarding the use of his prior convictions or the manner in which the trial was bifurcated. *See Eizember v. State*, 2007 OK CR 29, ¶ 106, 164 P.3d 208, 235.

¶56 In *McCormick v. State*, 1993 OK CR 6, ¶ 40, 845 P.2d 896, 903, this Court held that bifurcation is not authorized in first-degree murder trials where the State is not seeking the death penalty, and there are no previous convictions in other counts requiring bifurcation under 22 O.S.2001, § 860. Later, in *Carter v. State*, 2006 OK CR 42, ¶ 2, 147 P.3d 243, 244, we reiterated that where the State is not seeking the death penalty and there are no

other charged offenses requiring bifurcation under 22 O.S.2001, § 860.1, bifurcation is not authorized. We found the bifurcation used in *Carter* violated *McCormick.* However, as the appellant suffered no prejudice, this Court found no relief was warranted.

¶57 In *McCormick* and *Carter*, the defendant was convicted only of first degree murder. In the present case, Appellant was charged and convicted of non-capital murder, which is not a charge requiring bifurcation, and first degree robbery, subject to bifurcation pursuant to § 860.1. Appellant raises the issue that in the recent unpublished opinion of *Lewis v. State*, F-2008-06 (Okl.Cr.2009) the defendant was similarly convicted of non-capital first degree murder and robbery with firearms with the allegation of prior felony convictions. This Court found that deciding punishment for both the non-enhanceable murder conviction and the enhanceable robbery conviction was improper. This Court stated:

> To make it clear, when a defendant is charged with non-capital first degree murder, as well as other felony offenses, and the defendant has prior convictions alleged on a page 2, the procedure shall be that the jury should decide guilt/innocence and punishment on the non-capital first degree murder charge, and guilt/innocence, but not punishment, for the other counts in the first stage. Punishment for the other counts should be decided during the second stage, where the prior felony convictions are introduced.
> This procedure is necessary, because of the incongruity which would be created if a different procedure is utilized for those only facing a murder charge versus those with a murder charge, as well as other enhanceable felonies. An enhancement stage would be created for the non-capital murder charge, where one is not authorized by statute.[6]

¶58 While *Lewis* is not binding precedent of this Court, the procedure in this case violated *Lewis*. However, this Court will not reverse a conviction or modify a sentence unless we find not only error, but some prejudicial effect resulting from that error. *Carter,* 2006 OK CR 42, ¶ 2, 147 P.3d at 244. *See also* 20 O.S.2001, § 3001.1. Here, we find no prejudice as evidence of Appellants brutal beating to death of his 71 year old former neighbor, in his own home, in order to rob him and not leave any witnesses, more than supports the life without parole punishment imposed. Any error in the sentencing was harmless beyond a reasonable doubt. This proposition of error is denied.

¶59 In his seventh proposition, Appellant contends the combined errors in his trial denied him the right to a constitutionally guaranteed fair trial. This Court has repeatedly held that a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732. However, when there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial. *Id.* While we have found error occurring in both the first and second stages of this trial, none of these errors required reversal singly. In viewing the cumulative effect of these errors we also find they do not require reversal of this case as none were so egregious or numerous as to have denied Appellant a fair trial. Therefore, no new trial or modification of sentence is warranted and this assignment of error is denied.

¶60 In a *pro se* supplemental brief, Appellant raises six allegations of ineffective assistance of trial counsel. Pursuant to an order from this Court, the State responded to these claims maintaining that Appellants trial counsel provided effective assistance and no relief is warranted.

¶61 Under *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984) to prove a claim of ineffectiveness, the defendant must show that counsels performance was deficient, and that the deficient performance prejudiced the defense. *Bland v. State,* 2000 OK CR 11, ¶¶ 112-113, 4 P.3d 702, 730-731. The burden rests with Appellant to show that counsels performance was deficient and that he was prejudiced thereby. When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Id., citing Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069.

¶62 Appellant first claims that counsel was ineffective for failing to cross-examine Detective Felton concerning statements used in the affidavit for the search warrant of Appellants car. Appellant contends the affidavit contains inaccurate statements. However, he does not identify what these inaccuracies might be or how they would have been corrected on cross-examination. Further, he does not state how he was prejudiced by the search of his car. The evidence linking him to the murder - the bloody jeans, socks and the decedents wallet - were found in the house on 51st, and not the car. Appellant has failed to show how he was prejudiced by counsels conduct.

¶63 Appellant next complains that Mr. Jacobs, the decedents neighbor, provided false evidence that before 12:20 p.m., the day of the murder, he heard his dog barking. He claims this formed the basis for the prosecutors allegedly false theory that Appellant cut his leg on the fence leaving the scene of the murder. Appellant claims he was prejudiced by counsels failure to object to this allegedly false evidence. Further, he claims the State failed to provide any pre-trial discovery concerning Mr. Jacobs testimony and defense counsel failed to raise an objection.

¶64 Appellant provides no information showing that Mr. Jacobs testimony was false or that there was any discovery violation. Mr. Jacobs was thoroughly cross-examined at trial without any mention of a discovery violation.

¶65 Appellant also asserts that the prosecution had his girlfriend Sheila Jones falsely testify that the water was turned off at the house on 51st street and defense counsel failed to object to this testimony. Once again, Appellant offers no support for his claim this was false testimony. He has failed to show any prejudice by counsels conduct.

¶66 In his third and fourth claims of ineffective assistance, Appellant contends trial counsel failed to object to the seizure of evidence from the house on 51st street and that the search warrant was not obtained in good faith. As addressed in the fourth proposition of error above, defense counsel did file a motion to suppress the evidence seized from the house. However, based upon the trial courts overruling of that motion, counsel did not again object to the evidence when it was admitted. Also, as addressed previously, even though the property had been abandoned by Appellant and he lacked standing to object, the search warrant was valid. Therefore, we will not find counsel ineffective for failing to raise a second objection to the admission of the seized evidence.

¶67 Appellant next finds counsel ineffective for failing to object to the DNA taken from him by buccal swab because he was not advised of his *Miranda* rights.[7] The buccal swab was obtained as the result of a valid search warrant. (Amended O.R. pgs. 3-9). Accordingly, Appellant was not entitled to advisement of *Miranda* rights prior to the execution of the search warrant. We will not find counsel ineffective for failing to raise an objection which would have been overruled. *Phillips v. State,* 1999 OK CR 38,¶ 104, 989 P.2d 1017, 1044.

¶68 Finally, Appellant claims counsel was ineffective for failing to object to the search warrant for the buccal swabs because the supporting affidavit allegedly contained falsehoods. Appellant provides only conclusory allegations in support. A review of the affidavit shows it was sufficient to support the search warrant for Appellants DNA. Appellant has not shown he was prejudiced by counsels failure to object.

¶69 The record reflects trial counsel vigorously and competently defended Appellant in the face of overwhelming evidence of guilt. Trial counsel filed numerous motions prior to trial, and at trial, repeatedly raised and argued objections and thoroughly cross-examined witnesses. Appellant has failed to meet his burden of showing a reasonable probability that, but for any unprofessional errors by counsel, the result of the trial would have been different as any errors or omissions by counsel did not influence the jurys determination of guilt or punishment. Accordingly, we find that Appellant was not denied effective assistance of counsel and this assignment of error is denied.

DECISION

¶70 The Judgment and Sentence is **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM C. KELLOUGH, DISTRICT JUDGE

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OPINION BY: LUMPKIN, J.
C. JOHNSON, P.J.: CONCUR IN RESULTS
A. JOHNSON, V.P.J.: CONCUR
LEWIS, J.: CONCUR

FOOTNOTES

[1] *See McCarty v. State*, 2005 OK CR 10, 114 P.3d 1089, on post-conviction, the conviction was reversed, the death sentence was vacated, and the case remanded for a new trial.

[2] 12 O.S.1991, § 2703 provided:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

An amendment, effective November 1, 2009 adds the following language:

> Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

[3] Implicit in the testimony of any expert witness is the ability to form an independent opinion based on the evidence and materials reviewed. If Mr. Wilson had formed and testified to his own independent opinion the issue would be moot.

[4]Compare *State v. Crager,* 879 N.E.2d 745 (Ohio 2007) where the Ohio Supreme Court held that based on its own interpretation of Crawford, DNA reports were properly admitted under the hearsay exception of business records and a criminal defendant's constitutional right to confrontation is not violated when a qualified expert DNA analyst testifies at trial in place of the DNA analyst who actually conducted the testing. However, in *Crager v. Ohio*, 129 S.Ct. 2856, 174 L.Ed. 598 (2009) the Supreme Court vacated the judgment and remanded the case for further consideration in light of *Melendez-Diaz*.

[5] Appellant argues in passing that improper hearsay was admitted during the testimony from the investigating officer in the J & J robbery, Detective Little. Appellant contends that over defense counsels objection, Det. Little testified that the police had received an anonymous tip that Mr. Henry Cobb and Mr. Billy Marshall were responsible for the robbery at J & Js. Appellants trial objection on the grounds of hearsay was overruled with the court agreeing with the prosecutor that the statement was not offered for the truth of the matter. This conclusion is supported by reading the testimony in context. Det. Little testified that the physical evidence from the J & J robbery yielded no leads in finding the perpetrator. It was not until police received the anonymous tip did they focus their investigation on Appellant. The hearsay rule does not preclude a witness from testifying about the actions he or she took as a result of a conversation with a third party. *Fontenot v. State,* 1994 OK CR 42, ¶ 41, 881 P.2d 69, 82.

[6] In footnote 3, this Court recognized an exception where a defendant testifies and admits his prior convictions in the first stage, thereby waiving the bifurcated proceeding.

[7] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Citationizer© Summary of Documents Citing This Document

Cite Name **Level**

Oklahoma Court of Criminal Appeals Cases

Cite	Name	Level
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2011 OK CR 12, 252 P.3d 221,	UNDERWOOD v. STATE	Discussed
2011 OK CR 13, 253 P.3d 997,	JONES v. STATE	Discussed
2013 OK CR 11, 313 P.3d 934,	MILLER v. STATE	Discussed at Length
2013 OK CR 18, 313 P.3d 274,	TATE v. STATE	Discussed
2014 OK CR 1, 319 P.3d 681,	STATE v. MARCUM	Discussed
2015 OK CR 14, 360 P.3d 1203,	BOSSE v. STATE	Cited
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2017 OK CR 10, 400 P.3d 834,	BOSSE v. STATE	Cited
2018 OK CR 4, 419 P.3d 257,	SMITH v. STATE	Discussed at Length
2018 OK CR 8, 419 P.3d 283,	LAMAR v. STATE	Discussed at Length
2018 OK CR 9, 421 P.3d 314,	KIRKWOOD v. STATE	Discussed at Length
2018 OK CR 13, 422 P.3d 765,	ANDERSON v. STATE	Discussed
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2018 OK CR 30, 428 P.3d 326,	MACK v. STATE	Discussed
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2019 OK CR 19,	ALEXANDER v. STATE	Discussed
2019 OK CR 22,	HARRIS v. STATE	Discussed

Citationizer: Table of Authority

Cite **Name** **Level**

None Found.

SANCHEZ v. STATE

2009 OK CR 31

223 P.3d 980

Case Number: D-2006-627

Decided: 12/14/2009

ANTHONY CASTILLO SANCHEZ, Appellant -vs- STATE OF OKLAHOMA, Appellee

Cite as: 2009 OK CR 31, 223 P.3d 980

OPINION

LEWIS, JUDGE:

¶1 Anthony Castillo Sanchez, Appellant, was tried by jury and found guilty of Count 1, murder in the first degree, in violation of 21 O.S.Supp.1996, § 701.7(A); Count 2, rape in the first degree, in violation of 21 O.S.1991, § 1114(A)(3); and Count 3, forcible sodomy, in violation of 21 O.S.Supp.1992, § 888(B)(3), in Cleveland County District Court, Case No. CF-2000-325.[1] The State alleged the murder involved three statutory aggravating circumstances: The murder was especially heinous, atrocious, or cruel; the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and the existence of a probability that Appellant would commit criminal acts of violence that would constitute a continuing threat to society. 21 O.S.1991, § 701.12(4), (5), and (7). The jury found all three aggravating circumstances and sentenced Appellant to death for murder in the first degree, forty (40) years imprisonment and a $10,000 fine for rape in the first degree, and twenty (20) years imprisonment and a $10,000 fine for forcible sodomy. The Honorable William C. Hetherington, District Judge, presided over the trial and pronounced the judgment and sentence on June 6, 2006. This Court stayed execution of the judgment and sentence on June 14, 2006. Mr. Sanchez appeals.

FACTS

¶2 Jewell Jean "Juli" Busken lived in the Dublin West Apartments on East Lindsey Street in Norman, near the University of Oklahoma, where she studied ballet. In the winter of 1996, she had completed her course requirements for graduation. Ms. Busken planned to return to her parent's home in Arkansas and enroll in graduate school. She had packed most of her belongings earlier in the week. Her parents were to arrive in Norman on December 20, 1996, to collect her things in a U-Haul trailer and accompany her back to Arkansas.

¶3 Ms. Busken spent the evening of December 19, 1996, visiting with her college friends, exchanging Christmas gifts and goodbyes. She had planned to give her friend, Megan Schreck, a ride to Will Rogers Airport early on the morning of December 20, so the two decided to stay up all night long. Ms. Busken and Ms. Schreck left Schreck's apartment on West Lindsey Street and ate at the Kettle around 2:00 a.m., returning to the apartment around 3:00 a.m. Ms. Busken fell asleep for a short while, and they headed toward the airport around 4:30 a.m. Around 5:00 a.m. on December 20, 1996, Ms. Busken dropped off her friend. She left Will Rogers Airport driving her red Eagle Summit, which bore an Arkansas license plate.

¶4 Around 5:30 a.m., back at the Dublin West apartments where Ms. Busken lived, at least three people heard a woman scream in terror. William Alves, a Norman Police officer, lived at the apartments and worked off-duty security. When Alves heard the screaming, he went outside and looked, but saw nothing. Jackie Evans lived across the parking lot from Ms. Busken. She also heard a woman's scream, and a man saying "just shut up and get in the car." Ms. Evans described a car door opening, then closing, the sound of footsteps, and another car door opening and closing. She then heard the car start and quickly drive away. Norman Police officer Kyle Harris arrived at the apartments around 5:51 a.m. in response to a 911 call reporting the screams. He could find nothing suspicious at the apartment.

¶5 Ryan James worked with Juli Busken at the OU Golf Course. They were close friends. Mr. James had plans to meet Ms. Busken for lunch on December 20, 1996. When he arrived at Ms. Busken's apartment around 11:00 a.m., he noticed her car was gone. Mr. James returned to work at the golf course. He checked Ms. Busken's apartment again when he got off work around 4 p.m., hoping they would have dinner together, but she still had not returned home. Mr. James was worried about Ms. Busken and checked with his grandparents to see if she had called or visited their home, as she often did. She had not been there, either. Mr. James and his grandfather searched for Ms. Busken, even driving to Will Rogers Airport trying to find her. Mr. James' grandfather knew OU Police Chief Joe Lester. They contacted Chief Lester early in the evening of December 20, 1996, to report that Ms. Busken was missing. Juli Busken never returned.

¶6 Randy Lankford saw something unusual lying along the shoreline of Lake Stanley Draper around noon on December 20, 1996. He may have persuaded himself it wasn't a human body he had seen, but whatever it was still troubled his mind after he returned home. Lankford returned to the lake with his wife after dark that evening. Shining their lights down onto the shore, the Lankfords believed they saw a body lying at the water's edge. They reported the matter to a nearby police station, and police soon descended on the scene to investigate the body and preserve evidence. From the physical description in a Missing Persons report originating from Norman concerning a female student, Oklahoma City police quickly deduced they had found the body of Juli Busken. Chief Joe Lester gave the awful news to Bud and Mary Busken, who had arrived in Norman just a short time before, that the search for their missing daughter was over. A long search for Juli Busken's killer had only begun.

¶7 Ms. Busken's body was clothed when she was found, but her jeans were unbuttoned and unzipped, and her underwear was partially rolled down her thighs. She was found lying face down, her head and shoulders in the shallow freezing water, her hands bound behind her with black shoe laces. Her prized opal and diamond ring, a gift from her parents, was missing from her finger and has never been found. Crime scene technicians recovered a possible pubic hair from her stomach when she was turned over. Investigators could see Ms. Busken had been shot in the head.

¶8 At the autopsy, the Medical Examiner observed that Ms. Busken's nose and forehead were scratched and bruised, and blood was in her left nostril. Several oval shaped bruises were seen on her inner thigh. She was also bruised in a small area near the labia, and a small scrape was found in the perianal region. Fecal matter was smeared in an area on her buttocks. The Medical Examiner preserved swabs of her oral, vaginal, and anal cavities for DNA analysis. The death wound was a contact gunshot to the rear of the skull, traversing the brain from back to front, left to right, and slightly upward before coming to rest in the frontal area of the skull, causing multiple fractures and catastrophic brain injury. The Medical Examiner recovered the fatal bullet, later identified by caliber as .22 Long Rifle. Subsequent ballistics analysis showed the barrel of the weapon that fired the fatal bullet marked it with sixteen lands and grooves and a right-hand twist.

¶9 Police recovered several items of evidence from the crime scene at Lake Stanley Draper, including a discarded pink leotard bearing the initials "JB," wiped with apparent fecal matter. A tissue smeared with apparent fecal matter was also recovered. Investigators could see two sets of footprints leading to the water's edge, and one set leading away, which they marked and photographed. From multiple cuttings of Ms. Busken's garments, the anal swab obtained from the body, and a pair of pajama bottoms recovered from Ms. Busken's vehicle, criminalists later identified the presence of human spermatozoa. Criminalists eventually used the genetic material recovered from Ms. Busken's panties and the pink "JB" leotard to develop the DNA profile of an unknown suspect.

¶10 Sightings of Juli Busken and her abductor reported by other witnesses narrowed the timeframe within which Ms. Busken was kidnapped and killed. Janice Keller saw a small red car like Juli Busken's near Lake Stanley Draper between 6:45 and 7:00 a.m. on the morning of December 20, 1996. Keller saw a young man, she approximated between age twenty-five and thirty, driving the car. In the passenger seat, she could see a woman who seemed somewhat younger, with her hair pulled back and prominent bangs in front. In the young woman's remarkably large eyes and facial expression, Ms. Keller sensed the presence of fear. She also noticed how the male driver looked angry. Ms. Keller contacted police about her sighting after hearing of the Juli Busken murder, but was not interviewed until two years later. She provided police with her own profile drawing of the man she saw, and helped develop a composite drawing admitted at trial.

¶11 David Kill was on his way home from a night shift at Tinker Air Force Base, driving back toward Norman that morning around 7:10 to 7:15 a.m. He encountered a red compact car bearing an Arkansas license plate driving away from Lake Stanley Draper. A male driver, alone in the car, cut off Mr. Kill in traffic and seemed not to notice he was there. Mr. Kill was incensed by the man's driving and chased the car back to Norman at high speed. He testified that despite his aggressive pursuit of the car, the driver still seemed oblivious to him. He parted with the red car when he turned on Alameda Street, but watched it continue south toward Lindsey Street. After seeing a news report about Ms. Busken's disappearance, Mr. Kill realized he had seen her car and called Oklahoma City Police. Kill also gave a physical description of the driver he had seen and helped develop a composite drawing, also admitted as evidence.

¶12 Late in the evening of December 20, 1996, OU Police found Juli Busken's red Eagle Summit parked just across the street from the Dublin West Apartments, where the screams were heard early that morning. A pair of pajama bottoms recovered from the car were stained with semen, from which criminalists later isolated a sperm fraction and developed a partial DNA profile. Police also photographed an impression of a person's buttocks imprinted on the exterior panel of the car. A cell phone, a CD player, and a radar detector were missing from the car. Records of activity from Ms. Busken's missing cell phone showed that a call was placed on December 21, 1996, to a number investigators later associated with Appellant's former girlfriend. Calls were also placed from Ms. Busken's phone after her murder to two numbers (both in the form 447-68xx) similar to phone numbers later associated with friends of Appellant.

¶13 In 2000, the State of Oklahoma charged an unknown suspect with the kidnapping, sexual assault, and murder of Juli Busken, identifying the defendant only by the DNA profile developed from crime scene evidence. In the months and years after her murder, investigators contacted and interviewed virtually every person they could find who had ever known, or might have had reason or opportunity to harm, Juli Busken. Detectives asked for DNA samples from almost 200 people to compare against the suspect DNA profile and other serology evidence. Throughout the entire investigation, prior to July, 2004, Anthony Castillo Sanchez was never interviewed, contacted, or considered a suspect in Ms. Busken's murder. Indeed, Ms. Busken's closest friends testified at trial they had never seen or heard of Anthony Sanchez as a friend or acquaintance of Juli Busken.

¶14 Appellant went to prison in 2002 for a second degree burglary committed the previous year. While serving his sentence, the Oklahoma Department of Corrections obtained his tissue sample for DNA analysis, as required by statute. The Oklahoma State Bureau of Investigation (OSBI) then developed a DNA profile from the sample and placed it into the OSBI's Combined DNA Index System (CODIS). In July, 2004, OSBI Criminalist Ken Neeland notified a cold case detective in the Oklahoma City Police Department that Anthony Sanchez's DNA profile had generated a hit on the unknown DNA profile associated with the Juli Busken murder.

¶15 Police obtained a search warrant and a new sample of Appellant's DNA for further comparisons. The State presented evidence at trial that Appellant's DNA matched the DNA profile generated from the sperm cell fraction isolated on Ms. Busken's panties; and also matched the sperm cell fraction isolated from the stained pink leotard discarded at the crime scene. The matches corresponded to Appellant's known DNA at all sixteen genetic loci tested. The State's DNA expert characterized the probability of a random DNA match on the Busken evidence with an unrelated individual other than Appellant as 1 in 200.7 trillion Caucasians, 1 in 20.45 quadrillion African Americans, and 1 in 94.07 trillion Southwest Hispanics. Appellant also could not be excluded as the donor of a DNA mixture isolated from epithelial cell fractions on the panties and leotard. DNA comparisons on the spermatozoa recovered from the anal swab and the pajama bottoms from the car were inconclusive.

¶16 Appellant's former girlfriend, Christin Setzer, testified that between 1994 and 1996 she lived with Appellant in a residence on Drake Drive in southeast Norman, about one mile from Juli Busken's apartment. Ms. Setzer and Appellant had a child in May, 1997, but later separated. When police interviewed Ms. Setzer years after the Busken murder, she described an incident when shots were fired within the Drake Drive residence. Only Appellant and his step-father were in the room where shots were fired. Ms. Setzer told police she later saw bullet holes in the east wall of the room. Police obtained a search warrant for the residence in 2004, and dismantled the walls looking for evidence of these shots and any potential projectiles. They located a linear defect in the lumber of a wall stud consistent with a bullet strike, but were unable to find a projectile. Police also found a piece of foam which bore marks consistent with a bullet strike. After police collected these items and left the scene, the owner of the residence vacuumed the area of the wall which police had dismantled. Searching the contents of the vacuum bag later in his garage, he located an item later identified as a .22 Long Rifle projectile. The Drake Drive bullet was marked ballistically with sixteen lands and grooves and a right-hand twist, and thus shared the same caliber and general barrel markings as the .22 bullet that killed Juli Busken. Testimony from one of Appellant's friends established that Appellant was in possession of a small .25 caliber pistol in 1994 and 1995. The State impeached this witness with his prior statement that the pistol could have been a .22 or .25 caliber. Attempts to positively identify the Drake Drive bullet and the bullet recovered from Juli Busken as being fired from the same weapon proved inconclusive.

¶17 Appellant called no witnesses in the first stage of trial and did not testify. We will relate additional facts in connection with individual propositions of error.

ANALYSIS

¶18 In Proposition One, Appellant argues the District Court committed reversible error by trying him before the jury in shackles in violation of 22 O.S.2001, § 15, which provides:

> No person can be compelled in a criminal action to be witness against himself; nor can a person charged with a public offense be subjected before conviction to any more restraint than is necessary for his detention to answer the charge, and *in no event shall he be tried before a jury while in chains or shackles* (emphasis added).

¶19 Before trial commenced, the District Court notified Appellant and his counsel that Appellant would be required to wear either a high-voltage shock sleeve or restraints during the trial for "security reasons." Appellant objected, arguing that he had not engaged in any disruptive or threatening conduct warranting restraints. This was not disputed at the outset of trial,[2] yet the Court indicated in discussions with Appellant that it was the desire of his custodians that he be restrained, and the Court intended to accommodate that request.

¶20 Defense counsel did not oppose the Court's decision to order the Appellant restrained either by shackles or the shock sleeve. With the District Court resolved to use some form of restraint, counsel attempted to persuade Appellant to wear the invisible (or minimally visible) shock sleeve to prevent an appearance before the jury in irons. Appellant initially declined the Court's offers to wear the shock sleeve, saying fear of an accidental shock would prevent him from focusing on the trial. The record which reached this Court was unclear about exactly what restraints Appellant wore at trial.

¶21 Following oral argument in this case, the Court remanded for an evidentiary hearing to clarify the nature of Appellant's restraints during the jury trial. Counsel for the parties stipulated in that hearing that Appellant wore leg irons around his ankles during proceedings before the jury. Appellant testified at the hearing that he was also handcuffed during the jury trial, but these claims were vague, self-serving, and contradicted by the remaining evidence. Appellant's restraints were obscured from the jury's view during individual *voir dire* by seating Appellant at the end of a table in the Court's chambers. During proceedings in open court, Appellant's leg irons were concealed from the jury by the placement of identical black curtains around the prosecution and defense tables. Testimony established that Appellant's movements to and from the courtroom occurred outside the presence of jurors. A deputy testified that every effort was made to conceal Appellant's restraints from jurors at all times. The members of the trial jury each testified that they were unaware that Appellant was wearing any form of restraints during the trial. Most of the jurors saw the curtains at the tables, but thought nothing of the matter.

¶22 By his own objections, Appellant has preserved the issue for appellate review. The principle of law we consider here has an ancient and impressive history. In Henry of Bracton's Laws and Customs of England, collected around A.D. 1230, we are told that "when the person thus arrested is to be brought before the justices he ought not to be brought with his hands tied (though sometimes in leg-irons because of the danger of escape) *lest he may seem constrained to submit to any form of trial.*" (emphasis added). 2 H. Bracton, Laws and Customs of England 385 (Thorne, Ed.). Chief Justice John Kelyng's Report of Crown Cases, dating from 1660, shows "it was resolved that, when Prisoners come to the Bar to be tryed, their Irons ought to be taken off, so that they be not in any Torture while they make their defense, be their Crime never so great. And accordingly upon the Arraignment and Tryal of *Hewlet* and others, who were brought in Irons, the Court commanded their Irons be taken off." J. Kelyng, A Report of Divers Cases in Pleas of the Crown, Adjudged and Determined, in the Reign of the Late King Charles II, With Directions for Justices of the Peace and Others 11 (3d ed. 1873). Justice Kelyng was speaking directly of the accused traitors indicted for compassing the murder of the late King Charles I. *Id.* Lord Matthew Hale, Sir William Hawkins, and Sir William Blackstone also set down the common law rule that a prisoner brought into court for jury trial must appear "free of all manner of shackles or bonds" unless there was "evident danger of his escape." 2 M. Hale, Pleas of the Crown 219; II W. Hawkins, Pleas of the Crown 308; 4 W. Blackstone, Commentaries on the Laws of England 317 (1st ed., 1769), *citing Layer's Case,* 6 State Trials (4th ed., by Hargrave) 230; *see also, Waite's Case*, 1 Leach's Cases in Crown Law 36.

¶23 In 1953, the Legislature amended Title 22, section 15, adding the final clause providing that "in no event shall he be tried before a jury while in chains or shackles." The amendment came in response to this Court's controversial decision the previous year in *DeWolf v. State*, 1952 OK CR 70, 95 Okla. Crim. 287, 245 P.2d 107. In *DeWolf,* the District Court ordered a capital murder defendant tried before the jury in leg irons, allowing the

restraints removed only when defendant took the witness stand. He was convicted and sentenced to death. 95 Okla. Crim. at 291, 245 P.2d at 112. Framing the question on appeal as whether the actions of the trial court denied due process of law, this Court acknowledged the common law rule that a defendant be "free of all manner of shackles and bonds, unless there be evident danger of escape, and then he may be secured by irons." 95 Okla. Crim. at 291- 292, 245 P.2d at 113, *citing* 4 W. Blackstone, Commentaries 322, supra.

¶24 The Court in *DeWolf* considered section 15 declaratory of the common law rule and its exceptions, and reasoned that the statute granted the trial judge considerable discretion in determining what restraint was necessary for defendant's detention to answer the charge. The appellant in *DeWolf* had prior violent felony convictions and had escaped from custody. The sheriff thought him intent upon an escape during the trial, and he was known to create handcuff keys and weapons from items in his jail cell. 95 Okla. Crim. at 291, 245 P.2d at 112-113.

¶25 This Court held that "restraint by means of surveillance, shackles and leg irons and other means of maintaining order and preventing acts of violence and escape are matters within the sound judicial discretion of the trial court." 95 Okla. Crim. at 294-295, 245 P.2d at 115. "[E]ach case must depend on its own facts, and this court will scrutinize with the greatest care every such case in search of abuse of discretion." 95 Okla. Crim. at 295, 245 P.2d at 116. The Court in *DeWolf* ultimately decided "the trial court's conclusions [to shackle defendant at trial] were well founded" and affirmed the judgment and sentence of death. 95 Okla. Crim. at 295, 245 P.2d at 116, 124. *DeWolf* was not well-received in the Legislature, which passed the 1953 amendment to section 15 "in order that, never again, could a defendant be tried for any crime without the full use of his faculties and with the presumption of innocence the law allows." *Baker v. State*, 1967 OK CR 178, ¶ 17, 432 P.2d 935, 940.

¶26 After the 1953 amendment expressly prohibited the restraint approved in DeWolf, almost a decade passed before a District Court ran foul of the statute again in a reported case. In *French v. State*, 1962 OK CR 157, 377 P.2d 501, *overruled in part in Peters v. State*, 1973 OK CR 443, ¶ 13, 516 P.2d 1372 (see discussion, infra), the capital defendant was brought before the jury prior to the commencement of trial escorted by three armed guards, and wearing visible handcuffs shackled to a six inch belt around his body. On another day, he was seated at counsel table while several jurors were seated in the jury box. Two of the defendant's escorts removed the handcuffs and large belt in full view of the jurors. The District Court denied counsel's request for a mistrial, finding the first occurrence happened before the trial had begun, and the second while court was not in session. French was convicted of murder and sentenced to death. On appeal, he argued the District Court violated section 15. French, at ¶¶ 1-4, 377 P.2d at 502.

¶27 Writing for the Court, Judge Nix characterized the guarantee of section 15 as protecting the defendant's common law right "to appear in court with free use of his faculties, both mentally and physically." *Id.* at ¶ 6, 377 P.2d at 502. The Court contrasted how the earlier version of section 15 "left the court with a broad discretion to determine what was necessary" in terms of a defendant's restraints, while the 1953 amendment had "removed any and all discretion that the trial court had" in the matter. *French*, at ¶¶ 12-13, 377 P.2d at 503. This Court found the Legislature had also intended by the exacting language of the 1953 amendment to preserve the defendant's presumption of innocence, recognizing that "a man brought before the court in chains and shackles was prejudiced in the minds of the jury," who would conclude that he was "a dangerous criminal who had to be chained and shackled to prevent his escape or prohibit him from doing harm to others or any act of violence." *French*, at ¶ 13, 377 P.2d at 503. Section 15's prohibition against restraints at trial "permits no discretion nor ramifications. It simply says it shall not be done." *French*, at ¶ 15, 377 P.2d at 504. Guided by these principles, the Court found the statute was "designed to prohibit an occurrence as is depicted in the case at bar," and reversed the conviction. *Id.* at ¶¶ 5, 24, 377 P.2d at 502, 505.

¶28 In *Davis v. State*, 1985 OK CR 140, 709 P.2d 207, the appellant sat through his capital murder trial in court-ordered leg irons. Appellant in *Davis* was considered a security risk and shackled at the direction of the County Sheriff. However, the record on appeal failed to establish "any disruptive or disrespectful conduct on the part of appellant justifying the use of shackles." *Id.* at ¶ 4, 709 P.2d at 209. The Court found the defendant's restraints violated section 15. In a special concurrence, Judge Brett added that "the trial judge is bound to proceed in accordance with 22 O.S.1981, § 15 until some reason develops to proceed otherwise. Further, when restraint becomes necessary, *the record should be made completely clear why restraint is being applied.*" *Davis*, at ¶ 2, 709 P.2d at 210. (Brett, J., specially concurring) (emphasis added). Although the State argued the error was harmless because the jury had not seen appellant in leg irons until he took the witness stand in the sentencing phase of trial, this Court declined to limit the statutory prohibition to guilt-phase trials and reversed the conviction. *Id.* at ¶¶ 5-6, 709 P.2d at 209.

¶29 In cases since the *French* case, the Court has clarified that the prohibition against restraints in section 15 is not absolute. The right to be free from restraints may be waived "if defendant engages in misconduct so disruptive and disrespectful that the trial cannot continue." *Peters v. State*, 1973 OK CR 443, ¶ 13, 516 P.2d 1372, 1374-75. The appellant in *Peters* ran from the courtroom during trial, and engaged in two outbursts before the jury. *Id.* at ¶¶ 10-12, 516 P.2d at 1374. This Court found the trial judge gave appellant "every opportunity" to be present without handcuffs if he would not disrupt the proceedings. *Id.* at ¶ 15, 516 P.2d at 1375. The Court affirmed the judgment though the defendant was handcuffed for a portion of the trial, overruling language in *French* and other cases indicating the prohibition against restraints admitted no exceptions. *Peters*, at ¶ 12, 516 P.2d at 1374-75.

¶30 We conclude from the foregoing history that the current version of section 15 has removed the discretionary common law authority to restrain a defendant before the jury at trial. Section 15 imposes a strong presumption against such restraint, which can be overcome only by evidence of a defendant's disruptive or aggressive behavior in court, or an expressed or implied intention to engage in such behavior. In *Ochoa v. State*, 2006 OK CR 21, 136 P.3d 661, we found the District Court violated section 15 by compelling the appellant to wear a shock sleeve during his mental retardation trial. Counsel did not object to the shock sleeve, but appellant repeatedly objected. *Ochoa*, at ¶ 21, 136 P.3d at 667. The record showed that counsel and the Court were concerned the appellant might disrupt the proceedings. *Id.* at ¶ 29, 136 P.3d at 669. When he asked why he was being restrained, the District Court replied that appellant had told his counsel he would disrupt the trial, but no testimony was taken to establish this fact. The record did not disclose the nature of counsel's concern about appellant's behavior, nor did it reflect any disruptive or aggressive behavior by appellant before the District Court ordered him to wear the shock sleeve. The District Court in *Ochoa* characterized its use of the shock sleeve simply as "insurance" and a "precautionary" measure should appellant be tempted to disrupt the trial. We held on these facts the use of restraints before the jury violated section 15. *Ochoa*, at ¶¶ 29-30, 136 P.3d at 669.

¶31 *Ochoa* provides an analysis appropriate to the case before us. The record here supports the conclusion that the District Court's decision to order Appellant restrained, either with the shock sleeve or shackles, was a precautionary security measure at best. The order was prompted by a law enforcement request, rather than specific facts showing Appellant's intent to harm anyone or disrupt the trial. In this respect, the District Court's error is identical to the violation of section 15 in *Davis*, where the defendant "was apparently shackled [at trial] at the direction of the County Sheriff, and no basis for that decision is found in the record." *Davis*, at ¶ 4, 709 P.2d at 209. Indeed, the District Court in this case expressed the view that "if law enforcement thought and recommends that that's what has to be done [placing defendant in restraints], I don't even---I'm not even in that loop really. If they want to do it, I think they can do it. There's no law that prevents them from just requiring you to do it."

¶32 We must note here that the requirements of section 15 were never raised by counsel or considered on the record in connection with the District Court's decision. Neither prosecution nor defense counsel---at least five seasoned criminal practitioners in all---directed the District Court's attention to section 15 or case law applying the statute. Nor did counsel for either party mention the Supreme Court's 2005 decision in *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), overturning a death penalty verdict on due process grounds because the prisoner was tried before a jury in visible chains without specific factual findings to justify the restraint. Even a brief perusal of section 15 and its annotations would have given the District Court reason to doubt the legality of ordering Appellant restrained in irons before the jury for unspecified security reasons or merely at the request of law enforcement. Forty-six years ago, Judge Nix said that "[i]nside the portals of the court room, the trial judge is master. . . [and] should use *every precaution within his grasp to see that the defendant is not paraded before the jury or jury panel in chains or shackles.*" *French,* at ¶ 20, 377 P.2d at 504. (emphasis added). More than twenty years ago, Judge Brett said "[t]he Sheriff does not control the courtroom. That is the responsibility of the trial judge. The trial judge is *bound to proceed in accordance with the terms of 22 O.S. 1981 § 15 until some reason develops to proceed otherwise.*" *Davis*, at ¶ 2, 709 P.2d at 210. (Brett, J., specially concurring)(emphasis added).

¶33 Appellant might very well have been a threat, but an order to restrain him at trial in derogation of section 15 required a factual predicate sufficient to justify the restraint and permit this Court's review of the decision on appeal. The record here lacks the necessary factual justification. Appellant had not disrupted the proceedings at the time the shackling order was made, nor had he expressed or implied any intention to do so, as far as the record reflects. A mere belief that Appellant might be a security risk did not justify a departure from the statutory command. The District Court's restraint of Appellant with shackles before the trial jury clearly violated section 15. *Davis*, at ¶ 4, 709 P.2d at 209 ("The record fails to establish any disruptive or disrespectful conduct on the part of appellant justifying use of shackles. Moreover, there is not a scintilla of evidence that the appellant planned to disrupt the trial").

¶34 Before ordering that any defendant be tried before a jury restrained by a shock sleeve, shackles, or any other form of physical restraint, the District Courts in future cases must make a specific finding on the record that the defendant has engaged in disruptive or aggressive behavior in connection with the proceedings, or made an express or implied threat to disrupt the proceedings or endanger public safety during the trial. The Court must further specify the facts supporting this conclusion and demonstrating that restraint of the defendant during the trial is necessary to prevent the disruptive or threatening behavior. Defendant must be afforded an opportunity to be heard in opposition to any order to wear restraints and present evidence bearing on the issue. If the facts supporting the Court's decision to use restraints include material protected by attorney-client confidentiality, disclosure of which to the State would violate the defendant's right to confidentiality, attorney-client privilege, or the privilege against self-incrimination, the Court should to that extent conduct the proceedings *ex parte*, memorialize the facts justifying the restraint, and preserve the sealed record for appellate review.

¶35 We turn now to the question of whether we must reverse the judgment. While the prohibition against restraints safeguards a defendant's dignitary and tactical interests in making his defense without the mental and physical burdens of shackles, the principal harm with which statute concerns itself is *evidentiary*, in that it ordinarily forbids the prejudicial spectacle of a defendant clapped in irons during trial before a jury. A violation of the statute is not reversible error *per se*. In *Phillips v. State*, 1999 OK CR 38, 989 P.2d 1017, the District Court ordered a capital defendant to wear a stun belt during trial. On appeal, he argued the restraint violated section 15. The District Court's order was in response to defendant's prior outburst at another court proceeding and his prior violent behavior in jail. *Phillips*, at ¶¶ 52-54, 989 P.2d at 1033-1034. Despite these facts, this Court

assumed the restraint violated section 15. The Court noted "[a]ll parties agreed the stunbelt was not visible to the jury," and there was no evidence the stunbelt hampered defendant physically or mentally. *Phillips*, at ¶ 55, 989 P.2d at 1034. Absent such evidence, this Court found the error had no "substantial influence" on the outcome of the trial. *Id.* In *Ochoa*, supra, the record suggested the shock sleeve worn by defendant was either invisible to jurors under his clothing or minimally visible, and no more prejudicial than the defendant's decision to appear in prison garb at trial. Nor did the defendant claim the shock sleeve interfered with his ability to participate in his defense. On these facts, we found defendant had "not proven this error had a substantial influence on the outcome of the proceeding and has not shown prejudice." *Ochoa*, at ¶ 32, 136 P.3d at 670.

¶36 In this case, the District Court certainly encouraged Appellant to wear a shock sleeve under his clothing. Appellant refused the shock sleeve, believing it would prevent his concentration on the trial. Appellant was subjected to restraint by leg irons throughout the trial. The evidence before us is that every precaution was taken to conceal his restraints from jurors; and no trial juror actually viewed him in restraints. We do not condone the District Court's error in ordering Appellant restrained in violation of section 15, and such restraint will not be permitted without a proper factual record in the future. However, Appellant has not shown how the District Court's error had any substantial influence on the outcome at trial. Proposition One therefore requires no relief.

¶37 In Proposition Two, Appellant claims the District Court denied a full and fair examination of prospective jurors regarding their opinions on the death penalty. Prior to jury selection, prospective jurors filled out extensive questionnaires and returned them to the Court. Counsel had the benefit of these questionnaires when conducting individual *voir dire*. The District Court permitted individual, sequestered *voir dire* with every prospective juror, followed by a general *voir dire* examination in open court. The entire jury selection in this case consumed several days of court time and the first 1,600 pages of trial transcript. The State exercised eight peremptory challenges against prospective jurors and waived its ninth. Appellant exercised nine peremptory challenges against prospective jurors. The parties each exercised one peremptory challenge against the prospective alternates. Appellant did not request additional peremptory challenges when his nine were exhausted, nor did he allege that he was forced, over objection, to keep an unacceptable juror. Appellant therefore accepted the jury panel as it was constituted and failed to preserve any objection to the District Court's rulings on his challenges for cause. *Warner v. State*, 2001 OK CR 11, ¶ 10, 29 P.3d 569, 573-74. We will nevertheless review the District Court's conduct of *voir dire* to determine whether Appellant's constitutional rights were infringed.

¶38 The District Court asked each prospective juror about exposure to pre-trial publicity and issues involving capital punishment, including variations on the following inquiries found in Instruction No. 1-5, Alternate 2, OUJI-CR (2d):

> The defendant is charged with murder in the first degree. It will be the duty of the jury to determine whether the defendant is guilty or not guilty after considering the evidence and instructions of law presented in court.
> If the jury finds beyond a reasonable doubt that the defendant is guilty of murder in the first degree, the jury will then have the duty to assess punishment. The punishment for murder in the first degree is death, imprisonment for life without parole or imprisonment for life.
> If you find the defendant guilty of murder in the first degree, can you consider all three of these legal punishments--death, imprisonment for life without parole or imprisonment for life . . . ?
> If you find beyond a reasonable doubt that the defendant is guilty of murder in the first degree, will you automatically impose the penalty of death?

¶39 The Committee on Oklahoma Uniform Jury Instructions-Criminal (OUJI-CR) added the question concerning whether a prospective juror would automatically impose the penalty of death in light of the Supreme Court's holding in *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). In *Morgan*, the Supreme Court held that due process of law affords a capital defendant an opportunity to learn whether a prospective juror would automatically impose the death penalty. 504 U.S. at 735-36, 112 S.Ct. at 2233. The trial court may either conduct this inquiry, or permit counsel to inquire, or both. *Fitzgerald v. State*, 1998 OK CR 68, ¶ 31, 972 P.2d 1157, 1170 (denial of any opportunity to inquire was error); *Cannon v. State*, 1998 OK CR 28, ¶ 7, 961 P.2d 838, 844 (allowing inquiry by defense counsel was sufficient).

¶40 During jury selection, several jurors answered affirmatively when asked whether they would automatically sentence the defendant to death, seemingly contradicting earlier statements that they could fairly consider all three punishments for first-degree murder. When asked to clarify this apparently inconsistent response, it became clear that prospective jurors were confused by the automatic death penalty question. The District Court noted how the sequencing of the question and its phrasing seemed to suggest to prospective jurors that the law required an automatic sentence of death for a conviction of first degree murder. Several jurors understandably reacted to the conflicting implications of the automatic death penalty question with another question or a statement indicating some confusion: "Say that again?;" "Repeat that?;" "I believe in the death penalty;" "Could you repeat that?;" "Automatically?;" "Can you read that again, please?;" "Can you repeat it again, please?;" "I don't know. Maybe you need to---I don't know."

¶41 The following exchange between the court and a thoughtful prospective juror illustrates the confusing nature of the automatic death penalty question:

The Court: The punishment for murder in the first degree is death, imprisonment for life without parole, or imprisonment for life. If you find the defendant guilty of murder in the first degree, can you consider all three of these legal punishments: Death, imprisonment for life without parole, or imprisonment for life, and impose the one warranted by law and the evidence?
Prospective Juror: Yes. Are you asking if I have an idea of what it should be if he's found guilty, or if I can fairly choose the one that's most right according to this case?
The Court: The latter.
Prospective Juror: I can.
The Court: If you are on this jury and if you find beyond a reasonable doubt that the defendant is guilty of murder in the first degree, would you automatically impose the death penalty?
Prospective Juror: If that's what the guidelines are.
The Court: That wasn't the question.
Prospective Juror: Go ahead. Say it again, please.
The Court: If you found beyond a reasonable doubt that the defendant is guilty of murder in the first degree, would you automatically impose the death penalty?
Prospective Juror: Now wait, because you just asked me before if I would do what---
The Court: Give equal consideration.
Prospective Juror: Right.
The Court: So you would give equal consideration?
Prospective Juror: Right. That's what I answered to just a minute ago, right, that I would give---
The Court: Yes, you did.
Prospective Juror: Okay.
The Court: That's correct.
Prospective Juror: I mean, I would have no problem if the law said this is what the punishment is for this crime, I have no problem saying the death penalty is the punishment, that's the punishment. But if the law says it can be one of these, then it depends on what the law tells me to do.
The Court: And if the law tells you, you have to give equal consideration to all three, you would do that?
Prospective Juror: If that's what the law said, yes, I would.
The Court: Well, I just told you that's what it is.
Prospective Juror: Okay. Yes, sir, I could.

¶42 When the Court and the State expressed concerns about the automatic death penalty question, defense counsel objected to the District Court's plan to clarify the question with follow-up questions if necessary, arguing (very much in the face of the evidence) that the question was not confusing to prospective jurors. The District Court overruled defense counsel's objections, and where prospective jurors expressed confusion about the automatic death penalty question, the District Court followed up with clarifying questions, usually by saying to the prospective juror "you will not *just* automatically impose the death penalty?" or words of similar import. Prospective jurors then seemed to understand this question addressed itself to their willingness to fairly consider all three punishments for murder, rather than being irrevocably committed to the death penalty.

¶43 A review of the entire *voir dire* shows that the District Court could readily distinguish between the prospective jurors who were initially befuddled by the automatic death penalty question and those irrevocably committed to imposing the death penalty for murder. The District Court properly disqualified several prospective jurors who

would automatically impose a death sentence in the event of a first degree murder conviction. The District Court also permitted additional, individual *voir dire* by counsel on these subjects. These *voir dire* questions cast additional light on prospective jurors' attitudes about capital punishment. The prosecutor quizzed jurors about how they would vote in a death penalty referendum. Defense counsel's questions ensured that prospective jurors understood no particular punishment was favored by the law more than another. On the whole, *voir dire* provided the Court and counsel with a wealth of information about prospective jurors' attitudes on the issue of capital punishment.

¶44 The purpose of *voir dire* examination is to ascertain whether there are grounds to challenge prospective jurors for cause and to permit the intelligent use of peremptory challenges. The manner and extent of *voir* dire lies within the District Court's discretion. The District Court may properly restrict questions that are repetitive, irrelevant or regard legal issues upon which the trial court will instruct the jury. There is no abuse of discretion as long as the *voir dire* examination affords the defendant a jury free of outside influence, bias or personal interest. *Young v. State*, 2000 OK CR 17, ¶ 19, 12 P.3d 20, 31-32 (and cases cited). A prospective capital juror should be excused for cause when the juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). Due process of law requires that a prospective juror be willing to consider all the penalties provided by law and not be irrevocably committed to a particular punishment before the trial begins. *Hain v. State*, 1996 OK CR 26, ¶ 21, 919 P.2d 1130, 1138. *Morgan v. Illinois*, supra, thus guarantees a capital defendant's right to inquire whether a prospective juror is irrevocably committed to imposing a death sentence.

¶45 While this case shows that the questions put to prospective jurors in a death penalty *voir dire* can be confusing to laypersons, the District Court's careful and repeated inquiries about each juror's qualifications sufficiently protected Appellant's rights to identify unqualified jurors and intelligently exercise peremptory challenges. Somewhat contrary to Appellant's suggestions on appeal, defense counsel at trial remarked that when a prospective juror's contradictory responses to the automatic death penalty question suggested a misunderstanding, "[t]he Court has, upon further inquiry, *cleared up any of the confusion*." (emphasis added). That is a fair assessment of the proceedings before us. Further, Appellant sought no additional peremptory challenges and identified no juror on the final panel who was unacceptable to him, and thus cannot show prejudice from the District Court's alleged errors. *Gilbert v. State*, 1997 OK CR 71, ¶ 32, 951 P.2d 98, 109. No relief is warranted.

¶46 Proposition Three challenges the State's seizure of Appellant's DNA as a violation his constitutional right to be secure in his person from unreasonable search and seizure. U.S. Const. amend. IV, XIV; Okla. Const. art. II, § 30. As a result of Appellant's incarceration for second degree burglary in 2002, the Department of Corrections collected his blood and submitted it to the Oklahoma State Bureau of Investigation. OSBI then developed Appellant's DNA profile and maintained it in the OSBI's Combined DNA Index System (CODIS), from which the State ultimately obtained a DNA match to evidence from the Busken murder.

¶47 The Legislature established the Combined DNA Index System "for the purpose of collecting and storing blood or saliva samples and DNA profiles, analyzing and typing of the genetic markers contained in or derived from DNA, and maintaining the records and samples of DNA" of individuals required to provide a sample by the statute. 74 O.S.Supp.2002, § 150.27a. Earlier versions of the law required a sample from certain sexual and violent offenders, while the current law directs the Department of Corrections to collect blood or saliva samples from every person convicted of a felony offense, and to forward the sample to OSBI for DNA profiling and storage in the CODIS. 74 O.S.Supp.2006, § 150.27a(A). In past and present versions of the statute, the Legislature has

specified that the purpose of the CODIS is "the detection or exclusion of individuals who are subjects of the investigation or prosecution of sex-related crimes, violent crimes, or other crimes in which biological evidence is recovered, and such information shall be used for no other purpose." *Id.*

¶48 Appellant challenges the statutory practice of collecting blood or saliva samples from inmates as an unreasonable search or seizure in violation of the Fourth Amendment and Article II, section 30. We agree with Appellant that the State's collection of an involuntary sample of an offender's blood, saliva, or other genetic material for the purpose of DNA typing and recording a known offender's DNA profile in the CODIS, is a search and seizure that must satisfy the constitutional requirement of reasonableness. *Skinner v. Railway Labor Executives' Assoc.,* 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (holding bodily intrusions involved in blood tests, breath tests, and the taking of urine are searches under the Fourth Amendment). We make two further assumptions for the sake of this argument: that Appellant was neither asked for, nor gave, his consent to the State's seizure of his genetic material; and that the seizure was not based on any individualized suspicion of Appellant amounting to either probable cause or reasonable suspicion. The remaining question is whether this warrantless, suspicionless seizure of Appellant's blood or saliva and development of his DNA profile for comparison was a reasonable search and seizure.

¶49 A series of cases from the United States Courts of Appeals have addressed whether this type of search violates the Fourth Amendment to the United States Constitution. In *Jones v. Murray,* 962 F.2d 302 (4th Cir. 1991), *cert. denied,* 506 U.S. 977, 113 S.Ct. 472, 121 L.Ed.2d 378 (1992), the Fourth Circuit rejected a Fourth Amendment challenge to a statute requiring convicted felons to submit blood samples for DNA analysis and inclusion in a data bank for law enforcement purposes. The Court of Appeals determined there is no "*per se* Fourth Amendment requirement of probable cause, or even a lesser degree of individualized suspicion, when government officials conduct a limited search for the purpose of ascertaining and recording the identity of a person who is lawfully confined to prison." *Jones*, 962 F.2d at 306. The Court of Appeals relied in part on an inmate's diminished expectation of privacy in the prison setting.

¶50 In *Rise v. Oregon,* 59 F.3d 1556, 1558-59 (9th Cir. 1995), *cert. denied,* 517 U.S. 1160, 116 S.Ct. 1554, 134 L.Ed.2d 656 (1996), an Oregon statute required all inmates convicted of murder or sex offenses, or certain related crimes, to submit DNA samples for inclusion in a data bank. The Court of Appeals noted that "[t]he information derived from the blood sample is substantially the same as that derived from fingerprinting---an identifying marker unique to the individual from whom the information is derived." *Rise*, 59 F.3d at 1559.

> [E]veryday 'booking' procedures routinely require even the merely accused to provide fingerprint identification, regardless of whether the investigation of the crime involves fingerprint evidence . . . Once a person is convicted of one of the felonies included as predicate offenses under [the statute], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling.

Id. at 1560. The Court of Appeals found that although obtaining DNA requires drawing blood (or saliva) as opposed to "inking and rolling a person's fingertips," *id.,* the intrusion on the inmate's diminished Fourth Amendment interests is minimal.

¶51 The Court of Appeals then balanced the minimal intrusion on the prisoner's Fourth Amendment interests against the legitimate government interest in identifying and prosecuting murderers and sex offenders, the degree to which gathering the DNA information would advance that interest, "and the severity of the resulting interference with individual liberty." *Rise,* 59 F.3d at 1560. Noting "the public's incontestable interest in preventing recidivism

and identifying and prosecuting murderers and sexual offenders, and the likelihood that a DNA bank will advance this interest," the Ninth Circuit Court of Appeals also concluded that the seizure mandated by the state's DNA collection statute was reasonable under the Fourth Amendment. *Id.* at 1562.

¶52 In *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996), inmate plaintiffs challenged a Colorado statute requiring convicted sex offenders to provide DNA samples before their release on parole as an unreasonable search and seizure in violation of the Fourth Amendment. The Tenth Circuit Court of Appeals reached the same conclusion as the Fourth and Ninth Circuits:

> [W]e hold that while obtaining and analyzing the DNA or saliva of an inmate convicted of a sex offense is a search and seizure implicating Fourth Amendment concerns, it is a reasonable search and seizure. This is so in light of an inmate's diminished privacy rights, *see Dunn v. White,* 880 F.2d 1188, 1195 (10th Cir.1989) (in upholding AIDS testings against inmates' Fourth Amendment challenge, stating that "plaintiff's privacy expectation in his body is further reduced by his incarceration"), *cert. denied,* 493 U.S. 1059, 110 S.Ct. 871, 107 L.Ed.2d 954 (1990); the minimal intrusion of saliva and blood tests; and the legitimate government interest in the investigation and prosecution of unsolved and future criminal acts by the use of DNA in a manner not significantly different from the use of fingerprints.

Boling, 101 F.3d at 1340. Largely relying on its ruling in *Boling* and the conclusions of the Fourth and Ninth Circuits, the Tenth Circuit turned away a Fourth Amendment challenge to the Oklahoma DNA testing statute in *Shaffer v. Saffle,* 148 F.3d 1180, 1181 (10th Cir. 1998).

¶53 We are persuaded by these authorities that the seizure of Appellant's blood and development of his DNA profile were reasonable under the Fourth Amendment to the United States Constitution and Article II, section 30 of the Oklahoma Constitution. The State's legitimate interest in the collection and storage of this highly probative form of identification for use by law enforcement in the detection and prevention of past and future crimes far outweighs a convicted prisoner's minimal interest in freedom from a brief intrusion required to collect a sample of genetic material. The District Court properly denied Appellant's motion to suppress the resulting evidence of his DNA profile and its comparison to the previously unknown DNA profile developed after the murder of Juli Busken. Proposition Three is denied.

¶54 In Proposition Four, Appellant challenges the District Court's admission of evidence tending to show that shoe prints at the scene of the Busken murder were similar to a pair of Nike shoes owned by Appellant. Investigators observed and photographed two pairs of shoe prints in the soil leading to where Juli Busken's body was found. One pair of shoe prints correlated to hiking boots worn by Ms. Busken. The other pair of shoe prints led down to the killing scene and then back toward the road. Police compared photographs of these prints to a variety of shoes and came to believe the soles were similar to the Nike *Air Max 2*. Photographs of the questioned shoe print were admitted at trial, along with inked imprints and acetate overlays of the Nike *Air Max 2* shoes provided by the Nike Corporation. The State then presented testimony from Appellant's ex-girlfriend, Christin Sezter, who read to the jury an October 14, 1996, entry from her personal calendar indicating that she and Appellant had purchased matching Nike shoes that day. The District Court also admitted the page from Ms. Setzer's calendar in evidence.

¶55 Appellant first objects that the testimony of Ms. Setzer's calendar entry was inadmissible hearsay. He has preserved his objection on appeal. The District Court's admission or exclusion of evidence over a timely objection or offer of proof is ordinarily discretionary and will not be reversed on appeal unless clearly erroneous or manifestly unreasonable. *Hancock v. State*, 2007 OK CR 9, ¶ 72, 155 P.3d 796, 813. Hearsay is an out of court

statement offered at trial to prove the truth of matters asserted therein. 12 O.S.2001, § 2801. Hearsay statements are generally inadmissible, subject to numerous well-known exceptions. 12 O.S.2001, § 2802. The Evidence Code excepts from the hearsay rule a "record concerning a matter about which a witness once had knowledge but now has insufficient recollection to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. The record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party." 12 O.S.2001, § 2803(5).

¶56 Appellant concedes that the calendar entry might have been admissible as a past recollection recorded, if the State had laid a foundation showing the witness' lack of recollection. Appellant reasons the District Court improperly admitted the testimony of Ms. Setzer, because if she could testify to Appellant's purchase of the Nike shoes from her personal recollection without reference to the document, the calendar entry itself was inadmissible hearsay. At trial, defense counsel initially objected the witness had no recollection of the shoe purchase, but her direct testimony for the State showed the contrary. The witness testified that she remembered, independent of her calendar entry, the purchase of matching Nike shoes with Appellant in 1996. On cross-examination, defense counsel elicited that police had shown the witness a pair of Nike *Air Max 2* shoes and asked her if the shoes were similar to the ones bought by Appellant in 1996. She testified the shoes shown to her by police were similar to Appellant's, but she could not positively say the shoes were the exact model purchased by Appellant. While the evidence of Appellant's purchase of the shoes came from the witness' personal knowledge, it is apparent that the witness could not have remembered the specific date in October, 1996, on which the shoes were purchased over a decade earlier, without reference to the entry in her calendar. For this purpose, the witness' reading of the calendar entry was admissible under the hearsay exception for a past recollection recorded. Admission of the document itself as a State exhibit, while contrary to the language of the rule, was cumulative and did not result in unfair prejudice. 12 O.S.2001, § 2803(5).

¶57 Appellant next argues the entirety of the shoe comparison evidence was erroneously admitted, because the State failed to establish a sufficient "nexus" associating Appellant with a pair of Nike *Air Max 2* shoes and the shoe impressions photographed at the scene. Appellant ignores a series of incriminating inferences from other evidence, such as his DNA, when he claims "the shoe print was the only tangible evidence which could provide a direct connection to Ms. Busken's homicide and the killer . . . [and unless] the State can put a pair of Nike *Air Max* 2's on Mr. Sanchez, as opposed to just any Nike Air-style of shoe, then all of the evidence concerning shoe prints was irrelevant and should have been excluded."

¶58 Relevant evidence is defined as evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. 12 O.S.2001, § 2401. Contrary to Appellant's premise in argument, relevant evidence need not conclusively, or even directly, establish the defendant's guilt. Evidence from which the jury may adduce the guilt or innocence of the defendant is admissible if, when taken with other evidence in the case, it tends to establish a material fact in issue. Relevancy and materiality of evidence "are matters within the sound discretion of the trial court absent an abuse thereof." *Patton v. State*, 1998 OK CR 66, ¶ 73, 973 P.2d 270, 293-94, *citing Robedeaux v. State*, 1993 OK CR 57, ¶ 60, 866 P.2d 417, 432. An abuse of discretion is a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *C.L.F. v. State*, 1999 OK CR 12, ¶ 5, 989 P.2d 945, 946.

¶59 Evidence tending to establish that Appellant owned shoes with a sole design similar to shoe prints found near a murdered girl, from whose clothing his DNA was recovered, is clearly relevant in a trial for sexual assault and murder. For many decades, trial courts in this State have admitted testimony about shoe prints connected

with a crime scene, and the comparison of those impressions to shoes associated with the accused. We find this type of evidence admitted in *Simpson v. State*, 1992 OK CR 13, ¶ 2, 827 P.2d 171, 173 (impressions similar to shoes worn by defendant found on window); *Cleveland v. State*, 1977 OK CR 214, ¶ 5, 566 P.2d 144, 145 (photograph of shoe impression near crime scene and investigator's testimony of similarity upon comparison to defendant's boot); *Taylor v. State*, 1952 OK CR 160, 96 Okla. Crim. 188, 190, 251 P.2d 523, 525 (same); *McCoin v. State*, 1952 OK CR 9, 95 Okla. Crim. 93, 93-94, 240 P.2d 452, 453-54 (finding evidence of a print similar to defendant's shoe was important circumstantial evidence of guilt); *Rice v. State*, 1950 OK CR 150, 93 Okla. Crim. 86, 91-91, 225 P.2d 186, 189 (evidence of similarity of impression to defendant's shoes); *Beam v. State*, 1939 OK CR 26, 66 Okla. Crim. 14, 16, 89 P.2d 372, 373 (testimony of comparison of impressions at crime scene with defendant's shoes). Such evidence has figured significantly in several capital cases. *Miller v. State*, 1998 OK CR 59, ¶¶ 36-37, 977 P.2d 1099, 1108 (expert testimony comparing defendant's sandal impression to bloody print); *Hooper v. State*, 1997 OK CR 64, ¶¶ 6, 31, 947 P.2d 1090, 1096, 1103 (evidence that defendant's shoe print was similar to impression left at murder scene); *Cudjo v. State*, 1996 OK CR 43, ¶ 25, 925 P.2d 895, 901 (evidence of investigator's opinion that shoe print at crime scene matched defendant's shoes); *Hooker v. State*, 1994 OK CR 75, ¶ 30, 887 P.2d 1351, 1360 (evidence of bloody shoe print at crime similar to shoes worn by defendant, which were common brand and could have belonged to others).

¶60 Appellant's objection here is not unlike the challenge to shoe print evidence in *Patton v. State*, 1998 OK CR 66, 973 P.2d 270. In *Patton,* the appellant in a capital murder case challenged the relevancy of a photograph of an unidentified shoe print that developed briefly after police sprayed Luminol in the crime scene. This Court held admission of the evidence was proper:

> State's Exhibit 103 was a Polaroid photograph showing a portion of the bloody shoeprint. The officer who observed the print made a drawing of it to help preserve the image in his memory. This drawing was admitted as State's Exhibit 336. A print similar to the shoe print was admitted as State's Exhibit 51. Each of these exhibits was admitted over defense objection. Now, as at trial, Appellant challenges the relevancy of the exhibits . . . *Although these exhibits were not identified as having belonged to Appellant or any other specific individual, they were relevant in showing the possibility of a person other than Appellant in the victim's home, a fact Appellant alluded to in one of his interviews. The exhibits were also relevant in showing the police conducted a thorough investigation and the prosecution was not hiding any evidence.* (emphasis added).

Patton, at ¶¶ 72-74, 973 P.2d at 293-94. Through cross-examination and argument, Appellant advanced the theory at trial that someone else killed Juli Busken. According to this theory, the real killer, not the Appellant, made the shoe prints found near her body at the lake. Given his theory of defense, Appellant correctly perceives that evidence connecting him to *Nike* shoes with soles similar in appearance to impressions at the crime scene is "particularly harmful." But the jury was certainly entitled to weigh the plausibility of Appellant's theory of defense by considering shoe impressions and other evidence left at the scene, including Appellant's DNA, as circumstantial evidence about who committed the murder. We find this evidence "tended to place the defendant at the scene of the crime, and it was for the jury to determine the weight and value to be given this evidence." *Martin v. State,* 1961 OK CR 30, ¶ 14, 360 P.2d 253, 256. Proposition Four is without merit.

¶61 In Proposition Five, Appellant challenges the sufficiency of the evidence to convict him of murder and rape. Despite conceding that the DNA evidence establishes "a strong connection between Mr. Sanchez and a sexual assault," Appellant argues the evidence of murder is insufficient. Appellant's major points may be summarized as follows: (1) Other than his ability to drive a standard transmission, "nothing whatsoever places him in the car,"

meaning none of the fingerprints developed from inside Ms. Busken's vehicle could be matched to him; (2) although Appellant finds it "obvious that Ms. [Keller] described Juli Busken" as the female she saw in the red car near Lake Stanley Draper, the witness' description of the driver as an older man points to someone other than Appellant, who had just turned eighteen; (3) because of the narrow time frame established by the respective sightings related by Janice Keller and David Kill, of two people riding together around 6:45, and then the lone driver leaving Lake Stanley Draper around 7:15, the sexual assault probably occurred elsewhere. Appellant therefore reasons that the "times involved lend themselves to more than one person involved."

¶62 This Court's task in reviewing the sufficiency of the evidence is simply to assess "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." *Young*, at ¶ 35, 12 P.3d at 35, *citing Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203. The evidence presented at trial tends to show that Appellant forced Ms. Busken into her own car around 5:30 a.m., sexually assaulted her in an unknown location, and murdered her on the shoreline of Lake Stanley Draper around 7:00 a.m on December 20, 1996. Appellant then returned to Norman and dumped the car, taking a few belongings with him, including Ms. Busken's ring, cell phone, compact disc player, and radar detector.

¶63 Three strands of evidence contradict Appellant's major premise that he cannot be placed at the scene of the murder or in Ms. Busken's car: First, Appellant's DNA matched the unknown DNA isolated from sperm fractions recovered from Ms. Busken's panties, and the unknown DNA from the pink leotard found discarded at the crime scene. Police also identified human sperm from stains found on pajama bottoms recovered from Ms. Busken's car. These facts permit the logical inference that the sperm on the pajama bottoms in Ms. Busken's car is also Appellant's, despite inconclusive DNA results on the pajama bottoms. Second, records of activity on Ms. Busken's missing cell phone show a call placed to a number which investigators eventually associated with Appellant's former girlfriend, over thirty hours *after* the Busken murder. The logical inference is that Appellant was in possession of Ms. Busken's phone, and he got the phone from her car, where she usually left it. Finally, the shoe impressions discussed in Proposition Four, consistent with a pair of Nike shoes owned by Appellant, tend to establish his presence where Ms. Busken was murdered. This direct and circumstantial evidence is sufficient to support the jury's finding that Appellant sexually assaulted and murdered Juli Busken.

¶64 In the second sub-proposition to Proposition Five, Appellant argues the evidence is insufficient to support a conviction for first degree rape. In particular, Appellant argues the absence of trauma to the vaginal area and the absence of any detectible semen or spermatozoa in the vaginal cavity fails to establish the penetration required by statute. Certainly the evidence of abduction and the condition of Ms. Busken's body and clothing at the time of her death support the inference that Appellant intended a sexual assault. These circumstances, and the presence of human spermatozoa in the anal cavity, readily establish the penetration necessary to convict Appellant of forcible sodomy.

¶65 The evidence of observable trauma to Ms. Busken's genital area was a small contusion in the right area of the labia, and a slight abrasion to the perianal area. The Medical Examiner described the labia for the jury as "the outer genitalia of a woman outside of the vagina." However, the diagram of the injury admitted in State's Exhibit 1A shows the labial contusion was located on the inner lip of the labia minora. The character of Appellant's assault is further shown from the cluster of oval-shaped contusions observed on the inner thigh, which support the inference of his intent to forcibly penetrate the genitalia. The Medical Examiner testified that he observed no internal trauma to the vagina.

¶66 Any penetration of the female genitalia by the male penis, however slight, is sufficient to constitute the completed offense of rape. *Warner v. State*, 2006 OK CR 40, ¶ 36, 144 P.3d 838, 863; *Kitchen v. State*, 1937 OK CR 99, 61 Okla. Crim. 435, 443, 69 P.2d 411, 414 (crime of rape demands "proof of some degree of entrance of the male organ 'within the labia of the pudendum'"). We find the State's evidence of a contusion to the interior surface of the labia, when considered in the light most favorable to the prosecution with all the remaining facts and circumstances, would permit any rational trier of fact to find the elements of rape established beyond a reasonable doubt. Proposition Five is denied.

¶67 In Proposition Six, Appellant argues the District Court erroneously admitted sentencing stage evidence showing Appellant's sexual assault of a girlfriend in 2001 as proof of the continuing threat aggravating circumstance. We review the admission of this evidence only for abuse of discretion. *Hancock,* supra. The State presented sentencing stage testimony from Appellant's former girlfriend tending to show that in September, 2001, Appellant entered her apartment without consent while she was gone. When she returned home, she was surprised to find Appellant waiting for her, sitting in the dark. Appellant argued with her, bound her hands with her own shoe laces, and raped her. The State also offered evidence of the judgment and sentence in the subsequent criminal case showing Appellant's conviction for second degree burglary arising from this incident.

¶68 On appeal, counsel characterizes Appellant's objection to this evidence as a "laches-type" argument. Appellant reasons that since the State originally charged him with first degree rape based on these facts, but later agreed to the plea bargain in which Appellant suffered only a conviction of second degree burglary, the State is estopped from presenting evidence of the violent events that led to the charges. He argues the State's use of both the underlying violent assault and the subsequent plea-bargained conviction as evidence in a capital sentencing proceeding constitutes a second "bite at the apple," the State having waived its original opportunity to show proof of Appellant's guilt of the violent rape charge either by insisting upon a trial or guilty plea to that charge.

¶69 Our prior decisions indicate the State may prove the continuing threat aggravating circumstance "through the introduction of Judgments and Sentences showing a history of violent criminal behavior or through the introduction of additional evidence detailing the defendant's participation in other unrelated crimes, or both." *Malone v. State*, 1994 OK CR 43, ¶ 39, 876 P.2d 707, 717-18. We have long recognized that "unadjudicated offenses linked to a defendant in a capital case may be introduced to support the claim of future dangerousness." *Walker* v. *State*, 1986 OK CR 116, ¶ 46, 723 P.2d 273, 285. The State's decision to enter into a plea bargain with a defendant, or even dismiss charges based on the defendant's violent actions, has no bearing on whether the underlying violent conduct is admissible to prove future dangerousness. *Walker v. State*, 1992 OK CR 10, ¶ 20, 826 P.2d 1002, 1007 (State's subsequent dismissal of pending rape charge did not affect admissibility of underlying criminal acts offered to prove continuing threat aggravating circumstance); *Vega v. Johnson*, 149 F.3d 354, 359 (5th Cir. 1998)(testimony by victim that defendant committed unadjudicated sexual assault was admissible to prove future dangerousness in capital sentencing, despite acquittal of a related gun possession charge connected to the assault).

¶70 A defendant's conviction or acquittal of a criminal charge neither alters the basic evidentiary facts of the underlying conduct, nor determines whether those facts may be offered to show his future dangerousness in a capital sentencing trial. Relevant evidence of a capital defendant's violent acts is admissible to show the existence of the continuing threat aggravating circumstance, whether those acts resulted in a conviction of the actual offense, some related or lesser included offense, or no conviction at all. Cf. *Smith v. State*, 2007 OK CR

16, ¶ 78, 157 P.3d 1155, 1178. Appellant's sexual assault of an ex-girlfriend in 2001, almost five years after the murder of Juli Busken, and his resulting second degree burglary conviction, were relevant to the jury's consideration of this aggravating circumstance. Proposition Six is denied.

¶71 Appellant argues in Proposition Seven that prosecutorial misconduct in the sentencing phase closing arguments renders his death sentence unreliable and unfair. We have long allowed counsel for the parties "a wide range of discussion and illustration" in closing argument. *Hamilton v. State*, 1944 OK CR 69, 79 Okl.Cr. 124, 135, 152 P.2d 291, 296. Counsel enjoy a "right to discuss fully from their standpoint the evidence and the inferences and deductions arising from it." *Frederick v. State*, 2001 OK CR 34, ¶ 150, 37 P.3d 908, 946, *citing Brown v. State*, 1931 OK CR 464, 59 Okl.Cr. 307, 4 P.2d 129, 130 (Syllabus). We will reverse the judgment or modify the sentence "only where grossly improper and unwarranted argument affects a defendant's rights." *Ball v. State*, 2007 OK CR 42, ¶ 57, 173 P.3d 81, 95, *citing Howell v. State,* 2006 OK CR 28, ¶ 11, 138 P.3d 549, 556.

¶72 We review the challenged comments here only for plain error, due to the lack of any timely objection to the comments at trial. *Simpson v. State,* 1994 OK CR 40, 876 P.2d 690. In the first comment, the prosecutor acknowledged the difficulty of the jury's job in sentencing, but emphasized that a death verdict could only be the result of twelve people unanimously returning a verdict. "Not one of you, no one individually will decide whether this man receives the death penalty or not." The prosecutor also asked the jury to not "let anyone, [defense counsel], don't let yourself, don't let anyone put that burden on your shoulder that it's your decision and your decision alone . . . The way our system works, 12 people have to return a verdict." Appellate counsel calls this comment "highly improper" and interprets it as "telling the jury that an individual sense of morality and mercy did not count and, indeed, would be contrary to law," which he characterizes as "patently false." We find no error in this argument. The prosecutor's statements were legally accurate.

¶73 Appellant's real complaint here is that the prosecutor's argument might have diminished a successful defense based on the fact that in Oklahoma, "a single juror has the power to prevent a death sentence in a given case." *Malone v. State*, 2007 OK CR 34, ¶ 73, 168 P.3d 185, 215. The prosecutor's argument certainly anticipated common capital defense rhetoric emphasizing the individual moral responsibility of each juror in voting to "kill" the defendant, in the hopes that one or more jurors will hold out against a death verdict favored by the others. The fact that a prosecutor anticipates a known defense argument and presents a counterpoint is not fundamentally unfair. A few pages later in this allegedly improper argument, we find the prosecutor telling jurors:

> But, basically, you've got three choices. You've got one crime, murder in the first degree. The defendant has been found guilty of that, and you've got to decide, does that person receive death, does that person receive life in prison without the possibility of parole, or does Mr. Sanchez receive a term of life in prison with the possibility of parole. *Bottom line is if you don't want to do it, you don't have to. Read all these instructions. They're very important, none more than any of the others. But the bottom line is, you don't want to, you don't think it's appropriate, you don't have to.* If you do think it's appropriate, then what Mr. Sitzman read in his opening, the Bill of Particulars, and what the Judge has talked about, the aggravating circumstances, become very important (emphasis added).

In the context of the entire argument and in light of other comments, these comments were not plain error.

¶74 In the second argument challenged on appeal, counsel claims the prosecutor improperly appealed to societal alarm "by urging the jury to imagine Mr. Sanchez embarking on a reign of terror with homemade weapons obtained within the prison walls." Appellate counsel states that "one can only imagine [the prosecutor's] theatrical presentation as he was quite obviously waving his props before the jury" when arguing that jurors should consider

the possibility that Appellant could make and obtain weapons to hurt others in prison. We find the only evidence of any use of "props" occurs when the prosecutor refers to "these;" and from the context of the comment, he is holding before the jury the shoe laces used by Appellant to bind the woman he defiled and murdered. These were not "props," but rather evidence admitted in the case. In the same comment, the prosecutor makes mention of an antique letter opener to illustrate the use of ordinary objects to make "shanks" in the penitentiary. The record does not reflect whether he displayed a letter opener during his argument. The argument itself was a proper persuasive argument in support of the continuing threat aggravating circumstance, based on properly admitted evidence of Appellant's use of both ordinary items and dangerous weapons to subdue and attack innocent people. Again, we find no plain error.

¶75 Appellant next objects to several comments referring to Appellant and his actions as evil, and stating that some people come to symbolize evil by their infamous acts. The prosecutor stated at one point, "This is the handiwork---the evil handiwork of a heartless, merciless, pitiless, cruel, and depraved executioner." We see nothing unfair in these comments. Premeditated murder has been regarded as the pinnacle of evil in every age, and our law reflects this. Blackstone described willful murder as "a crime at which human nature starts [i.e., recoils], and which is I believe punished almost universally throughout the world with death." 4 W. Blackstone, Commentaries 194. The Oklahoma Uniform Jury Instructions-Criminal define the "especially heinous, atrocious, or cruel," aggravating circumstance with reference to how a murderer's depravity and savagery shock the senses of humankind:

> The term "heinous" means extremely wicked or shockingly evil; the term "atrocious" means outrageously wicked and vile; and the term "cruel" means pitiless, designed to inflict a high degree of pain, or utter indifference to or enjoyment of the suffering of others.

Instruction No. 4-73, OUJI-CR(2d). We see an important distinction between a comment on the murderous human evil made relevant by the especially heinous, atrocious, or cruel aggravating circumstance, and the rhetorical indulgence of calling defendant a monster, a devil, or other inhuman entity. The comments here addressed the distinctly human evil involved in this case. We will not require counsel in such serious cases to address the jury with lifeless and timid recitations void of moral reflection or persuasive power. The wickedness of the murder itself, and the convicted murderer's indifference to, or enjoyment of, the suffering of others, were relevant, and the comments here were properly based upon the evidence. *See, e.g., Hooper*, at ¶¶ 55, 58, 947 P.2d at 1110-11 (argument that appellant was "an evil monster" trying to kill victim, and that his eyes reflected "stone cold evil" were proper comments based on evidence); *Malicoat v. State*, 2000 OK CR 1, ¶ 32, 992 P.2d 383, 401 (prosecutor's repeated references to defendant as a monster and evil were disfavored but not plain error). There is no plain error here.

¶76 Finally, Appellant claims that not only did the prosecutor "interject God in the proceedings . . . he practically offered the jury a pastoral reassurance that, through divine forgiveness, the death penalty was approved by God." Counsel for Appellant reads the prosecutor's comments imaginatively, at the least. The prosecutor's comment here attempted to explain to jurors how he could ask "twelve good and honest people . . . to do something that is against their human will, against their human nature," i.e. to forfeit, by their verdict, the life of a fellow human being. The prosecutor told jurors, "I know that what I ask of you, in my heart, I know my God will forgive me."

¶77 Our decisions have discouraged, if not entirely prohibited, state prosecutors from invoking divine precepts and Biblical references in support of the death penalty, either through evidence or argument. *See e.g., Malone,* at ¶ 57, 168 P.3d at 209 (finding victim impact witness' "invocation of religious belief and obligation in the context of a capital sentencing recommendation is totally inappropriate"); *Washington v. State*, 1999 OK CR 22, ¶ 61, 989 P.2d

960, 978 (sentencing recommendation with biblical references contained in victim impact statement was improper); *Martinez v. State*, 1999 OK CR 33, ¶¶ 51-59, 984 P.2d 813, 827-829 (warning trial judges against the practice of offering prayer before trial because of strong potential for error); *Fontenot v. State,* 1994 OK CR 42, ¶ 59, 881 P.2d 69, 85 (closing argument during a criminal trial "should not include biblical references"). We need not decide whether the prosecutor's statement here would be error under these decisions, because the State did not interject divine reckoning into the sentencing proceeding, the defense did.

¶78 Defense counsel's sentencing stage closing argument shared a personal anecdote of how he "lost a lot of friends when I became a death penalty attorney" and why his work as a capital defense attorney was important: "Because there has to be fairness before we kill—before the Government kills in the United States of America." Defense counsel then argued that from his years of experience with capital defendants:

> [T]hose [prisoners] who suffer most are the ones that have to think about what they've done. That's why life without parole is such a serious and damning punishment . . . they know as the clock ticks away, that they're going to meet their Maker. Everybody does.
>
> ***
>
> Everyone in this courtroom is hurting, and everyone will leave here today, and will always hurt. [The prosecutor] indicated he had, I believe, a daughter that's now 18. I have a daughter that's 8 who's a ballerina. This is the last time I get to speak to you on behalf of Anthony Sanchez. I ask you to focus on fairness and mercy. I don't have much to offer you. But it is your decision, it's not the world's. I would make him think for as long as possible what he has done. He will meet his maker. But let that be on other people's or God's time.

¶79 The prosecutor's brief personal reflections about the forgiveness of God "were no more than an adversarial balance to Appellant's positions on religion." *Cole v. State*, 2007 OK CR 27, ¶ 57, 164 P.3d 1089, 1101. The argument did not, as Appellant hyperbolically contends, reassure jurors "that they, too, would be forgiven for imposing the death penalty;" nor did it "encourage the jury to follow biblical standards rather than the Court's instructions." *Powell v. State*, 2000 OK CR 5, ¶¶ 146-149, 995 P.2d 510, 538-539.

¶80 Our decisions on this subject serve to warn that a prosecutor who calls upon Heaven to witness the State's cause against the capital defendant will needlessly imperil the earthly judgment of the District Court. But the religious statements made by counsel for both parties here were brief and insignificant in view of the overwhelming evidence of aggravating circumstances, which clearly explain the jury's verdict. We find no prosecutorial misconduct warranting reversal or modification of the sentence. Proposition Seven is denied.

¶81 In Proposition Eight, Appellant argues the State's use of the continuing threat aggravating circumstance results in a cruel and unusual punishment. 21 O.S.1991, § 701.12(7);[3] U.S. Const. amend. VIII, XIV; Okla. Const. art II, § 9. This Court has repeatedly upheld the continuing threat aggravating circumstance, although Appellant claims we have done so "without any substantive analysis." *Malone,* at ¶ 27, 876 P.2d at 715-16 (citing cases). According to Appellant, Oklahoma is one of only two States currently using a prediction of a convicted murderer's future dangerousness as an aggravating circumstance to determine eligibility for the death penalty. Using an "evolving standards of decency" analysis, *see generally*, *Trop v. Dulles,* 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958), he argues the emerging consensus against this practice has rendered the State's use of the continuing threat aggravating circumstance offensive to contemporary moral standards. He also argues that our view of the

constitutionality of the continuing threat aggravating circumstance is conceptually flawed by its reliance on *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), and further undermined by the Supreme Court's decision in *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001).

¶82 Since *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Supreme Court's Eighth Amendment jurisprudence has required that a State's capital sentencing scheme channel the sentencer's discretion by clear and objective standards which provide specific, detailed guidance and make the death sentencing process rationally reviewable on appeal. *Lewis* v. *Jeffers,* 497 U.S. 764, 774, 110 S.Ct. 3092, 3099,111 L.Ed.2d 606 (1990). In a generation of cases decided since *Gregg*, the Supreme Court has articulated Eighth Amendment standards governing two discrete aspects of capital decision-making: the eligibility decision and the selection decision. *Tuilaepa v. California*, 512 U.S. 967, 971, 114 S.Ct. 2630, 2634, 129 L.Ed.2d 750 (1994). Before a defendant may be eligible for the death penalty, the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its procedural equivalent) under state law, during either the guilt or penalty phase of trial. *Tuilaepa,* 512 U.S. at 972, 114 S.Ct. at 2634, *citing inter alia, Lowenfield v. Phelps*, 484 U.S. 231, 244-246, 108 S.Ct. 546, 554-55, 98 L.Ed.2d 568 (1988). Factors for determining eligibility "almost of necessity require an answer [from the sentencer] to a question with a factual nexus to the crime *or the defendant* so as to 'make rationally reviewable the process for imposing a sentence of death.'" *Tuilaepa*, 512 U.S. at 973, 114 S.Ct. at 2635, *quoting Arave v. Creech,* 507 U.S. 463, 471, 113 S.Ct. 1534, 1540, 123 L.Ed.2d 188. (1993)(emphasis added). A State's aggravating circumstance "is not unconstitutional if it has some 'common sense core of meaning . . . that criminal juries should be capable of understanding.'" *Tuilaepa,* 512 U.S. at 974, 114 S.Ct. at 2636, *quoting Jurek v. Texas*, 428 U.S. 262, 279, 96 S.Ct. at 2959, 49 L.Ed.2d 929 (White, J., concurring in judgment). Thus, an aggravating circumstance must meet two specific constitutional requirements: It cannot apply to every convicted murderer, but rather only a defined subclass of convicted murderers; and it cannot be unconstitutionally vague, in the sense that the language of the aggravating circumstance itself fails to provide "any guidance to the sentencer." *Arave*, 507 U.S. at 471, 113 S.Ct. at 1541-1542, *quoting Walton v. Arizona,* 497 U.S. 639, 654, 110 S.Ct. 3047, 3057-58, 111 L.Ed.2d 828 (1990), *overruled on other grounds, Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Within these parameters, States may adopt eligibility and selection factors "that rely upon the jury, in its sound judgment, to exercise wide discretion." *Tuilaepa*, 512 U.S. at 974, 114 S.Ct. at 2636. In formulating the factors by which the class of convicted murders potentially subject to capital punishment is defined, "the States have considerable latitude in determining how to guide the sentencer's decision." *Tuilaepa,* 512 U.S. at 977, 114 S.Ct. at 2637.

¶83 The selection decision, where the sentencer determines whether an eligible murderer will actually suffer the penalty of death, must avoid arbitrariness in a different sense, by ensuring "individualized sentencing . . . expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability." *Tuilaepa,* 512 U.S. at 973, 114 S.Ct. at 2635. The State's selection procedures must afford "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." Tuilaepa, 512 U.S. at 972, 114 S.Ct. at 2635, *quoting Zant v. Stephens,* 462 U.S. 862, 879, 103 S.Ct. 2733, 2743-44, 77 L.Ed.2d 235 (1983). While the deliberative tasks of the sentencer in the eligibility and selection decisions are "somewhat contradictory," *see Romano v. Oklahoma,* 512 U.S. 1, 6, 114 S.Ct. 2004, 2009, 129 L.Ed.2d 1 (1994), the Supreme Court has emphasized a common requirement that eligibility and selection procedures must be "neutral and principled so as to guard against bias or caprice in the sentencing decision," *Tuilaepa,* 512 U.S. at 973, 114 S.Ct. at 2635, and must "minimize the risk of wholly arbitrary and capricious action." *Id., quoting Gregg,* 428 U.S. at 189, 96 S.Ct. at 2932 (Opinion of Stewart, Powell, and Stevens, JJ.).

¶84 In a time before state police forces and penitentiaries, the need to proscribe dangerous persons from society

was perhaps the strongest justification for taking the life of a criminal as punishment. Blackstone said:

> Death is ordered to be punished with death; not because one is equivalent to the other, for that would be expiation, not punishment . . . But the reason upon which this sentence is grounded seems to be, that this is the highest penalty that man can inflict, and *tends most to the security of the world; by removing one murderer from the earth,* and setting a dreadful example *to deter others.*

4 W. Blackstone, Commentaries 13 (emphasis added). In 1793, a well-meaning New Hampshire minister gave the murderer Samuel Frost the illuminating, if not comforting, explanation that he must hang because his "life and liberty are dangerous to the peace of society, dangerous to the lives and liberties of your fellow citizens." S. Banner, The Death Penalty: An American History 13 (Harvard University Press, 2002). The twin justifications of incapacitating the dangerous offender by execution, and deterring others of similar disposition in the process, remained inseparable objects of American capital punishment for a long time. *Id.* In our own times, the view undeniably persists among some American lawmakers, and a great many electors, that a convicted murderer's potential for future violence is a relevant consideration in deciding whether the prisoner should suffer death.

¶85 This incapacitation rationale lies at the heart of the continuing threat aggravating circumstance. The circumstance itself is "phrased in conventional and understandable terms," *Tuilaepa*, 512 U.S. at 976, 114 S.Ct. at 2637, and presents the sentencer with the type of "forward-looking inquiry" that is a "permissible part of the sentencing process . . ." *Id.* at 977, 114 S.Ct. at 2637, *citing Jurek*, 428 U.S. at 269, 96 S.Ct at 2955. We have held the statutory language of the continuing threat aggravating circumstance "directs the jury to examine the accused's conduct in the offense for which he was just convicted as well as *other relevant conduct relating to the safety of society as a whole.*" *Malone*, at ¶ 28, 876 P.2d at 716. (emphasis added). Questions from capital juries seeking clarification of this aggravating circumstance are relatively rare, suggesting that most jurors intuitively grasp the question presented by the aggravating circumstance as one that is familiar, if not so gravely important, in everyday life. We thus find support for our previous statements that this aggravating circumstance is "specific, not vague, and readily understandable." *Boltz v. State*, 1991 OK CR 1, ¶ 27, 806 P.2d 1117, 1125. With this factor, Oklahoma capital jurors are simply "asked to make a predictive judgment" about whether the defendant's potential for future violence presents a threat to human society, and if so, to consider that risk of violence in weighing all of the aggravating and mitigating factors in the selection aspect of its sentencing decision. *Jurek*, 428 U.S. at 269, 96 S.Ct. at 2955; Instruction No. 4-80, OUJI-CR(2d).

¶86 Like all human judgments, a jury's finding of a continuing threat or other aggravating circumstance may be in error. But as Justice Stewart said for the Supreme Court plurality over three decades ago in *Jurek*, "[t]he fact that such a determination is difficult, however, does not mean that it cannot be made." 428 U.S. at 274-75, 96 S.Ct. at 2957-58. Our criminal law in general, and capital punishment law in particular, account for the imperfections of human judgments in several ways, including the requirement that guilt, as well as aggravating circumstances, be proved beyond a reasonable doubt. The capital jury instructions tell the sentencing jurors that unless they unanimously hold to a belief in the truth of at least one aggravating circumstance, they must not even *consider* the convicted murderer eligible for the death penalty. Instruction No. 4-76, OUJI-CR(2d). Oklahoma jurors are further instructed that a death penalty verdict is *never* required, even where the balance of aggravating and mitigating factors may fully justify it. Instruction No. 4-80, OUJI-CR(2d). The jury must also express its specific finding of any aggravating circumstance(s) on a special verdict form, Instruction No. 4-81, OUJI-CR(2d), providing "the further safeguard of meaningful appellate review . . . to ensure that death sentences are not imposed capriciously or in a freakish manner." *Gregg*, 428 U.S. at 195, 96 S.Ct. at 2935; *see also, Malone*, 1994 OK CR 43, 876 P.2d

707; *Cudjo*, 1996 OK CR 43, 925 P.2d 895; and *Perry v. State*, 1995 OK CR 20, 893 P.2d 521 (cases overturning a jury's finding of the continuing threat aggravating circumstance on appeal due to insufficient evidence). We find these procedural safeguards give to the capital defendant additional protection from wholly arbitrary sentencing.

¶87 Appellant also argues that the Supreme Court's decision in *Penry v. Johnson,* 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (*Penry* II), has undermined this Court's rationale for the constitutionality of the continuing threat aggravating circumstance, because our conclusion rested in part on the Supreme Court's opinion in *Jurek v. Texas*, supra. Under Texas law, a defendant's *eligibility* for the death penalty is determined by the conviction of a capital murder as defined by statute in the guilt stage of trial. The Texas sentencing procedure then uses the sentencer's answers to three special circumstances---one of which asks the sentencer to determine "whether there was a probability that defendant will commit criminal acts of violence that will constitute a continuing threat to society---to determine whether the death penalty will be imposed. *Jurek,* 428 U.S. at 267-68, 96 S.Ct. at 2954.

¶88 In *Jurek*, the Supreme Court initially approved of Texas' use of the continuing threat to society factor in the selection aspect of its sentencing procedure, largely because it believed the Texas Court of Criminal Appeals would interpret the continuing threat factor "so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show." 428 U.S. at 272, 96 S.Ct. at 2956. Subsequent cases gave the Supreme Court reason to doubt if the Texas procedure actually guaranteed the individualized sentencing consideration required by *Gregg* and *Jurek*. *Cf. Franklin v. Lynaugh,* 487 U.S. 164, 175, 108 S.Ct. 2320, 2328, 101 L.Ed.2d 155 (1988) (plurality opinion); *id.,* at 185-186, 108 S.Ct. at 2333-2334 (O'Connor, J., concurring in judgment), and id., at 199-200, 108 S.Ct. at 2340-2341 (Stevens, J., dissenting). The Supreme Court eventually held, in *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)(Penry I), *overruled on other grounds, Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), that sentencing phase jury instructions setting forth the special circumstances were not broad enough to allow a Texas jury to give effect to mitigating evidence that the defendant suffered brain damage and mental retardation, and thus violated the Eighth Amendment. *Penry* I, 492 U.S. at 322, 109 S.Ct. at 2948. On remand, the Texas trial court gave a supplemental instruction telling jurors they were authorized to consider mitigation evidence; and if the jury found the mitigating evidence warranted a life sentence, the jury should answer "NO" to one of the special circumstances. The supplemental instruction thus appeared to require jurors to answer one of the special circumstances "NO," in violation of the their oaths, even if the jury also believed the special circumstance had been proven beyond a reasonable doubt. In *Penry* II, the Supreme Court held this convoluted approach was an inadequate means for the jury to give a reasoned moral response to Penry's mitigating evidence, and again reversed the death sentence. *Penry* II, 532 U.S. at 799-804, 121 S.Ct. at 1922-24.

¶89 Appellant reads *Jurek* as narrowly approving the Texas Legislature's use of a future dangerousness question in the selection phase of death penalty decision-making, and *Penry* II as rendering the Supreme Court's earlier statements in *Jurek* obsolete. Our reliance on *Jurek* was wrong from the start, he argues, because of the significant difference between the purpose of eligibility and selection factors in Eighth Amendment jurisprudence. Indeed, he claims that the Supreme Court's "tacit approval of 'continuing threat' as a selection-stage factor *forecloses its use as an eligibility-stage aggravator."* (emphasis added). Appellant here finds it significant that the Supreme Court has never held that a State's use of the continuing threat aggravating circumstance as an *eligibility* factor "is permissible under the Constitution." We do not find this fact at all remarkable for the reasons that follow.

¶90 Setting aside for the moment the distinctions between the Oklahoma and Texas sentencing schemes, the relevant Supreme Court cases indicate a State may just as readily direct the sentencer's attention to future dangerousness as a means of including or excluding the defendant from the class of offenders potentially subject

to capital punishment (thus creating an *eligibility* factor); or, on the other hand, a State may direct the sentencer to consider future dangerousness in determining whether a particular *eligible* defendant should *actually* suffer death (thus making future dangerousness a *selection* factor). *Arave*, 507 U.S. at 471, 113 S.Ct. at 1540 (holding eligibility factor may properly require sentencer to answer a question with a factual nexus to the crime or the defendant); *California v. Ramos*, 463 U.S. 992, 1008, 103 S.Ct. 3446, 3457, 77 L.Ed.2d 1171 (1983)(holding once the jury finds defendant within category of persons eligible for the death penalty, it is "free to consider a myriad of factors to determine whether death is the appropriate punishment").

¶91 The State of Oklahoma has followed the former course, while Texas, Virginia, and other States have followed their own unique versions of the latter, in full view of the Supreme Court for the more than three decades since *Gregg* and *Jurek*. Each of these approaches is consistent with the underlying rationale of incapacitation, and each can potentially avoid Eighth Amendment arbitrariness. Appellant seems to say that Oklahoma's approach, conditioning *eligibility* for the death penalty on a finding of future dangerousness, partakes too much of an individualized determination and should be reserved for the jury's selection decision, or better yet, dispensed with altogether.

¶92 The Eighth Amendment prohibits a punishment which offends the "evolving standards of decency that mark the progress of a maturing society," even if the punishment was accepted when the Eighth Amendment was adopted. *Trop*, 356 U.S. at 101, 78 S.Ct. at 598-99 (denaturalization of citizen was cruel and unusual punishment for desertion in wartime). In those instances where the Supreme Court has invoked the "evolving standards of decency" to interdict the use of capital punishment, the Court has found either the severity of punishment grossly disproportionate to the crime, or the existence of some categorical *mitigating* factor which so diminishes the offender's culpability as to render the punishment cruel and unusual. *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (death penalty for rape was cruel and unusual); *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (death was cruel and unusual punishment for felony murder defendant who did not personally kill, attempt to kill, or intend that killing result); *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (execution of insane defendant would be cruel and unusual); *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (execution of prisoner with mental retardation offends contemporary standards of decency); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (execution of person who was under 18 when capital crime was committed is cruel and unusual); *Kennedy v. Louisiana*, __ U.S. __, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) (death penalty for rape of a child was cruel and unusual).

¶93 We can find no case where the Supreme Court has directly applied the "evolving standards of decency" analysis—as opposed to the vagueness or overbreadth analysis used in *Tuilaepa* and earlier cases—to strike down a legislatively enacted *aggravating* circumstance, which functions to narrow the application of the death penalty by identifying those convicted murderers eligible for capital punishment. Indeed, in the case of the continuing threat aggravating circumstance, such an analysis would seriously infringe on the Legislature's reasonable determination that death may be an appropriate punishment for a murderer who has shown "repeated disregard for the welfare, safety, personal integrity and human worth of others, and who seemingly cannot be deterred from continuing such conduct." *Coker*, 433 U.S. at 610, 97 S.Ct. at 2875 (Burger, C.J., joined by Rehnquist, J., dissenting); *Malone*, at ¶ 28, 876 P.2d at 716 (aggravating circumstance directs the jury to examine the current offense "as well as *other relevant conduct relating to the safety of society as a whole*") (emphasis added). While the Supreme Court's capital jurisprudence has focused primarily on retribution and deterrence as justifications for capital punishment, the Court has acknowledged that incapacitation of a dangerous capital

offender "is a legitimate consideration in a capital sentencing proceeding." *Spaziano v. Florida*, 468 U.S. 447, 461-62, 104 S.Ct. 3154, 3163, *citing Gregg,* 428 U.S. at 183, n. 28, 96 S.Ct. at 2930; *and Jurek,* 428 U.S. 262, 96 S.Ct. 2950 (Opinion of Stewart, Powell, and Stevens, JJ.).

¶94 We find the continuing threat aggravating circumstance is consistent with both traditional and modern standards of decency as reflected in the Supreme Court's decisions. The incapacitation rationale and the statutory language of the aggravating circumstance contain a common-sense core of meaning that criminal juries are capable of understanding. Future dangerousness is historically and logically relevant to whether a convicted murderer should suffer the extreme penalty. The continuing threat aggravating circumstance therefore narrows the class of convicted murderers eligible for the death penalty in a meaningful way, and when combined with other procedural safeguards in the Oklahoma statutes, sufficiently minimizes the risk of a wholly arbitrary death sentence for first degree murder. Proposition Eight is denied.

¶95 Appellant challenges the District Court's instruction on mitigating circumstances in Proposition Nine. He failed to lodge a timely objection to the instructions at trial, and thus waived all but plain error. *Simpson*, supra. Appellant concedes we recently upheld the uniform instruction on mitigating circumstances in *Harris v. State*, 2007 OK CR 28, ¶¶ 25-26, 164 P.3d 1103, 1113-14, finding it did not unconstitutionally limit the jury's ability to give effect to a defendant's mitigating evidence. He urges our reconsideration of the matter, pointing to the fact that we directed the Committee on Uniform Jury Instructions-Criminal to submit an alternate to the current instruction because the current language was being used in erroneous arguments by prosecutors. Plain error is error which goes to the foundation of the case or denies defendant a right essential to his defense. *Simpson,* at ¶ 12, 876 P.2d at 695. Based on our treatment of the issue in *Harris,* Appellant has not shown plain error in the District Court's use of the instruction. Proposition Nine requires no relief.

¶96 In Proposition Ten, Appellant claims violations of his right to assistance of counsel under the Sixth and Fourteenth Amendments and Article II, section 20 of the Oklahoma Constitution. Appellant argues defense counsel failed to "marshal the evidence" by all but conceding Appellant's guilt of rape and sodomy. He also argues counsel was ineffective in failing to object to improper arguments discussed in Proposition Seven, and in failing to discover and utilize additional mitigating evidence of Appellant's turbulent family background. In connection with this latter claim, he has filed a motion to supplement the appellate record and request for evidentiary hearing as permitted by Rule 3.11(B), *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S.Supp.2008, Ch. 18, App.

¶97 We address these complaints applying the familiar test required by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). This Court strongly presumes that counsel rendered reasonable professional assistance. Appellant must establish the contrary by showing: (1) that trial counsel's performance was deficient; and (2) that he was prejudiced by the deficient performance. *Spears v. State*, 1995 OK CR 36, ¶ 54, 900 P.2d 431, 445. To determine whether counsel's performance was deficient, we ask whether the challenged act or omission was objectively reasonable under prevailing professional norms. In this inquiry, Appellant must show that counsel committed errors so serious that he was not functioning as the counsel guaranteed by the Constitution. *Browning v. State*, 2006 OK CR 8, ¶ 14, 134 P.3d 816, 830. The right to effective counsel is a means of enforcing the Constitution's guarantee of a fair and impartial trial, meaning a trial with a reliable result. Therefore, our overriding concern in judging counsel's trial performance is "whether counsel fulfilled the function of making the adversarial testing process work." *Hooks v. State*, 2001 OK CR 1, ¶ 54, 19 P.3d 294, 317.

¶98 Where the Appellant shows that counsel's representation was objectively unreasonable under prevailing professional norms, he must further show that he suffered prejudice as a result of counsel's errors. The Supreme Court in *Strickland* defined prejudice as a reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial or sentencing would have been different. *Hooks, id., citing Williams v. Taylor*, 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). We will reverse the judgment and sentence only where the record demonstrates counsel made unprofessional errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. If the record before us permits resolution of a claim of ineffectiveness on the ground that *Strickland's* prejudice prong has not been satisfied, we will ordinarily follow this course. *Phillips*, at ¶ 103, 989 P.2d at 1043.

¶99 Appellant's claim that counsel failed to "marshal the evidence" in closing argument by conceding Appellant's guilt of the rape charge is answered by our holding that the evidence of rape was sufficient. We find defense counsel's tactical decision not to contest guilt of these crimes was a reasonable decision based on informed judgment and provides no basis for relief. Our cases have recognized that counsel's concession of certain facts may be appropriate "to establish credibility with the jury in the hope that at least one juror can be persuaded to vote for a sentence less than death in the penalty stage." *Abshier v. State*, 2001 OK CR 13, ¶ 60, 28 P.3d 579, 594, *overruled on other grounds, Jones v. State,* 2006 OK CR 17, 134 P.3d 150. Counsel's strategic decision not to contest guilt on these counts was not deficient performance under *Strickland.* Because we found no prosecutorial misconduct in Proposition Seven, counsel's failure to object to the challenged comments at trial provides no ground for a claim of ineffective assistance on appeal.

¶100 Appellant requests supplementation of the appellate record by remand for an evidentiary hearing in connection with his claim that counsel failed to discover and utilize mitigating evidence of his troubled family life.[4] He attaches to his motion to supplement affidavits from Appellant's step-mother and sister, both of whom testified as mitigation witnesses at trial. In their affidavits, these witnesses now claim that defense counsel and their investigators failed to properly interview them and advise them of the purpose of mitigation, which prevented them from disclosing additional information about Appellant's troubled childhood.

¶101 The materials submitted disclose that trial counsel personally met with Appellant's sister and step-mother two weeks before trial, at which time counsel and the witnesses reviewed a report of an earlier interview between the witnesses and a defense investigator. Both affiants state that mitigation was explained to them during the earlier interview with the defense investigator, but Appellant's sister now states that she "did not understand how the bad things in Anthony's life could help him;" while his step-mother states that "I do not feel that the significance of Anthony's troubled past and how it would have impacted the mitigation part of the trial was adequately explained to me." In sum, both witnesses claim they would have provided additional details on Appellant's troubled early life, his abusive father, and his drug-addicted and absent mother.

¶102 Under Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S.Supp.2008, Ch. 18, App., this Court reviews the affidavits and evidentiary materials submitted by Appellant to determine whether they contain "sufficient information to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence." If the Court determines from the application that a strong possibility of ineffectiveness is shown, we will "remand the matter to the trial court for an evidentiary hearing, utilizing the adversarial process, and direct the trial court to make findings of fact and conclusions of law solely on the issues and evidence raised in the application." Rule 3.11(B)(3)(b)(ii). The evidentiary record thus created in the District Court may then be admitted as part of the record on appeal and considered in connection with Appellant's claims of ineffective counsel. Rule 3.11(B)(3) and (C).

¶103 After considering Appellant's claim in light of both the evidence offered at trial and materials submitted in support of his Rule 3.11 application, the Court finds that Appellant has not shown clear and convincing evidence suggesting a strong possibility that trial counsel was ineffective in the acts or omissions challenged here. The general subjects embraced in the supplemental affidavits of Appellant's family members were effectively presented to the jury during trial testimony. Although the witnesses now aver they could have provided additional details about the events and dynamics in Appellant's life, we find most of the additional facts now suggested could be readily inferred from the testimony given at trial. Appellant came from an unstable, broken home where alcoholism by his father, and the resulting drunken abuse of Appellant and his stepmother, were a corrosive part of family life. Appellant was once a hurting and mistreated youngster who experienced betrayal, rejection, physical and emotional abuse and neglect. We also consider the evidence of other mitigating witnesses, which showed that through his relationships with caring educators and close friends, Appellant showed intelligence, personal charm, an ability to give and receive love, and a desire to protect women whom he respected. One after another, Appellant's mitigation witnesses expressed to jurors their utter disbelief that the person they thought they knew could be guilty of this heinous crime.

¶104 Nothing in the supplemental materials alters or amplifies in any compelling way the portrait which emerged from the testimony at trial. Appellant's defense at trial amounted to a denial that he killed Juli Busken, offering the theory that someone else was responsible for her murder. His arguments on appeal advance the same theory, at one point seemingly implicating his own father in the killing. Considering the record as a whole, we are unable to say that counsel's failure to discover and utilize the type of mitigation evidence identified in the supplemental materials was not part of a reasonable trial strategy. Indeed, the materials actually present no persuasive proof that trial counsel was unfamiliar with these facts. Counsel may have simply decided not to present the facts in the detail now considered more effective by appellate counsel. This record fails to establish clear and convincing evidence of a strong possibility that counsel was ineffective. We therefore deny Appellant's motion to supplement the record by remanding this case for an evidentiary hearing. Proposition Ten is denied.

¶105 Proposition Eleven argues the accumulation of errors in this case warrants reversal or modification of the sentence. We found error in the District Court's order requiring Appellant to wear restraints during the trial. Appellant has not shown that the error resulted in prejudice. We thus conclude the errors at trial had no cumulative prejudicial effect which rendered the trial unfair or the outcome unreliable. Proposition Eleven requires no relief.

¶106 This Court must determine in every capital case: (1) whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and (2) whether the evidence supports the jury's finding of the aggravating circumstances. 21 O.S.2001, § 701.13(C). The jury found the murder was especially heinous, atrocious, or cruel; that Appellant committed the murder to avoid or prevent arrest or prosecution; and the existence of a probability that Appellant would commit criminal acts of violence that would constitute a continuing threat to society. 21 O.S.1991, § 701.12(4), (5), and (7). Appellant presented mitigating circumstances including a troubled family life, abandonment by his mother, abuse by his father, his good character qualities, and loving relationships with family, friends, and teachers. We have carefully reviewed the record of this trial and concluded the jury was not improperly influenced by passion, prejudice, or any other arbitrary factor in finding the existence of the aggravating circumstances beyond a reasonable doubt, and that the aggravating circumstances outweighed the mitigating evidence. The sentence of death is factually supported and appropriate.

DECISION

¶107 The Judgment and Sentence of the District Court of Cleveland County is **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2009), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY
THE HONORABLE WILLIAM C. HETHERINGTON, DISTRICT JUDGE

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OPINION BY LEWIS, J.
C. JOHNSON, P.J.: Concur
A. JOHNSON, V.P.J.: Concur
LUMPKIN, J.: Concur
CHAPEL, J.: Concur

FOOTNOTES

1 The State dismissed Count 4, a charge of kidnapping, due to the statute of limitations.

2 The record reflects that Appellant engaged in some disruptive conduct when the verdict of guilty was received in open court, by turning and addressing Ms. Busken's parents with a declaration of his innocence. The District Court also stated that Appellant had to be physically removed from the courtroom after those proceedings had adjourned. Appellant attended the remainder of the trial without further disruptions after a warning from the Court.

3 "Aggravating circumstances shall be: . . . (7) the existence of a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society."

4 Appellant's Motion to Amend Application for Evidentiary Hearing on Sixth Amendment Claims is **GRANTED** in connection with our consideration of this request.

Cite Name Level

Oklahoma Attorney General's Opinions

Cite	Name	Level
2013 OK AG 17,	Question Submitted by: The Honorable Mark Matloff, McCurtain County District Attorney, District 17	Cited
2016 OK AG 8,	Question Submitted by: Director Stan Florence, Oklahoma State Bureau of Investigation	Discussed

Oklahoma Court of Criminal Appeals Cases

Cite	Name	Level
2010 OK CR 10, 236 P.3d 671,	GOODE v. STATE	Discussed
2011 OK CR 6, 248 P.3d 918,	HARMON v. STATE	Discussed at Length
2011 OK CR 8, 248 P.3d 362,	TAYLOR v. STATE	Discussed
2011 OK CR 3, 253 P.3d 969,	GRISSOM v. STATE	Discussed
2011 OK CR 13, 253 P.3d 997,	JONES v. STATE	Discussed
2011 OK CR 15, 255 P.3d 425,	ROBINSON v. STATE	Discussed
2011 OK CR 17, 254 P.3d 684,	CODDINGTON v. STATE	Discussed at Length
2011 OK CR 30, 267 P.3d 114,	POSTELLE v. STATE	Discussed at Length
2012 OK CR 5, 272 P.3d 720,	JOHNSON v. STATE	Discussed
2013 OK CR 1, 293 P.3d 198,	MALONE v. STATE	Discussed at Length
2013 OK CR 14, 306 P.3d 557,	SMITH v. STATE	Discussed
2013 OK CR 11, 313 P.3d 934,	MILLER v. STATE	Discussed at Length
2013 OK CR 18, 313 P.3d 274,	TATE v. STATE	Discussed
2016 OK CR 10, 373 P.3d 118,	REED v. STATE	Discussed
2016 OK CR 21, 387 P.3d 934,	MITCHELL v. STATE	Discussed
2017 OK CR 12, 400 P.3d 786,	FREDERICK v. STATE	Discussed at Length
2017 OK CR 22, 406 P.3d 27,	SANCHEZ v. STATE	Discussed at Length
2018 OK CR 20, 423 P.3d 617,	TRYON v. STATE	Discussed
2019 OK CR 2, 437 P.3d 1061,	WHITE v. STATE	Discussed

Citationizer: Table of Authority

Cite Name Level

Oklahoma Court of Criminal Appeals Cases

Cite	Name	Level
1991 OK CR 1, 806 P.2d 1117,	BOLTZ v. STATE	Cited
1992 OK CR 10, 826 P.2d 1002,	WALKER v. STATE	Discussed
1992 OK CR 13, 827 P.2d 171,	SIMPSON v. STATE	Discussed
1993 OK CR 57, 866 P.2d 417,	ROBEDEAUX v. STATE	Discussed
1994 OK CR 40, 876 P.2d 690,	SIMPSON v. STATE	Discussed
1994 OK CR 42, 881 P.2d 69,	FONTENOT v. STATE	Discussed
1994 OK CR 43, 876 P.2d 707,	MALONE v. STATE	Discussed at Length

Cite	Name	Level	
1994 OK CR 75, 887 P.2d 1351,	HOOKER v. STATE		Discussed
1995 OK CR 20, 893 P.2d 521,	PERRY v. STATE		Discussed
1995 OK CR 36, 900 P.2d 431,	SPEARS v. STATE		Discussed
1996 OK CR 26, 919 P.2d 1130,	HAIN v. STATE		Discussed
1996 OK CR 43, 925 P.2d 895,	CUDJO v. STATE		Discussed at Length
1977 OK CR 214, 566 P.2d 144,	CLEVELAND v. STATE		Cited
2001 OK CR 1, 19 P.3d 294, 72 OBJ 371,	HOOKS v. STATE		Discussed
2001 OK CR 11, 29 P.3d 569, 72 OBJ 1205,	WARNER v. STATE		Discussed
2001 OK CR 13, 28 P.3d 579, 72 OBJ 1819,	ABSHIER v. STATE		Discussed
2001 OK CR 34, 37 P.3d 908, 72 OBJ 3509,	FREDERICK v. STATE		Discussed
1931 OK CR 464, 4 P.2d 129, 52 Okl.Cr. 307,	Brown v State		Discussed
2006 OK CR 17, 134 P.3d 150,	JONES v. STATE		Discussed
2006 OK CR 8, 134 P.3d 816,	BROWNING v. STATE		Discussed
2006 OK CR 21, 136 P.3d 661,	OCHOA v. STATE		Discussed
2006 OK CR 28, 138 P.3d 549,	HOWELL v. STATE		Discussed
2006 OK CR 40, 144 P.3d 838,	WARNER v. STATE		Discussed
2007 OK CR 9, 155 P.3d 796,	HANCOCK v. STATE		Discussed
2007 OK CR 16, 157 P.3d 1155,	SMITH v. STATE		Cited
2007 OK CR 27, 164 P.3d 1089,	COLE v. STATE		Discussed
2007 OK CR 28, 164 P.3d 1103,	HARRIS v. STATE		Discussed
2007 OK CR 34, 168 P.3d 185,	MALONE v. STATE		Discussed
2007 OK CR 42, 173 P.3d 81,	BALL v. STATE		Discussed
2000 OK CR 1, 992 P.2d 383, 71 OBJ 142,	Malicoat v. State		Discussed
2000 OK CR 5, 995 P.2d 510, 71 OBJ 427,	Powell v. State		Discussed
1961 OK CR 30, 360 P.2d 253,	MARTIN v. STATE		Cited
1937 OK CR 99, 69 P.2d 411, 61 Okl.Cr. 435,	Kitch v State		Discussed
1939 OK CR 26, 89 P.2d 372, 66 Okl.Cr. 14,	Beam v State		Discussed
1962 OK CR 157, 377 P.2d 501,	FRENCH v. STATE		Discussed
1967 OK CR 178, 432 P.2d 935,	BAKER v. STATE		Cited

Cite	Name	Level
1944 OK CR 69, 152 P.2d 291, 79 Okl.Cr. 124,	Hamilton v State	Discussed
1950 OK CR 150, 225 P.2d 186, 93 Okl.Cr. 86,	RICE v. STATE	Discussed
1952 OK CR 9, 240 P.2d 452, 95 Okl.Cr. 93,	McCOIN v. STATE	Discussed
1952 OK CR 70, 245 P.2d 107, 95 Okl.Cr. 287,	DeWOLF v. STATE	Discussed
1952 OK CR 160, 251 P.2d 523, 96 Okl.Cr. 188,	TAYLOR v. STATE	Cited
1997 OK CR 64, 947 P.2d 1090, 68 OBJ 3623,	Hooper v. State	Discussed
1997 OK CR 71, 951 P.2d 98, 68 OBJ 3891,	Gilbert v. State	Discussed
1998 OK CR 28, 961 P.2d 838, 69 OBJ 1803,	Cannon v. State	Discussed
1998 OK CR 59, 977 P.2d 1099, 69 OBJ 3876,	Miller v. State	Discussed
1998 OK CR 66, 973 P.2d 270, 69 OBJ 4283,	Patton v. State	Discussed at Length
1998 OK CR 68, 972 P.2d 1157, 69 OBJ 4307,	Fitzgerald v. State	Discussed
1999 OK CR 12, 989 P.2d 945, 70 OBJ 946,	C.L.F. v. State	Discussed
1999 OK CR 22, 989 P.2d 960, 70 OBJ 1578,	Washington v. State	Discussed
1999 OK CR 33, 984 P.2d 813, 70 OBJ 2402,	Martinez v. State	Discussed
1999 OK CR 38, 989 P.2d 1017,	Phillips v. State	Discussed
1973 OK CR 443, 516 P.2d 1372,	PETERS v. STATE	Discussed at Length
1985 OK CR 132, 709 P.2d 202,	SPUEHLER v. STATE	Discussed
1985 OK CR 140, 709 P.2d 207,	DAVIS v. STATE	Discussed
2000 OK CR 17, 12 P.3d 20, 71 OBJ 2286,	Young v. State	Discussed
1986 OK CR 116, 723 P.2d 273,	WALKER v. STATE	Discussed

Title 12. Civil Procedure

Cite	Name	Level
12 O.S. 2401,	Relevant Evidence Defined	Cited
12 O.S. 2801,	Definitions	Cited

Cite	Name	Level
12 O.S. 2802,	Hearsay Rule	Cited
12 O.S. 2803,	Hearsay Exceptions - Availability of Declarant Immaterial	Discussed

Title 21. Crimes and Punishments

Cite	Name	Level
21 O.S. 701.7,	Murder in the First Degree	Cited
21 O.S. 701.12,	Aggravating Circumstances	Discussed at Length
21 O.S. 701.13,	Review of Death Penalty Sentence	Cited
21 O.S. 888, 21 888,	Forcible Sodomy	Cited

Title 22. Criminal Procedure

Cite	Name	Level
22 O.S. 15,	Testimony Against One's Self - Restraint Prior to Conviction - Chains or Shackles	Discussed

Title 74. State Government

Cite	Name	Level
74 O.S. 150.27a,	Establishment of OSBI DNA Offender Database	Discussed

What Government Agencies keep DNA?

https://www.fbi.gov/services/laboratory/biometric-analysis/federal-dna-database#DNA-Kit Instructions

As of January 2019, federal law enforcement has the ability to view a subject's DNA status via their NCIC criminal history record. Near the top of the criminal history record, above the biographical information, there now is a DNA indicator that will inform law enforcement as to whether or not a DNA profile already exists in the Combined DNA Index System (CODIS) for a particular subject. This report can be accessed at any time prior to arrest and/or booking, therefore saving law enforcement time and resources by significantly reducing duplicative DNA collections. This DNA indicator is useful for determining whether or not a previously submitted DNA sample has been uploaded to CODIS.

NCIC – National Crime Information Center – It was created in 1967 under J. Edgar Hoover. Its purpose is to create a centralized information system to facilitate information flow between the numerous law enforcement branches.

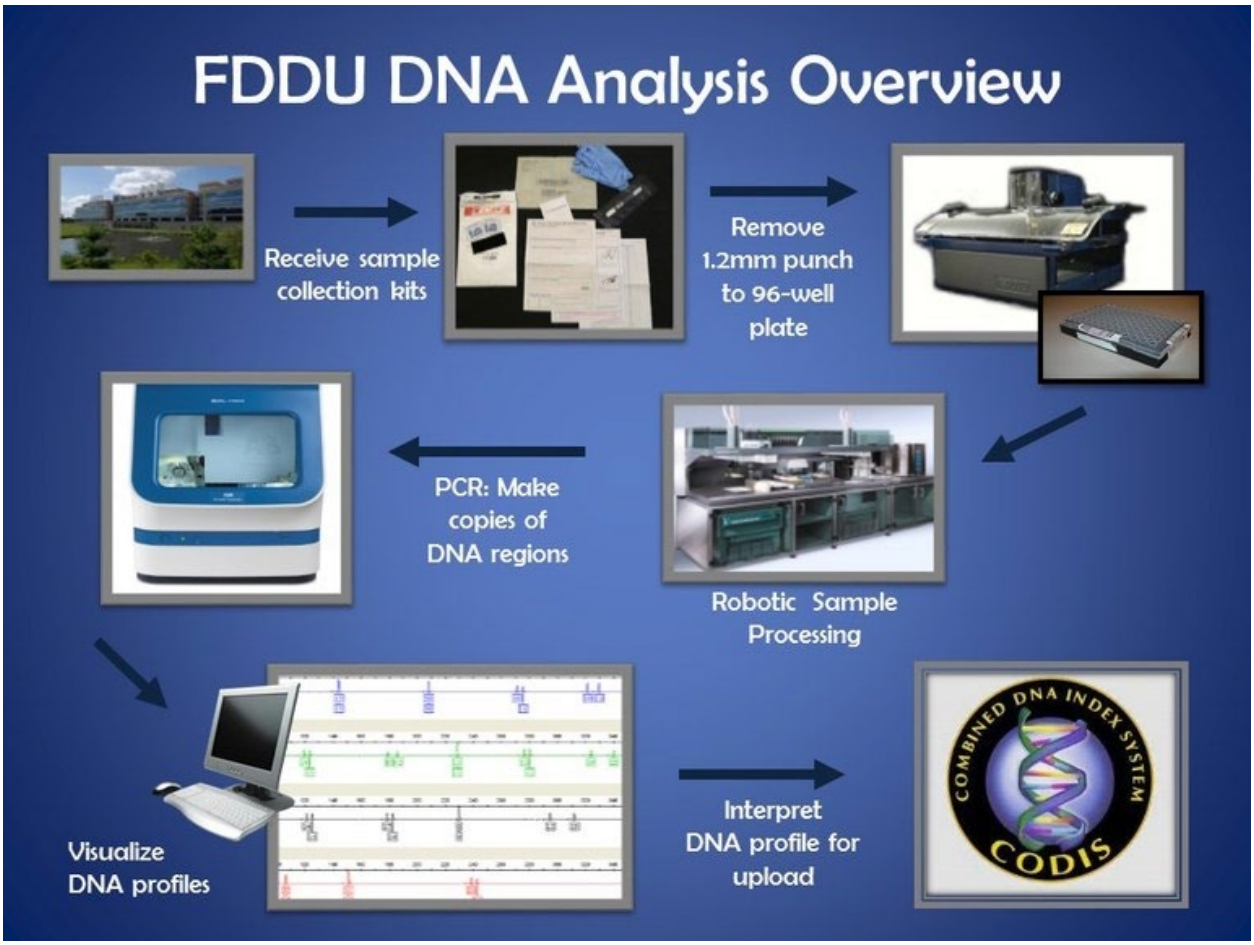
CODIS – The Combined DNA Index System - is the generic term used to describe the FBI's program of support for criminal justice DNA databases as well as the software used to run these databases. The National DNA Index System or NDIS is considered one part of CODIS, the national level, containing the DNA profiles contributed by federal, state, and local participating forensic laboratories

Pursuant to federal law (the DNA Identification Act of 1994), DNA data is confidential. Access is restricted to criminal justice agencies for law enforcement identification purposes. Defendants are also permitted access to the samples and analyses performed in connection with their cases. If all personally identifiable information is removed, DNA profile information may be accessed by criminal justice agencies for a population statistics database, for identification research and protocol development purposes, or for quality control purposes. The unauthorized disclosure of DNA data in the National DNA database is subject to a criminal penalty not to exceed $250,000.

A. The DNA Identification Act, §14132(b)(3), specifies the access requirements for the DNA samples and records "maintained by federal, state, and local criminal justice agencies (or the Secretary of Defense in accordance with section 1565 of title 10, United States Code)," and "allows disclosure of stored DNA samples and DNA analyses only:
   to criminal justice agencies for law enforcement identification purposes;
B. in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules;

C. for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged; or
D. if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes."

FDDU - The Federal DNA Database Unit - serves the greater forensic community by aiding investigations through hit confirmations against individuals whose profiles are in the National DNA Index System (NDIS). Agencies submit blood or buccal samples to the unit from individuals who are required by law to do so. These include individuals convicted of, arrested for, or facing charges of certain qualifying federal crimes or convicted of qualifying District of Columbia offenses, as well as non-U.S. citizens who are detained under the authority of the United States. FDDU then produces a DNA profile for each of these individuals and uploads it to the NDIS, which is part of the Combined DNA Index System (CODIS)



Privacy - No names or other personal identifiers of the offenders, arrestees, or detainees are stored using the CODIS software (for missing persons records stored at NDIS, available metadata, such as the date of birth, may be included.) Only the following information is stored and can be searched at the national level:

The DNA profile—the set of identification characteristics or numerical representation at each of the various loci analyzed;

1. The Agency Identifier of the agency submitting the DNA profile;
2. The Specimen Identification Number—generally a number assigned sequentially at the time of sample collection. This number does **not** correspond to the individual's social security number, criminal history identifier, or correctional facility identifier; and
3. The DNA laboratory personnel associated with a DNA profile analysis.

In Oklahoma – the OSBI Forensic Biology Unit is responsible for DNA testing for samples collected as part of a criminal investigation.

The Forensic Biology Unit works in conjunction with the Combined DNA Index System (CODIS) Unit to enter appropriate evidentiary samples into the National DNA Index System (NDIS).

The CODIS Unit also processes convicted offender samples from the State of Oklahoma for entry into the national database.

Case Law on when the government can take DNA

https://newrepublic.com/article/112540/supreme-court-dna-case-can-government-take-your-dna

Maryland v. King, 133 S.Ct. 1958 (2013)

Held : When officers make an arrest supported by probable cause to hold for a serious offense and 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. Pp. 1966 – 1980.

DNA collection after arrest. Supported by Kennedy, Roberts, Thomas, Breyer, and Alito

Dissenting = Scalia filed a dissenting opinion and is joined by Ginsburg, Sotomayor and Kagan

Oklahoma Cases

Sanchez v. State, 2009 OK CR 31

Defendant challenges the State's seizure of Appellant's DNA as a violation his constitutional right to be secure in his person from unreasonable search and seizure. U.S. Const. amend. IV, XIV; Okla. Const. art. II, § 30. As a result of Appellant's incarceration for second degree burglary in 2002, the Department of Corrections collected his blood and submitted it to the Oklahoma State Bureau of Investigation. OSBI then developed Appellant's DNA profile and maintained it in the OSBI's Combined DNA Index System (CODIS), from which the State ultimately obtained a DNA match to evidence from the Busken murder.

The Legislature established the Combined DNA Index System "for the purpose of collecting and storing blood or saliva samples and DNA profiles, analyzing and typing of the genetic markers contained in or derived from DNA, and maintaining the records and samples of DNA" of individuals required to provide a sample by the statute. 74 O.S.Supp.2002, § 150.27a.

The State's legitimate interest in the collection and storage of this highly probative form of identification for use by law enforcement in the detection and prevention of past and future crimes far outweighs a convicted prisoner's minimal interest in freedom from a brief intrusion required to collect a sample of genetic material. The District Court properly denied Appellant's motion to suppress the resulting evidence of his DNA profile and its comparison to the previously unknown DNA profile

Marshall v. State, 2010 OK CR 8

Defendant didn't need to be Mirandized prior to collection of DNA sample authorized by a valid search warrant.

Oklahoma Department of Corrections rules about DNA collection and who is required to submit a DNA sample (from the DOC Website)

DNA Testing

The Oklahoma Department of Corrections (ODOC) is responsible for collecting samples for DNA testing from inmates and submitting the samples to the Oklahoma State Bureau of Investigation (OSBI) in accordance with state law. (2-CO-1F-07)

I. Testing of Inmates

The following inmates/offenders are subject to DNA testing.

A. Criteria for DNA Testing

1. Any inmate who has been convicted of a felony offense, or has received a delayed sentence, and is incarcerated or in the custody of ODOC after July 1, 1996, will be required to provide a blood or saliva sample for DNA testing prior to their release.

2. Any offender who receives a suspended sentence after January 1, 2006, and is not sentenced to a term of confinement, will provide a blood or saliva sample as a condition of such sentence (Oklahoma Statute Title 22 and Title 57).

3. Any inmate/offender who has previously submitted a blood or saliva sample for DNA testing, and for whom a valid sample is on file with the OSBI at the time of their sentencing, will not be required to submit to another sample.

4. Any offender who receives a deferred sentence for an offense that does not require registration as a sex offender, and is supervised by Probation and Parole or the Community Sentencing Program, and is ordered by the court to submit to DNA testing, will be required to submit to testing within 30 days of said order.

5. Any offender who receives a deferred sentence for a sex offender registration offense and is required to register as a sex offender must submit to DNA testing in accordance with OP-020307 entitled “Sex

and Violent Crime Offender Registration.”

II. DNA Testing Procedures

A. Time Limits

1. Any inmate who is convicted of an offense that requires DNA testing after July 1, 1996 and is sentenced to a term of incarceration will be tested within ten days of receipt at the assessment and reception center. DNA samples collected will be mailed to the OSBI within ten days of collection.

2. Any offender who is convicted of an offense that requires DNA testing after July 1, 1996 and is sentenced to probation will be required to submit to testing within 30 days of sentencing to ODOC or to the county sheriff, as directed by the court. Inmates sentenced to a term of incarceration in a county jail will submit to testing at the jail, by the county’s sheriff. DNA samples collected will be mailed to the OSBI within ten days of collection.

3. Offenders subject to DNA testing and who are not received at the assessment and reception center will be required to pay a fee of $15 to ODOC, payable by cashier’s check or money order.

B. Collection Process

1. Collection kits will be supplied by the OSBI. Sample collection for DNA testing will be conducted by an employee or contractor of ODOC, or by an employee/contractor of the county sheriff's department or any peace officer directed by the court.

2. Designated employees or contractors will receive an instructional packet that will show how to obtain the sample, prepare the sample and where to send the sample. The instructional packet will be supplied by the OSBI.

3. All samples collected will be submitted to the OSBI DNA Laboratory at the following address:

Oklahoma State Bureau of Investigation
Criminalistic Service Division

800 East 2nd Street

Edmond, Oklahoma 73034

ATTENTION: DNA Laboratory

4. Prior to release from custody by discharge, parole, or transfer to any alternative to incarceration program, the inmate's current facility will ensure that a sample has been obtained and submitted to the OSBI in accordance with this procedure.

5. When an offender is received for community supervision, the OSBI database will be searched by the appropriate staff person to determine if a sample has been previously collected. If a sample is required and has not been submitted, a sample will be collected and submitted to the OSBI in accordance with this procedure.

6. The inmate's/offender's fingerprint will be obtained and imprinted on the sample collection card, prior to sample collection.

7. The following guidelines will be adhered to when a DNA blood or saliva sample is collected:

a. The person obtaining the sample is responsible for preserving it on the sample collection card or in the appropriate sample collection tube/container.

b. The person collecting the saliva sample will place it in the appropriate sample collection tube/container.

c. The person collecting the sample will label it immediately after it is collected. The label will include the information required by the OSBI.

8. Any use of force necessary to collect the DNA sample, will be in accordance with OP-050108 entitled "Use of Force Standards and Reportable Incidents."

III. OMS DNA Information Requirements

If DNA is required, appropriate staff at the Assessment Reception Centers or Probation and Parole will ensure that “DNA required” and “DNA tested” are entered in the Personal Information section of OMS.

IV. References

Policy Statement No. P-140100 entitled “Inmate Medical, Mental Health and Dental Care”

OP-020307 entitled “Sex and Violent Crime Offender Registration”

OP-050108 entitled “Use of Force Standards and Reportable Incidents”

22 O.S. § 991a

57 O.S. § 581 et seq

74 O.S. § 150.27

74 O.S. §150.27a

Shaffer v Saffle, 198 F3d 1180 (10 cir 1998)

Section-14 Health Services OP-140401 Page: 4 Effective Date: 10/30/2019

V. Action

The chief medical officer is responsible for compliance with this procedure.

The director of Health Services is responsible for the annual review and revisions.

Any exceptions to this procedure will require prior written approval from the agency director.

This procedure is effective as indicated.

Replaced: Operations Memorandum No. OP-140401 entitled “DNA Testing” dated April 25, 2018 Distribution: Policy and Operations Manual Agency Website

What rights do Defendants have if wrongfully convicted?

Oklahoma Postconviction DNA Act

22 O.S. 1373 – 1373.7

Oklahoma was the last state to implement post-conviction DNA testing. The State statute is regarded as on of the most comprehensive in the United States. It is considered comprehensive because the law does the following:

- Allows DNA testing in cases involving violent felonies
- Allows DNA testing in cases that ended with a prison sentence of more than 25 years
  *but only if the DNA testing could prove his/her innocence

22 O.S. 1373.2 states:

A. Notwithstanding any other provision of law concerning postconviction relief, a person convicted of a violent felony crime or who has received a sentence of twenty-five (25) years or more and who asserts that he or she did not commit such crime may file a motion in the sentencing court requesting forensic DNA testing of any biological material secured in the investigation or prosecution attendant to the challenged conviction. Persons eligible for testing shall include any and all of the following:

1. Persons currently incarcerated, civilly committed, on parole or probation or subject to sex offender registration;

2. Persons convicted on a plea of not guilty, guilty or nolo contendere;

3. Persons deemed to have provided a confession or admission related to the crime, either before or after conviction of the crime; and

4. Persons who have discharged the sentence for which the person was convicted.

B. A convicted person may request forensic DNA testing of any biological material secured in the investigation or prosecution attendant to the conviction that:

1. Was not previously subjected to DNA testing; or

2. Although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous DNA test.

C. The motion requesting forensic DNA testing shall be accompanied by an affidavit sworn to by the convicted person containing statements of fact in support of the motion.

D. Upon receipt of the motion requesting forensic DNA testing, the sentencing court shall provide a copy of the motion to the attorney representing the state and require the attorney for the state to file a response within sixty (60) days of receipt of service or longer, upon good cause shown. The response shall include an inventory of all the evidence related to the case, including the custodian of such evidence.

E. A guardian of a convicted person may submit motions for the convicted person under the provisions of this act and shall be entitled to counsel as otherwise provided to a convicted person pursuant to this act.

Gene Editing: Regulatory and bioethics concerns

Gene editing technology allows an organism's DNA to be changed by adding, removing, or altering genetic material at certain locations in the genome. Early methods of gene editing involved methods like injection of isolated DNA fragments into individual cells. The cells would then pick up the DNA fragments and potentially use them to repair broken DNA or replace other similar target DNA. Over time, we have developed new methods that have higher rates of success, are more efficient, and are less expensive.

Where does CRISPR fit in? The scientific community has been aware of a family of DNA sequences known as Clustered Regularly Interspaced Short Palindromic Repeats (CRISPR) since the 1990s. Notably, bacteria use CRISPR sequences to fend off viruses. More recently, however, we have come to understand how to use CRISPR for easier and more efficient genome editing. In 2015, the American Association for the Advancement of Science chose CRISPR as the Breakthrough of the Year.

Applications of gene editing range from developing efficient and disease-resistant crops to developing gene therapies to cure or slow diseases. With regard to gene-editing in humans however, there are two distinct types of gene editing that appear to delineate what types of gene editing are acceptable or not for now: Germline and Somatic. Germline gene editing involves changing genes in a group of cells including reproductive cells—in other words, the genetic changes can be passed down from generation to generation. Somatic gene editing involves changing genes in non-reproductive cells, such that the changes are not passed down to the next generation.

Germline gene editing is not illegal in the United States. Our regulatory scheme does not target the use of the technology, but rather the various applications for the technology. For example, after Congress convened a hearing to educate itself about the newly emerging technology, it increased the funding for the National Institute of Health by $2 billion for FY2016. It then prohibited those funds from being used for (1) the creation of human embryos for research purposes, or for (2) research in which human embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed by existing regulation. Pub. Law 114-113 § 508 (Dec. 18, 2015).

The appropriations bill for FY2016 also prohibited the Food and Drug Administration's use of federal funds on research or clinical trials in which a human embryo is intentionally created or modified to include a heritable genetic modification." Pub. Law 114-113 § 749 (Dec. 18, 2015). Congress's appropriations for Fiscal Year 2020 included the same prohibition. H.R. 3055, § 730. The FDA has also

exercised jurisdiction over assistive reproductive technologies such as *in vitro fertilization* for almost two decades, which means that any attempt to implant an embryo with germline genetic modification will run afoul of FDA regulations.

Privately funded research on germline modifications is not prohibited in the U.S. In the summer of 2017, a group of researchers in Portland, Oregon, made waves by announcing that they had successfully and efficiently edited genes in a human embryo to correct a gene associated with cardiomyopathy. The embryos involved in this research were not allowed to develop further than a few days.

But a different story was unfolding in China. In November 2018, He Jiankui, a Chinese biophysics researcher, announced his successful experiment to edit the genes of twin babies, and bring them to term and live birth. (See Announcement first 1:30 at https://www.youtube.com/watch?v=th0vnOmFltc).

Notably, He's announcement issued via press release rather than by published study. It was not peer-reviewed. It was not disclosed to the Southern University of Science and Technology, where He was an associate professor. It was not listed in a Chinese clinical trial registry until early November 2018, just before his results were announced. There is even some question as to whether the parents understood the magnitude of the endeavor.

Eight couples were recruited for the study, in which the male had HIV and the female did not. The consent forms described the study as an "AIDS vaccine development project." The couples were provided IVF services and some assisting medical staff may have been allowed to believe that they were *only* performing conventional IVF and gene-mapping (not editing). Dr. He admitted that he personally reviewed the informed consent provisions with the patients rather than allow a neutral third party to do so. And the consent form included an agreement to protect the project's "trade secrets."

Dr. He's work swiftly garnered heavy criticism, both for the secrecy and obfuscation involved, and the risks taken now that simpler HIV prevention and treatment methods are available. Dr. He stated that an "off-target" (unintended) mutation was detected prior to implantation, but he considered it unlikely to affect any biological function, and the parents elected to accept the risk and implant both embryos. One of the twin babies also has both CCR5 genes successfully disabled, but the other twin only has one CCR5 gene disabled, leaving some question as to whether that twin is still vulnerable to HIV infection. On the other hand, studies of the CCR5 gene suppression indicate there may be a link to cognitive plasticity, meaning that the twins may have an easier time learning in school and recovering from a stroke. But this "benefit" does not outweigh the risk—if anything, it raises the specter of eugenics as an additional concern.

Two months after Dr. He's announcement, Southern University of Science and Technology terminated its relationship with the professor. Chinese authorities noted that gene-edited embryos were only allowed to be viable for up to 14 days, meaning He's work could have violated state law. A Chinese investigation concluded that He had acted without first informing his government or his university, that he had dodged oversight measures, and that he had forged documents. However, the consent documents represent that some of the funding came from three state agencies, including the University. In any event, a May 2019 draft of China's new civil code added human genes and embryos to a section on fundamental personal rights to be protected. The regulation may result in the gene editor's liability for all adverse consequences of the gene editing.

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National Human Genome Research Institute, How Does Genome Editing Work

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https://crsreports.congress.gov/product/pdf/R/R45974

Evita V. Grant, FDA Regulation of Clinical Applications of CRISPR-CAS Gene-Editing Technology, 71 Food and Drug Law Journal 608 (2016)

https://www.fdli.org/wp-content/uploads/2017/01/FDLJ-71-4-fda-regulation-clinical-applications-crispr-cas-22115661.pdf

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PUBLIC LAW 114–113—DEC. 18, 2015

CONSOLIDATED APPROPRIATIONS ACT, 2016

Public Law 114–113
114th Congress

An Act

Dec. 18, 2015
[H.R. 2029]

Making appropriations for military construction, the Department of Veterans Affairs, and related agencies for the fiscal year ending September 30, 2016, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Consolidated Appropriations Act, 2016.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consolidated Appropriations Act, 2016".

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

Title II—Department of Housing and Urban Development
Title III—Related Agencies
Title IV—General Provisions—This Act

DIVISION M—INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2016

DIVISION N—CYBERSECURITY ACT OF 2015

DIVISION O—OTHER MATTERS

DIVISION P—TAX-RELATED PROVISIONS

DIVISION Q—PROTECTING AMERICANS FROM TAX HIKES ACT OF 2015

1 USC 1 note.

SEC. 3. REFERENCES.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referring only to the provisions of that division.

SEC. 4. EXPLANATORY STATEMENT.

The explanatory statement regarding this Act, printed in the House of Representatives section of the Congressional Record on or about December 17, 2015 by the Chairman of the Committee on Appropriations of the House, shall have the same effect with respect to the allocation of funds and implementation of divisions A through L of this Act as if it were a joint explanatory statement of a committee of conference.

SEC. 5. STATEMENT OF APPROPRIATIONS.

The following sums in this Act are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2016.

SEC. 6. AVAILABILITY OF FUNDS.

Each amount designated in this Act by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available (or rescinded, if applicable) only if the President subsequently so designates all such amounts and transmits such designations to the Congress.

SEC. 7. TECHNICAL ALLOWANCE FOR ESTIMATING DIFFERENCES.

If, for fiscal year 2016, new budget authority provided in appropriations Acts exceeds the discretionary spending limit for any category set forth in section 251(c) of the Balanced Budget and Emergency Deficit Control Act of 1985 due to estimating differences with the Congressional Budget Office, an adjustment to the discretionary spending limit in such category for fiscal year 2016 shall be made by the Director of the Office of Management and Budget in the amount of the excess but the total of all such adjustments shall not exceed 0.2 percent of the sum of the adjusted discretionary spending limits for all categories for that fiscal year.

SEC. 8. CORRECTIONS.

The Continuing Appropriations Act, 2016 (Public Law 114–53) is amended—

(1) by changing the long title so as to read: "Making continuing appropriations for the fiscal year ending September 30, 2016, and for other purposes.";

(2) by inserting after the enacting clause (before section 1) the following: "**DIVISION A—TSA OFFICE OF INSPECTION ACCOUNTABILITY ACT OF 2015**";

level. For unobligated, uncommitted balances and unobligated, committed balances the quarterly reports shall separately identify the amounts attributable to each source year of appropriation from which the balances were derived. For balances that are obligated, but unexpended, the quarterly reports shall separately identify amounts by the year of obligation.

(b) The report described in subsection (a) shall be submitted within 30 days of the end of each quarter.

(c) If a department or agency is unable to fulfill any aspect of a reporting requirement described in subsection (a) due to a limitation of a current accounting system, the department or agency shall fulfill such aspect to the maximum extent practicable under such accounting system and shall identify and describe in each quarterly report the extent to which such aspect is not fulfilled.

SEC. 508. Any costs incurred by a department or agency funded under this Act resulting from, or to prevent, personnel actions taken in response to funding reductions included in this Act shall be absorbed within the total budgetary resources available to such department or agency: *Provided*, That the authority to transfer funds between appropriations accounts as may be necessary to carry out this section is provided in addition to authorities included elsewhere in this Act: *Provided further*, That use of funds to carry out this section shall be treated as a reprogramming of funds under section 505 of this Act and shall not be available for obligation or expenditure except in compliance with the procedures set forth in that section: *Provided further*, That for the Department of Commerce, this section shall also apply to actions taken for the care and protection of loan collateral or grant property.

SEC. 509. None of the funds provided by this Act shall be available to promote the sale or export of tobacco or tobacco products, or to seek the reduction or removal by any foreign country of restrictions on the marketing of tobacco or tobacco products, except for restrictions which are not applied equally to all tobacco or tobacco products of the same type.

42 USC 10601 note.

SEC. 510. Notwithstanding any other provision of law, amounts deposited or available in the Fund established by section 1402 of chapter XIV of title II of Public Law 98–473 (42 U.S.C. 10601) in any fiscal year in excess of $3,042,000,000 shall not be available for obligation until the following fiscal year: *Provided*, That notwithstanding section 1402(d) of such Act, of the amounts available from the Fund for obligation, $10,000,000 shall remain available until expended to the Department of Justice Office of Inspector General for oversight and auditing purposes.

SEC. 511. None of the funds made available to the Department of Justice in this Act may be used to discriminate against or denigrate the religious or moral beliefs of students who participate in programs for which financial assistance is provided from those funds, or of the parents or legal guardians of such students.

SEC. 512. None of the funds made available in this Act may be transferred to any department, agency, or instrumentality of the United States Government, except pursuant to a transfer made by, or transfer authority provided in, this Act or any other appropriations Act.

SEC. 513. Any funds provided in this Act used to implement E-Government Initiatives shall be subject to the procedures set forth in section 505 of this Act.

pursuant to an agreement with the authority responsible for collecting the tax liability, where the awarding agency is aware of the unpaid tax liability, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

SEC. 746. None of the funds made available by this or any other Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to, any corporation that was convicted of a felony criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

SEC. 747. (a) The Act entitled "An Act providing for the incorporation of certain persons as Group Hospitalization and Medical Services, Inc.", approved August 11, 1939 (53 Stat. 1412), is amended—

(1) by redesignating section 11 as section 12; and

(2) by inserting after section 10 the following:

"SEC. 11. The surplus of the corporation is for the benefit and protection of all of its certificate holders and shall be available for the satisfaction of all obligations of the corporation regardless of the jurisdiction in which such surplus originated or such obligations arise. The corporation shall not divide, attribute, distribute, or reduce its surplus pursuant to any statute, regulation, or order of any jurisdiction without the express agreement of the District of Columbia, Maryland, and Virginia—

"(1) that the entire surplus of the corporation is excessive; and

"(2) to any plan for reduction or distribution of surplus.".

(b) The amendments made by subsection (a) shall apply with respect to the surplus of Group Hospitalization and Medical Services, Inc. for any year after 2011.

SEC. 748. (a) During fiscal year 2016, on the date on which a request is made for a transfer of funds in accordance with section 1017 of Public Law 111–203, the Bureau of Consumer Financial Protection shall notify the Committees on Appropriations of the House of Representatives and the Senate, the Committee on Financial Services of the House of Representatives, and the Committee on Banking, Housing, and Urban Affairs of the Senate of such request.

(b) Any notification required by this section shall be made available on the Bureau's public Web site.

SEC. 749. (a) Notwithstanding the time limitations specified in section 3744 of title 10, United States Code, or any other time limitation with respect to the awarding of certain medals to persons who served in the Armed Forces, the President may award the Medal of Honor under section 3741 of such title to Charles S. Kettles for the acts of valor during the Vietnam War described in subsection (b).

(b) The acts of valor referred to in subsection (a) are the actions of Charles S. Kettles during combat operations on May 15, 1967, while serving as Flight Commander, 176th Aviation Company, 14th Aviation Battalion, Task Force Oregon, Republic of

Vietnam, for which he was previously awarded the Distinguished Service Cross.

SEC. 750. (a) None of the funds made available under this or any other Act may be used to—

(1) implement, administer, carry out, modify, revise, or enforce Executive Order 13690, entitled "Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input" (issued January 30, 2015), other than for—

(A) acquiring, managing, or disposing of Federal lands and facilities;

(B) providing federally undertaken, financed, or assisted construction or improvements; or

(C) conducting Federal activities or programs affecting land use, including water and related land resources planning, regulating, and licensing activities;

(2) implement Executive Order 13690 in a manner that modifies the non-grant components of the National Flood Insurance Program; or

(3) apply Executive Order 13690 or the Federal Flood Risk Management Standard by any component of the Department of Defense, including the Army Corps of Engineers in a way that changes the "floodplain" considered when determining whether or not to issue a Department of the Army permit under section 404 of the Clean Water Act or section 10 of the Rivers and Harbors Act.

(b) Subsection (a) of this section shall not be in effect during the period beginning on October 1, 2016 and ending on September 30, 2017.

SEC. 751. Except as expressly provided otherwise, any reference to "this Act" contained in any title other than title IV or VIII shall not apply to such title IV or VIII.

TITLE VIII

GENERAL PROVISIONS—DISTRICT OF COLUMBIA

(INCLUDING TRANSFERS OF FUNDS)

SEC. 801. There are appropriated from the applicable funds of the District of Columbia such sums as may be necessary for making refunds and for the payment of legal settlements or judgments that have been entered against the District of Columbia government.

SEC. 802. None of the Federal funds provided in this Act shall be used for publicity or propaganda purposes or implementation of any policy including boycott designed to support or defeat legislation pending before Congress or any State legislature.

SEC. 803. (a) None of the Federal funds provided under this Act to the agencies funded by this Act, both Federal and District government agencies, that remain available for obligation or expenditure in fiscal year 2016, or provided from any accounts in the Treasury of the United States derived by the collection of fees available to the agencies funded by this Act, shall be available for obligation or expenditures for an agency through a reprogramming of funds which—

(1) creates new programs;