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Seeking John Doe: The Provision and Propriety of DNA-Based Warrants in the Wake of Wisconsin v. Dabney

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NOTE

SEEKING JOHN DOE: THE PROVISION AND PROPRIETY OF DNA-BASED WARRANTS IN THE WAKE OF WISCONSIN V. DABNEY

INTRODUCTION

When they learned that David A. Shuey was charged with attempting to rape a 33-year-old woman in St. John’s County, Florida in August, authorities in the area surrounding his alma mater, Penn State, began examining unsolved rape cases. What they found was a serial rapist. Shuey’s DNA matched a sample collected from a victim who, in May 1997, had placed an advertisement in the paper to sublet her apartment and was raped at gunpoint by a male respondent. The same thing happened just six months later to another woman seeking to sublet her apartment only a few blocks away. When authorities alerted the police in Shuey’s residence of Hamden, Connecticut, it was found that he was also wanted there for two attacks in early 2003, having committed sexual assault, armed robbery, and kidnapping. However, despite the severe nature of the crimes and their unnerving frequency, the charges may not withstand judicial scrutiny. In order to prevent the five year statute of limitations from running on the rapes, two “John Doe” warrants based on the DNA collected were issued on the eve of the statute’s expiration. Whether the charges of the complaint can be transferred from the John Doe warrants to Shuey have prosecutors worrying; it was the first time in the county that warrants were filed listing a defendant’s DNA instead of his or her name.

2. See id; see also Dan Lewerenz, DNA Connects Fla., Conn. Suspect to State College Rapes, ASSOCIATED PRESS, Sept. 18, 2003, available at 9/18/03 APWIRES 19:39:00.
3. See Nissley, supra note 1.
4. See Lewerenz, supra note 2.
5. See id.

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Despite the novelty of Shuey’s indictment in Pennsylvania, the bizarre situation is not so unfamiliar to authorities in other areas of the country. Nine years ago, a babysitter in Omaha was raped. In August of 2003, investigators filed a John Doe warrant for the babysitter’s rapist just days before the seven year statute of limitations on rape expired, having obtained his DNA from a strand of hair. Meanwhile, a John Doe in Colorado bludgeoned three members of a family to death in their own home; he was charged with eighteen counts, including three counts of first degree murder, three counts of felony murder, criminal attempt to commit murder, two counts of sexual assault, two counts of sexual assault on a child, and burglary. A John Doe warrant for homicide had never before been issued in Colorado, while approximately ten John Doe warrants based on DNA evidence had been issued for sexual assault. In California, the first conviction in the state based on a John Doe warrant (and the first in the entire nation obtained upon DNA evidence deemed improperly obtained) resulted in a maximum sixty-five-year prison term for rape.

The legal tactic was first employed in Milwaukee six years ago and has been utilized numerous times thereafter; district attorneys in New York, California, Wisconsin, Utah, Illinois, Colorado, and New Mexico have filed John Doe warrants, indicating only a DNA code to identify the suspect. However, the technique has withstood appeals in Wisconsin alone: Wisconsin v. Dabney is the first of its kind. The Wisconsin court was the first to address the issue of “whether a complaint and an arrest warrant, which identify the defendant/suspect as ‘John Doe’ with a specific DNA profile, satisfies the particularity and reasonable certainty requirements.” The court concluded that “for

7. See id.
9. See id.
12. See Kelly & Robinson, supra note 8.
14. Id. at 371. In 1994, a 15-year-old was abducted from a Milwaukee bus stop. The perpetrator threatened her life and sexually assaulted her, leaving a semen sample. However, the analysis was not performed until six years later, in 2000, due to a lack of funding. The assistant district attorney filed a John Doe arrest warrant based on the analysis only three days before the statute of limitations expired. About four months later, a match to the DNA sample collected from
purposes of identifying ‘a particular person’ as the defendant, a DNA profile is arguably the most discrete, exclusive means of personal identification possible,” relying on the fact that a genetic code greatly surpasses a name or physical description for the purpose of identification. In addition, the court found that by relying on this type of warrant/complaint, the State is not eliminating the statute of limitations when tolling the action by issuing the John Doe warrant shortly before the statutory period is up. By directing its inquiry to the Wisconsin statute of limitations, and focusing its attention on the word “commenced” therein, the court novelly concluded that the issuing of the complaint/warrant is itself the commencement of the action and, when completed before the statutory period lapses, it satisfies the statutory requirements and lawfully commences the action against the accused.

At least ten states, including New York, will soon consider the removal of the statute of limitations on offenses in which DNA evidence is found at the crime scene, following the example of twenty other states that have passed similar laws since 2000. Eighteen states are considering similar action in old child abuse cases. Another twelve states

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15. Id. at 372.
16. See id.
17. See WIS. STAT. ANN. § 939.74 (2003). The pertinent part of the statute reads:
(1) Except as provided in subs. (2) and (2d) . . . , prosecution for a felony must be commenced within 6 years . . . .
(2d)(a) In this subsection, “deoxyribonucleic acid profile” means an individual’s patterned chemical structure of genetic information identified by analyzing biological material that contains the individual’s deoxyribonucleic acid.
(b) If before the time limitation under sub. (1) expired, the state collected biological material that is evidence of the identity of the person who committed a violation . . . the state identified a deoxyribonucleic acid profile from the biological material, and comparisons of that [DNA] profile to [DNA] profiles of known person did not result in a probable identification of the person who is the source of the biological material, the state may commence prosecution of the person who is the source of the biological material for violation . . . within 12 months after comparison of the DNA profile relating to the violation results in a probable identification of the person.

Id. (Emphasis added).
18. Dabney, 663 N.W.2d at 373.
have already done so. On the federal level, the Domestic Security Enhancement Act of 2003 modifies the statute of limitations on an array of crimes through extension or elimination and Title 18 of the United States Code explicitly addresses DNA profile indictments and excepts them from the five-year limitation regulating criminal indictments in general. So, why is Wisconsin alone among the fifty states?

While the scientific and legal advances possible through the John Doe warrant are apparent, its application has raised fears among civil libertarians and legal defense groups who contend that use of the warrants abridges the defendant’s right to a fair trial. The principles behind a statute of limitation still stand as the most formidable obstructions to the John Doe warrant; most states have thus far been unwilling to forgo the defendant’s Sixth Amendment right to an expeditious trial. Courts have expressed a number of interests of import for the defendant that are at the core of the Sixth Amendment’s purpose: delay may limit defendant’s ability to put forth a viable defense, the preservation of freedom from oppressive pre-trial incarceration, and mitigation of the “anxiety and concern accompanying public accusation.” Scholars have reasoned that the Sixth Amendment’s sole purpose is to guarantee basic procedural safeguards for criminal defendants in order to assure fairness throughout the criminal process.

21. See id.
22. See id.
23. See 18 U.S.C. § 3282 (2005). Concerning offenses not capital, a person is not subject to prosecution, trial, or punishment for an offense if no indictment is found or “no information is instituted” within the five years following the offense. Id. However, DNA profile indictments are distinguished:

(b) DNA profile indictment.

(1) In general. In any indictment for an offense under chapter 109A for which the identity of the accused is unknown, it shall be sufficient to describe the accused as an individual whose name is unknown, but who has a particular DNA profile.

(2) Exception. Any indictment described under paragraph (1), which is found not later than 5 years after the offense under chapter 109A is committed, shall not be subject to—

(A) the limitations period described under subsection (a) [establishing the five year limitation].

Id.

24. See U.S. CONST. amend. VI. The Sixth Amendment stipulates in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” Id.
26. See id.
27. Id.
But does society have a countervailing interest in justice that outweighs the defendant's interest in a speedy trial, so much so that it justifies compromising a constitutional right?

Prosecutors are requesting that their state legislators pass provisions excepting John Doe warrants issued upon DNA evidence from existing statutes of limitation; and legislators are responding. However, drafting a statute that enables prosecutors to capitalize on the scientific advances in the field of genetics while maintaining the defendant's legal rights is proving to be a cumbersome project. What this Note seeks to investigate is the precarious balance courts and legislators across the country are being asked to establish: Must John Doe warrants that are based upon DNA evidence collected from the crime scene succumb to the foundational principles behind traditional statutes of limitation, and is it constitutionally possible for the warrant to co-exist with the Sixth Amendment right to a speedy trial?

In Section I, this Note will explore forensic DNA and its fundamental role in the issuance of a John Doe warrant. Section II will enumerate the principles behind statutes of limitation and the protections they provide. Consequently, this Note will address the paramount issue of whether the advancement of genetic technology and the resulting reliability of DNA-based identification have made the statute of limitations obsolete in circumstances involving DNA, and whether such exceptions should apply exclusively to sexual assault cases. In Section III, the Note will examine the recent case of Wisconsin v. Dabney and the indelible impact it will have on subsequent cases propagating the issuance of DNA-based or John Doe warrants and the probability of their success in a court of appeals. Particular attention will be paid to whether the result of Dabney would be upheld in the Supreme Court. In conclusion, the Note will discuss why Dabney is still unique amidst the recent attempts at amending statutes of limitation in sexual assault cases and the growing popularity of the John Doe DNA-based warrant. Is it particularly necessary to amend the state legislation, or can the warrant

29. See Moran, supra note 19.
31. The Wisconsin Court of Appeals has since been asked to decide upon this issue. In March of 2005, the court revisited Dabney when a defendant tried to distinguish his case by differentiating the DNA identification methods used on the warrant and his personal identification. While the defendant admitted that Dabney allowed for the use of a DNA-based warrant, he argued that "because the original complaint identified the DNA profile using a different technology than the amended complaint which eventually led to his identification, this case is distinguishable from Dabney." State v. Davis, No. 04-1163-CR (Wis. Ct. App. 2005), available at 2005 WL 524900. The court disagreed with the defendant, finding that his argument upheld form over substance. See id.
withstand the scrutiny of the courts and defeat the alleged constitutional infringements, and if not, how can legislation be drafted so as to provide the protections granted under our Constitution while still pursuing the best interests of justice?

I. FORENSIC DNA

DNA identification in criminal investigation has been hailed as the "most significant advance in forensic science since the advent of fingerprinting in the early 1900s," and furthermore as "the fingerprint of the 21st century." Notably, it has been recognized in court that "a DNA profile is arguably the most discrete, exclusive means of personal identification possible." From the DNA profile's inception, it has most often been issued against perpetrators of sexual crimes, especially rape. The purpose of this section is to familiarize the reader with the increasingly popular process of DNA identification in the legal discipline and its application in issuing the John Doe warrant.

A. The DNA Fingerprint

DNA is the chemical deoxyribonucleic acid found in all nucleated cells and is the genetic blueprint for every life form. Scientists construct a "DNA fingerprint" using the variations of each individual's DNA code: it can be determined whether two samples of DNA come from the same person by comparing isolated sections of these codes. The DNA strand is a sequence of millions of nucleotides, which are composed of sugar, a phosphate group, and one of four bases: (A) adenine, (G)

34. Dabney, 663 N.W.2d at 372.
35. See Paul E. Tracy, Ph.D. & Vincent Morgan, Big Brother and His Science Kit: DNA Databases for 21st Century Crime Control?, 90 J. CRIM. L. & CRIMINOLOGY 635, 657 (2000) (noting that DNA evidence is usually limited to cases of murder and rape); Julian E. Barnes, East Side Rapist, Known Solely by DNA, Is Indicted, N.Y. TIMES, Mar. 16, 2000, at B1 (discussing the indictment of an unknown rapist in Manhattan issued upon DNA evidence and predicting that such actions will soon be repeated throughout the country); Unknown Man Indicted in Austin Rape Case, HOUS. CHRON., Nov. 5, 2000, at 45 (noting that a grand jury indicted an unknown man for a 1995 rape case when genetic material constituted the only evidence); Richard Willing, Police Expand DNA Use, USA TODAY, Oct. 25, 2000, at 1A (noting that California is one of at least six states that has filed charges against unidentified suspects using DNA evidence). See also supra notes 1-10 and the accompanying text.

http://scholarlycommons.law.hofstra.edu/hlr/vol33/iss3/7
guanine, (T) thymine, and (C) cytosine. The bases interact with each other and form the DNA helix. Most importantly, the sequence of the bases determines the protein and enzyme make-up of our cells. Human beings share long stretches of similar DNA, throughout which there are small areas of marked variations in the base sequence. These regions, called "polymorphisms," repeat themselves and are used to differentiate between individuals; "the chances of any two individuals, except identical twins, having the same polymorphisms in [specific] segments of the DNA molecule [is] quite remote." In 1985, Alec Jeffreys discovered the application of DNA technology to the science of personal identification while searching for disease markers in DNA. Jeffreys was the originator of the term "DNA fingerprinting" and the restriction fragment length polymorphism ("RFLP") test, which identifies and isolates these polymorphisms for use in identification. RFLP is a process by which the DNA sequence is cut with enzymes designed to identify certain base sequences. The enzymes will cut the DNA strand into particular base sequences which will then be used for identification and comparison. The RFLP test was replaced shortly after its inception with the polymerase chain reaction ("PCR") developed by Kerry Mullis, which remains the standard procedure today. The PCR is a method by which DNA is extracted and replicated through a process similar to the natural process of our cells, resulting in a million fold replication of the DNA chain. PCR will allow a short stretch of DNA to be amplified exponentially so that one can determine its size, nucleotide sequence, etc. The particular stretch of DNA to be amplified, called the target sequence, is identified by a specific pair of DNA primers, oligonucleotides, which are usually about twenty nucleotides in length. With the PCR's amplification potential, there is

37. See id.
38. See id. at 546.
39. Id. at 546-47. The probability of two people sharing the same DNA profile is approximately one in thirty billion. See Amy Dunn, Note, Statutes of Limitation on Sexual Assault Crimes: Has the Availability of DNA Evidence Rendered Them Obsolete?, 23 U. Ark. Little Rock L. Rev. 839, 847 (2001).
40. Gerberth, supra note 36, at 547.
41. See id.
42. See id. at 548-51.
43. Mullis received the Nobel Prize in 1992 for her discovery. See id. at 547.
44. See id. at 554.
46. See id.
enough DNA in one-tenth of one-millionth of a liter (0.1 microliter) of human saliva to use the PCR system to identify a genetic sequence.47

Prior to DNA fingerprinting, the best mode of assailant identification available to forensic scientists was blood-type and protein enzymes; scientists were able to exclude an individual or suggest an inclusion by analyzing the blood samples.48 DNA fingerprinting proves to be an improvement upon blood-typing for reasons beyond its precision in identification: DNA maintains its integrity as a dried specimen for extended periods of time, and may therefore be used years, even decades,49 after it was collected, either to open an old case or to link an old case to a recent case or suspect.50 Furthermore, since DNA is found in all nucleated cells, a sample for extraction from the crime scene can be a hair, skin, blood, urine, sperm, saliva,51 and may even come from swabs taken from objects touched by the perpetrator.52

Once a DNA sample has been collected, it is compared to samples within the Combined DNA Index System ("CODIS"), created by the Federal Bureau of Investigation in 1990.53 Spurred by the passage of the DNA Identification Act of 1994, the progressive movement to maintain the national offender DNA database administered by the FBI and to offer financial incentives for states to create their own offender DNA databases actualized nationwide recognition.54 Today, all fifty states have legislation requiring specific classes of convicted offenders to provide DNA fingerprints for inclusion in both their state database and the FBI’s CODIS.55 As of October 1998, CODIS contained over 250,000

48. See id. at 557.
50. See GERBERTH, supra note 36, at 561.
51. See Tracy & Morgan, supra note 35, at 639; see also NATIONAL COMMISSION ON THE FUTURE OF DNA EVIDENCE, supra note 49.
DNA fingerprints and was responsible for over 400 matches between known offender DNA fingerprints and DNA left at crime scenes.\textsuperscript{56} The CODIS system is constructed of four databases:

(1) convicted offenders, whose samples are taken upon conviction, incarceration, or release; (2) unsolved cases, which contains biological crime scene evidence; (3) missing persons database, which contains both unidentified remains and profiles of parents of missing children; and (4) populations database, which compiles the frequency of certain genetic markers among various populations.\textsuperscript{57}

Despite the database's exponential growth, or perhaps as a result of it, the national system has encountered a number of difficult problems. First, the current national database is approaching full capacity, having been filled with DNA samples of convicted offenders.\textsuperscript{58} The system simply is not large enough to accommodate the rapidly increasing number of mandated samples. Second, there is an astronomical backlog warrant the sample. Initially, state statutes only required DNA fingerprints for inclusion in the database from offenders convicted of a small class of crimes such as homicide and sexual assault. As technology now allows for extraction of DNA from smaller, more common, bits of evidence such as hair and skin cells, the list of enumerated offenses that states are willing to include in their databases is expanding. See Amy Argetsinger & Craig Whitlock, \textit{Md. Seeks the DNA of Violent Criminals; Critics Cite Threat to Privacy Rights}, WASH. POST, Mar. 24, 1999, at B1. New York requires all individuals convicted of a felony to provide a sample “appropriate for DNA testing to determine identification characteristics specific to such person and to be included in a state DNA identification index.” N.Y. EXEC. LAW § 995-c (McKinney 2005). Upon reversal or vacatur of the conviction, the sample is expunged from the index. Id. Virginia enacted legislation in 2003 which mandated the collection of DNA samples (from tissue or saliva) from arrestees of a violent felony, and for the collection of blood, saliva, or tissue from a convicted felon. VA. CODE ANN. § 19.2-310.2 (2004). California requires DNA and forensic identification databank samples for the following felony offenses: any offense that requires them to register as a sex offender, murder, voluntary manslaughter, felony spousal abuse, aggravated sexual assault of a child, a felony offense of assault or battery, kidnapping, mayhem, torture, burglary, robbery, arson, car jacking, and terrorist activity (many of these also include the attempt to commit). CAL. PENAL CODE § 296 (2003). Only Colorado and Washington have laws that specifically allow for indictments issued solely upon DNA evidence. Molly McDonough, \textit{DNA Profile Conviction Upheld}, A.B.A. J. E-REP., May 30, 2003, available at Westlaw, 2 NO. 21 A.B.A. J. E-REPORT 3.


\textsuperscript{57} Mark A. Rothstein & Sandra Carnahan, \textit{Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks}, 67 BROOK. L. REV. 127, 131 (2001). Entry into the system is limited to specific crime labs.

\textsuperscript{58} See Subcommittee on Crime and Drugs, supra note 55, at 12 (Statement of Dwight E. Adams, Assistant Director, Laboratory Division, Federal Bureau of Investigation, Washington, D.C.).
of untested rape kits nationwide.\(^5\) There is no current accurate number of untested kits; however, press reports estimate a number approaching 500,000, and a government report from 1999 found that there were then 180,000 kits untested.\(^6\) In addition, there are 500,000 samples from convicted felons that have yet to be tested.\(^6\) Third, there is a shortage of funds for state labs, resulting in the backlog of untested rape kits and the failure to enter samples into the CODIS.\(^6\) Furthermore, the system has encountered a number of legal challenges: issues have been raised over the denial of good conduct time for prisoners who refuse to submit themselves for a sample, the use of force to obtain a sample from uncooperative prisoners, making parole contingent upon the submission of a DNA sample, and the subsequent use of the samples in trials.\(^6\) The most substantial argument is that the databank is unconstitutional as a violation of the Fourth Amendment’s guarantee against unreasonable search and seizure.\(^6\) However, none of these challenges have had an impact on the constitutional analysis of the courts.\(^6\)

**B. The John Doe Warrant**

John Doe or DNA profile-based warrants “provide no name, as would normally accompany the charges, instead listing a series of letters and numbers designating certain measurements of DNA segments that, taken together, represent the rapist’s unique DNA profile.”\(^6\) It is believed that the first John Doe warrant was filed in Kansas in 1991;\(^6\) however, it was with the Court of Appeals of Wisconsin’s decision in *Dabney*, which was decided in 1999, that the controversial practice was

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59. See id. at 15 (Statement of Sarah V. Hart, Director, National Institute of Justice, U.S. Dep’t of Justice, Washington, D.C.). A rape kit is the collection of semen samples from the rape victim, done by either hospital staff or the police during a victim’s post-rape hospital examination. The specimen is then retained by the police as evidence of the crime.

60. See id. at 3 (Opening statement of Hon. Joseph R. Biden, Jr., U.S. Senator from the State of Delaware).

61. See id. In the fiscal year 2002, approximately $80 million was funded by Congress to the states for DNA and other forensic support. See id. at 14. (Statement of Sarah V. Hart).

62. See id. at 3.

63. See Rothstein & Carnahan, supra note 57, at 132.

64. See id. at 133. The Fourth Amendment states in pertinent part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ….” U.S. CONST. amend. IV.

65. See Rothstein & Carnahan, supra note 57, at 133.


67. Id. at 279 fn. 78.
recognized and adopted by other jurisdictions. As of 2003, there were approximately twenty such John Doe warrants issued throughout the country; today, the Manhattan District Attorney's office, alone, has obtained thirty-one.

However, there is much controversy over the sufficiency of the information provided to identify the perpetrator on the John Doe warrant. The standard for warrants and indictments in most jurisdictions is "any name or description by which [the perpetrator] can be identified with reasonable certainty."

When Detective Lori Gaglione filed the original complaint in the Dabney case, the plaintiff was listed as:

John Doe #12, Unknown Male with Matching Deoxyribonucleic Acid (DNA) Profile as Genetic Locations D3S1358, vWA, FGA, D8S1179, D21S11, D18S51, D5S818, D13S317, D7S820, D16S539, THO1, TPOX, CSF1PO

It was on this complaint that authorities issued the warrant, including only the above information, and with no other specification of identity than the perpetrator's sex and race. However, it was because of this cryptic moniker that Bobby R. Dabney was identified as the kidnapper and assailant through a "cold hit" in the databank. The

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68. Id.
69. Id.
70. See Julia Preston, Prosecutor Seeks Unlimited Time in Rape Cases, N.Y. TIMES, April 29, 2005, at B1 (noting that the office had only started to obtain such warrants in 2000).
71. Frank B. Ulmer, Note, Using DNA Profiles to Obtain "John Doe" Arrest Warrants and Indictments, 58 WASH. & LEE L. REV. 1585, 1608 (2001). The Fourth Amendment requires that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.
72. See State of Wisconsin, Circuit Court Criminal Division, Milwaukee County, Criminal Complaint, DA Case # 00XF8921, available at http://www.denverda.org/legalresource/JohnDoeComplaintWithGeneticProfile.PDF (last visited May 24, 2005) (the identification of the defendant is then followed by a listing of the five counts charged, the respective penalties, and a detailed account of the kidnapping and sexual assault).
73. However, the perpetrator's race was specified as "U" - Unknown. See State of Wisconsin, Circuit Court, Milwaukee County, Felony Warrant (and Authorization for Extradition), DA Case # 00XF8921 available at http://www.denverda.org/legalresource/JohnDoeArrestWarrant.PDF (last visited May 24, 2005). The Sensitive Crimes Division of the Milwaukee Police Department began issuing John Doe warrants in September of 1999 to preserve jurisdiction over individuals it otherwise would not have because of the statutes of limitation on the crimes. The Department had become frustrated with the recurring situation where it was able to identify an offender, but do nothing about it because of the passing of the time limit. See Press Release, Norm Gahn, Milwaukee County District Attorney's Office, The Wisconsin John Doe Warrant, available at http://www.denverda.org/legalResource/Gahn%20Article.PDF.
74. Rodney Bowers, DNA Links Suspect to Benton Burglary, ARK. DEMOCRAT GAZETTE, Apr. 8, 2000, at B1 (describing a "cold hit" as the result of "matching a DNA sample to a previously unknown suspect").
amended complaint, after the cold hit, was identical to the original in all ways but one: where before there had been a DNA profile for an unknown male, there was now a name.\textsuperscript{76} Dabney’s defense was predicated upon the argument that the original complaint and arrest warrant that identified him solely by his DNA profile were insufficient and therefore could not pass the “reasonable certainty” requirement of Wisconsin Statute section 968.04(3)(a)4.\textsuperscript{77} Further, because the original complaint was insufficient and the warrant was not issued in a timely manner, the prosecution was barred by the statute of limitations.\textsuperscript{78}

The increasing frequency of the issuance of the John Doe warrants has resulted in a cry in many jurisdictions for an exception to the statute of limitations, since the warrant allows for the “identification of the perpetrator after the expiration of the normal period of limitations.”\textsuperscript{79} Proponents of this request argue that the “legislative purpose of the statute is to prevent the maintenance of prosecutions based on stale, unreliable evidence but that DNA evidence is so reliable that its availability should lift the bar of the statute.”\textsuperscript{80} However, Dabney’s argument is that echoed by defendants and supporting rights groups across the country: the statutes of limitation were created as a protection for the defendants, and are an undeniable right. What must be considered are the founding principles of the statutes of limitation, and in light of current forensic technology, the current applicability of the statutes of limitation. Have they outlived their purpose?

\textsuperscript{75} See Dabney, 663 N.W.2d at 369-70.
\textsuperscript{76} See State of Wisconsin, Circuit Court Criminal Division, Milwaukee County, Amended Criminal Complaint, DA Case # 00XF8921 available at http://www.denverda.org/legalResource/AmendedComplaintAfterColdHit.PDF (last visited May 24, 2005).
\textsuperscript{77} WIS. STAT. § 968.04(3)(a)4 (2004) (providing that the arrest warrant shall: “State the name of the person to be arrested, if known, or if not known, designate the person to be arrested by any description by which the person to be arrested can be identified with reasonable certainty”).
\textsuperscript{78} See Dabney, 663 N.W.2d at 370.
\textsuperscript{79} Elkins, supra note 52, at 279.
\textsuperscript{80} Id. (citation omitted); see also, e.g., Robert Moran, Seeking to End DNA-case Time Limits; Phila.’s District Attorney Wants Pa. to Lift Statutes of Limitations on Many Crimes In Which Genetic Evidence Identifies Criminals, PHILA. INQUIRER, Aug. 11, 2003, at A01; Richard Pyle, Pataki Lobby for Expanded DNA Bill, TIMES UNION (Albany, NY), June 5, 2003, at B11. Governor Pataki proposed to the state Assembly a plan to “expand the state’s current law on DNA by eliminating the five-year statute of limitations on violent felonies, require everyone convicted of a felony or major misdemeanor to furnish a DNA sample and create a DNA databank for all missing persons that would be linked to the FBI’s national databank.” Id.
II. STATUTES OF LIMITATION

With the increasing enthusiasm for the DNA-based John Doe warrant, there is a growing concern: by charging a DNA sequence rather than a denominated individual with a crime, are we adversely affecting the defendant’s chances of receiving a fair trial? Do the historical and political foundations of the statute of limitations efface DNA-based John Doe warrants of any validity and legitimacy? To answer such questions, we must look to the foundations of the contemporary statutes of limitation.

A. History of Statutes of Limitation

Statutes of limitation originate from early English laws governing civil property claims, the invocation of which became so popular at the beginning of the seventeenth century that King James I responded by codifying a new statute to allow the augmentation of the use of statutes of limitation to legal claims in general.81 The prevalent use of the statutes survived the pilgrimage from England to the American colonies, although even there the statutes were applied only to civil cases.82 It was not until after the American Revolution that criminal application of the statutes became widespread as states began effectuating time limits for criminal prosecution.83 Today, all but seven states have statutes of limitation for felonies.84 The respective state legislatures construct these statutes and maintain authority over their application and adherence, resulting in a variation of time limitations for respective crimes from state to state.85 However, there remain uniform qualities among the diverse statutes. First, the pertinent state legislative body has the authority to modify all time limiting actions. Second, all modifications to the limitation periods must be definitively established by the state.

83. See Developments in the Law, supra note 81, at 1179.
85. See Bernasconi, supra note 53, at 993.
Finally, there exists limited court discretion in applying these limitations. 86

B. Policies Supporting Statutes of Limitation

There are a number of rationales recognized as justifying statutes of limitation. The first and perhaps most notable rationale is the object of promoting repose. Repose promises benefits for all the parties involved in a particular crime: the defendant will not be asked to defend against acts committed in the distant past, 87 the innocent and unsure will be free from erroneous prosecution, 88 the witnesses and victims will be provided the peace of mind that the ordeal has reached an end and is past, 89 and the police are free to conclude investigation of the old case and redirect their attention to more recent affairs. 90 The sum of these advantages is the provision of "security and stability to human affairs." 91 Statutes are most often construed liberally in favor of repose because courts are mindful of the potential prejudice that may be created against the defendant who has to battle charges based on archaic acts, 92 and therefore generally hold the statutes "favored in the law." 93

The statute of limitation is not the only protection available for the defendant seeking repose. That is, a constitutionally based due process argument also guarantees that a defendant will not have to contend with stale charges. 94 The similarity between the two defenses is conspicuous as noted in Doggett v. United States: 95

Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay, since, by definition, he cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with customary promptness. If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial

86. See id.
88. See Dunn, supra note 39, at 846.
89. See id.
90. See id.
92. See Bernasconi, supra note 53, at 997-98.
93. Wood, 101 U.S. at 139.
94. See U.S. CONST. amend. VI; MODEL PENAL CODE § 1.06 notes of decision.
examination of the claim. This latter enquiry is significant to the speedy trial analysis because . . . the presumption that pretrial delay has prejudiced the accused intensifies over time.\textsuperscript{96}

Facially, the Sixth Amendment precludes the delay of a trial for the accused under any and all conditions. However, the Court curtails the application of the Amendment by specifically recognizing the relevance of four separate enquiries: whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay’s result.\textsuperscript{97}

A second policy argument is the importance of affording the defendant protection against the possible disadvantages accompanying the defense against stale claims.\textsuperscript{98} Embodied within the Sixth Amendment, a defendant’s right to a fair trial is comprised of the right to assemble evidence and prepare a vigorous defense, the exercise of which becomes increasingly difficult as time passes.\textsuperscript{99} Evidence inherently degenerates with time as memories fade and witnesses become unavailable. In \textit{Toussie v. United States}, the Supreme Court noted:

The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time . . . .\textsuperscript{100}

\textsuperscript{96} \textit{Id.} at 651-52 (citations omitted).
\textsuperscript{97} \textit{Id.} at 651.
\textsuperscript{99} The Sixth Amendment states:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.
U.S. CONST. amend. VI.
The statute in this case provides that all young men, with certain exceptions, between the ages of 18 and 26 shall register ‘at such time or times and place or places’ as the President may prescribe. The Government [referred] to a regulation promulgated under the Act which [provided] that ‘(t)he duty of every person subject to registration shall continue at all times, and if for any reason any such person is not registered on the day or
Such deterioration of evidence inevitably leads to greater financial costs for the defense: witnesses become more difficult to locate and the reconstruction of the events surrounding the alleged crime requires increased amounts of research and investigation.\(^\text{101}\) Therefore, the passing of time equates to both a greater evidentiary burden as well as a financial burden for the defendant. The statute of limitations seeks to regulate this resulting burden for a sub-class of defendants and seeks to provide all defendants with the equal right to conceive a substantial defense.

A further policy justification is that as time passes, society’s need for punishment diminishes.\(^\text{102}\) When a crime is committed, there is a pervasive societal desire for retribution. Scholars in this field propose that, as these criminal acts become part of the distant past of the potential defendant, society is less concerned with seeking retribution and is more likely to consider the defendant “self-rehabilitated” if he has not repeated the original criminal act.\(^\text{103}\) Those defendants who continue their criminal behavior will be punished for their more recent acts, abating the need for punishment for past acts.\(^\text{104}\) However, this policy argument is implausible when the crime at issue is sexual assault. The inherent violence and horrific violation of sexual assault combined with the long-lasting psychological injury it causes makes it a crime not easily forgotten or forgiven.\(^\text{105}\) Moreover, it has been established that sexual assailants repeat their crimes more often than any other class of offenders.\(^\text{106}\) Therefore, society plainly has a perpetual interest in the prosecution of sexual offenders, and is not placated with the passage of time.

A final justification advanced for statutes of limitation also relates to the protection afforded to the defendant against an unfair trial, arguing

\[\text{one of the days fixed for his registration, he shall immediately present himself for and submit to registration.}^{1}\]

\(\text{Id. (citing C.F.R. § 1611.1(c)).}\)

However, the court found that the regulation only made explicit what Congress implicitly said in the Act itself, that is that “registration is a duty that continues until age 26 and failure to register before then is a criminal offense that can be punished as late as five years after the 26th birthday.” \(\text{Id. at 116.}\)

\(101. \text{ See Dunn, supra note 39, at 846.}\)
\(102. \text{ See id. at 845.}\)
\(103. \text{ See id.}\)
\(104. \text{ See id.}\)
\(105. \text{ See Meredith A. Bieber, Comment, Meeting the Statute or Beating It: Using “John Doe” Indictments Based on DNA to Meet the Statute of Limitations, 150 U. PA. L. REV. 1079, 1091 (2002).}\)
\(106. \text{ See Dunn, supra note 39, at 863.}\)
that protection is provided by "encouraging law enforcement officials to investigate and prosecute crimes in a timely manner."107 The statutes are an assurance of diligence on the state's part, preventing any attempts to delay the prosecution.108 Most of these delays are not amoral or tactical, but are in fact the consequence of limited personnel and financial resources within the police departments.109 However, even without any intended malice, a delay in prosecution can result in harm to defendants in "low priority" cases that may succumb to a system of rank, "thereby creating more prejudice for some criminal defendants than others."110 The statute of limitations assures that every case will be brought and tried in a timely manner, or will not be prosecuted at all.

C. Issues Educed by the DNA Indictment

The preeminent reason DNA warrants raise concern is because they purport to extend the statute of limitations. In light of the preceding enumeration of justifying policies, such an extension is in direct conflict with the defendant's interests that the statutes seek to protect. By effectively tolling the limitation period, the indictments will contravene the statutes' promised repose and will force the defendant to answer stale charges, so outdated they impede his ability to gather potentially exculpatory evidence.111

Not only will circumstantial evidence, alibis, and witnesses become increasingly difficult to assemble with the passage of time, but the existing evidence, the DNA sample itself, may prove inadequate for the construction of a substantial defense. There is always the unfortunate possibility that a law enforcement agent or lab technician may mislabel or misplace the evidence,112 dispossessing the defendant of his right to also run tests on the DNA sample. Furthermore, the sample may be so small that after the initial analyses are run by the prosecution, there will not be enough remaining material for the defendant's own analyses.113 In both of these situations, the defendant is denied the opportunity to

107. Id. at 844.
108. See id. at 845.
109. See id.
110. Id.
111. See Bernasconi, supra note 53, at 999.
112. See Commission on DNA Forensic Science, The Evaluation of Forensic DNA Evidence 80 (1996) (noting that mislabeling of samples can occur at any point at which evidence is handled); Ulmer, supra note 70, at 1617-18; see also Daniel W. Shuman & Alexander McCall Smith, Justice and the Prosecution of Old Crimes 61, 88, 97 (2000) (recognizing that the passage of time increases the likelihood of misplacing evidence).
113. See Ulmer, supra note 71, at 1618.
confirm or rebut the prosecution’s evidence, and is forced to rely upon that same evidence that the opposition is claiming to be conclusive of positive identification of the perpetrator of the crime.

Accepting that the DNA profile may establish the defendant’s identity beyond a reasonable doubt, the defendant may still make an argument that the DNA sample was deposited at the crime scene not as a result of the crime, but either because the defendant was merely at the scene, or because the sex was consensual rather than rape.\textsuperscript{14} In either of these situations, the defendant’s ability to assemble alibi witnesses or witnesses to the character of the defendant’s relationship with the alleged victim has been negated with the passage of time,\textsuperscript{15} and his defense is significantly weakened.

III. WISCONSIN V. DABNEY

\textit{Wisconsin v. Dabney} defines the limitations and capabilities of DNA-based John Doe warrants in three capacities: it addresses the issue of whether an indictment and warrant based upon a DNA profile is sufficient to confer personal jurisdiction to the courts,\textsuperscript{16} whether a subsequently amended complaint (including the accused’s name after a cold hit has been obtained) is barred by the state’s statute of limitations,\textsuperscript{17} and whether a John Doe warrant violates the accused’s Due Process rights and his Sixth Amendment right to a speedy trial.\textsuperscript{18} An element integral to both Dabney’s and the court’s argument is the timing of the case; a time line best illustrates:

\textit{December 7, 1994}—15 year-old Dawana F. is kidnapped at gunpoint and is twice forced to perform fellatio while blindfolded in the kidnapper’s car.\textsuperscript{19} Once released, she is immediately taken to a sexual assault treatment center where “‘oral swabs and saliva samples’ as well as a ‘blood standard’ [are] obtained from her.”\textsuperscript{20} Semen is found in her saliva and is used to develop a DNA profile for the unknown male perpetrator.\textsuperscript{21}

\begin{itemize}
  \item \textsuperscript{14} See id. at 1618-19.
  \item \textsuperscript{15} See id.
  \item \textsuperscript{16} See Dabney, 663 N.W.2d at 371.
  \item \textsuperscript{17} See id. at 369.
  \item \textsuperscript{18} See id. at 374.
  \item \textsuperscript{19} See id. at 369.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id.
\end{itemize}
December 4, 2000—The State charges John Doe #12 with kidnapping and four counts of first-degree sexual assault. The DNA profile is used as the means of identification in the complaint. A trial court finds probable cause in the complaint and issues an arrest warrant for John Doe #12.122

December 18, 2000—The DNA profile is run against the DNA databank, but no match is found.123

February 27, 2001—The DNA profile is again run against the databank, and a match is found: the DNA profile formulated from the sample collected matches that of Robert Dabney.124 The match is reconfirmed on March 7, 2001.125

March 14, 2001—The State files an amended complaint, replacing the DNA profile and identification of “John Doe” with Dabney’s name. The previous match searches are included in the complaint.126

April 12, 2001—Dabney is bound over for trial and an information is filed, setting forth five counts: kidnapping, and four counts of first-degree sexual assault (two hand-to-breast and two mouth-to-penis).127

June 2001—Dabney moves to dismiss the charges, arguing that the original complaint and arrest warrant were insufficient in that they were based solely on his DNA profile and could not toll the six year statute of limitations, which would have expired on December 7, 2000. He further argues that the delay in prosecution violated his Sixth Amendment right to Due Process.128

July 2001—Dabney’s motion to dismiss is denied orally, followed by a written denial in August.129

September 13, 2001—The court denies Dabney’s filing for leave to appeal to the Supreme Court of Wisconsin and his request for pre-trial review.130

122. See id.
123. See id.
124. See id.
125. See id. at 370.
126. See id. at 369.
127. Id. at 370.
128. See id.
129. See id.
130. See id.
February 6, 2002—Case is tried to the court.131

After being found guilty by the trial court, Dabney set forth three arguments on appeal. First, that the complaint and arrest warrant, which originally identified him only by his DNA profile, were insufficient to confer personal jurisdiction to the court. Second, Dabney argued that the amended complaint, which identified him by his name, was untimely and barred by Wisconsin’s statute of limitations. Finally, he argued that his Due Process rights were violated by the six year delay between the commission of the crime and the commencement of the prosecution. An analysis of the Wisconsin Court of Appeals’ answer to Dabney’s contentions reveals the obsolescence of the statute of limitations in the prosecution of sexual crimes, and the unnecessary complications such a statute may cause. The court systematically denied each argument and established the DNA-based John Doe warrant as a fungible tool of criminal prosecution, solidifying the precedent of this case.

As to the first of Dabney’s arguments, the court predicated its finding that jurisdiction was properly obtained upon the satisfaction of two common law requirements. First, the prosecution must file a complaint or an indictment stating probable cause to believe a crime has been committed and that it was probably committed by the defendant.132 In addition, the filing of the complaint or indictment must be in compliance with the applicable statute of limitations.133 In other words, the action must be commenced before the cessation of the statutory period. The Wisconsin Statute Section 939.74(1) states that an action is “commenced when a warrant or summons is issued, an indictment is found, or an information is filed.”134 The complaint and arrest warrant for Dabney were filed three days before the expiration of the applicable six year statute of limitations.135 While Dabney did not contest this fact, he argued that the complaint and warrant were not sufficient because they did not pass the reasonable certainty test set forth by the Wisconsin legislature.136

Wisconsin Statute Section 968.04(3)(a)4 states that the arrest warrant shall “[s]tate the name of the person to be arrested, if known, or if not known, designate the person to be arrested by any description by which the person to be arrested can be identified with reasonable

131. See id.
133. See State v. Pohlhammer, 254 N.W.2d 478, 481 (Wis. 1977).
134. Wis. Stat. § 939.74(1).
135. See Dabney 663 N.W.2d at 371.
136. See id.
The court held that the “reasonable certainty” standard is satisfied when the name is unknown if the identification on the complaint and warrant was “the best description available.” It concluded that “for purposes of identifying ‘a particular person’ as the defendant, a DNA profile is arguably the most discrete, exclusive means of personal identification possible,” further stating that a DNA profile provides a far superior description of the defendant than a physical description. It should be noted that the court follows this conclusion with the comment that when possible, the DNA profile should be accompanied by any particular physical characteristics of the defendant that are known by the police. However, due to the circumstances of this particular crime, there were no known physical characteristics of the defendant to be included in the complaint and warrant. Therefore, the complaint and warrant identified the defendant with reasonable certainty and were filed within the statutory period, commencing the action and conferring jurisdiction upon the court.

Would this decision be upheld if it came before the United States Supreme Court? Although the Supreme Court has yet to address the applicability of the DNA-based John Doe warrant, the Court has decided other cases involving John Doe warrants and the reasonable certainty requirement of warrants in general. The Court relies upon a strict “constitutional requirement of a particular description in the warrant,” the foundation for which is found in the particularity requirement of the Fourth Amendment. In *West v. Cabell*, the Supreme Court articulated the point at which any court is to begin a consideration of whether an arrest warrant satisfies the Fourth Amendment’s particularity requirement:

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137. Wis. Stat. § 968.04(3)(a)4.
138. See Dabney, 633 N.W.2d at 371.
139. Id. at 372.
140. See id.
141. See id. This was added in the interest of protecting notice for the defendant, as the DNA profile itself would be meaningless for self-identification.
142. See id.
144. U.S. Const. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.
By the common law, a warrant for the arrest of a person charged with
crime must truly name him, or describe him sufficiently to identify
him.

The principle of the common law, by which warrants of arrest, in
cases criminal or civil, must specifically name or describe the person to
be arrested, has been affirmed in the American constitutions; and by
the great weight of authority in this country a warrant that does not do
so will not justify the officer making the arrest.

Relying upon this principle, lower courts have both upheld and
denied the application of John Doe warrants, deciding on a case-by-case
basis whether the warrant satisfies the particularity requirement. The
determination relies substantially upon the particular facts of each case.
Courts have invalidated warrants that ostensibly professed to authorize
searches of undescribed, unidentified persons at a particular
location.

Other courts have invalidated John Doe warrants when extrinsic
evidence is relied upon to supplement the warrant in lieu of a more
thorough identification within the warrant itself. However, the Third
Circuit reached the opposite result in 1971 with United States v.
Ferrone, where the court upheld a warrant that authorized the search
of "John Doe, a white male with black wavy hair and stocky build
observed using the telephone in Apartment 4-C, 1806 Patricia Lane, East
McKeesport, Pennsylvania." The court held that the physical
description, coupled with an address where he might be found, satisfied
the specificity requirement of the Fourth Amendment, even without the
actual name of the defendant.

So, would a DNA-profile withstand the scrutiny of courts outside of
Wisconsin? Does it satisfy the Fourth Amendment’s particularity
requirement? The principal reason the previously mentioned warrants
were found to fail the specificity requirement of the standard of
particularity was because they left too much room for error in identifying
the alleged defendant: A description must be the best description

145. West, 153 U.S. at 85-86.
146. See People v. Tenney, 101 Cal. Rptr. 419, 423 (Cal. Ct. App. 1972); see also People v.
147. See United States v. Doe, 703 F.2d 745, 747-48 (3d Cir. 1983); see also United States v.
148. 438 F.2d 381 (3d Cir. 1971).
149. Id. at 389.
150. See id.
available for it to be held sufficient. The DNA-profile leaves less room for mistaken identity than does a name. For example, even though an individual can always assume an alias, or even legally change his name, he can never change or escape his DNA code. In addition, given the accuracy of contemporary technology, the chance of mistake in the formulation of the DNA-profile and its correspondence to an individual is minimal. As the Dabney court stated, the DNA profile is “arguably the most discrete, exclusive means of personal identification possible.” Therefore, the DNA profile would most certainly meet the particularity standard of the Fourth Amendment and would satisfy the accompanying judicial scrutiny.

Dabney’s second argument contended that by relying upon a DNA-based warrant, the state “is effectively eliminating the statute of limitations because a DNA complaint/warrant could be issued just before the statute of limitations passed in order to toll the action forever.” The court replied with two arguments as to why the state’s actions do not effectually nullify the Wisconsin statute of limitations. First, the “protection afforded by the statute of limitations is not a fundamental right of a criminal defendant.” The court makes clear that the protection is statutorily created for the purpose of protecting “the accused from having to defend himself against charges of remote misconduct,” and that it is not a constitutional or fundamental right. Second, the legislature amended the statute of limitations for felonies subsequent to Dabney’s indictment and established the DNA-based John Doe warrant as a valid prosecutorial tool under certain circumstances.

151. See United States v. Gomez-Soto, 723 F.2d 649, 654 (9th Cir. 1984) (holding that a general description in the warrant of the items to be searched may be acceptable “if a more precise description is not possible”); see also United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986) (stating that one relevant factor in appraising the specificity of warrants is whether the government could have described the items more particularly “in light of the information available to it at the time the warrant was issued”); United States v. Hayes, 794 F.2d 1348, 1354 (9th Cir. 1986); United States v. Hillyard, 677 F.2d 1336, 1339 (9th Cir. 1982).

152. See supra notes 39-54 and accompanying text.

153. Dabney, 663 N.W.2d at 372.

154. Id.

155. Id. at 373.

156. Id. (quotation omitted).

157. See id. WIS. STAT. § 939.74(2d) states in pertinent part:

“deoxyribonucleic acid profile” means an individual’s patterned chemical structure of genetic information identified by analyzing biological material that contains the individual’s deoxyribonucleic acid ["DNA"].

(b) If before the time limitation under sub. (1) expired [the six year period for felonies], the state collected biological material that is evidence of the identity of the person who
While the modified statute does not apply to Dabney, it is evidence of the legislature’s original intent for the statute of limitations in cases of sexual assault. In effect, the legislature extended the period instead of abolishing the statute of limitations altogether.

As discussed in Section II, there are four principal policies supporting the establishment of statutes of limitation: the promotion of repose for the defendant and all others involved, affording the defendant protection against the possible disadvantages accompanying the defense against stale claims, the recognition that as time passes, society’s need for punishment diminishes, and the interest in assuring diligence on the State’s part to prevent any attempts to delay the prosecution. In light of these policies, is the Dabney decision reconcilable with the principles supporting a statute of limitations?

Dabney’s argument that the use of such a procedure could result in the endless tolling of the statute of limitations was not accepted by the court. Rather, the court found that the warrant does not effectively eliminate the statute because the prosecution was commenced before the expiration of the six year period. Further, since the “legislature has determined that six years is not so ‘remote’ as to negatively prejudice the defendant’s rights[.]” the filing of the John Doe warrant did not violate Dabney’s rights. The court did not directly address Dabney’s concerns, but rather argued the purpose of the statute of limitations and the sufficiency with which this statute governed this situation. Dabney did not contend that the warrant was not filed within the six year period, nor did he argue that the legislatively determined six year period was so remote as to hinder his defense. Rather, he argued that the filing of the John Doe warrant allowed the statutory period, in essence, to continue endlessly as the prosecution searched for the name to associate with the known DNA code. Therefore, the time of prosecution became increasingly remote from the commission of the crime, and Dabney’s ability to garner a defense was effectively diminished.

committed a violation . . . the state identified a [DNA] profile from the biological material, and comparisons of that [DNA] profile to [DNA] profiles of known persons did not result in a probable identification of the person who is the source of the biological material, the state may commence prosecution of the person who is the source of the biological material for violation . . . within 12 months after comparison of the [DNA] profile relating to the violation results in a probable identification of the person.

WIS. STAT. § 939.74(2d).
158. See Dabney, 663 N.W.2d at 373.
159. Id.
160. See id. at 372.
161. See id. at 372. See also supra notes 99 - 102 and accompanying text (discussing the complications to the defense caused by a delay in prosecution).
The judicial conclusion was dictated by the statute’s language. The Wisconsin statute of limitations for a felony does not specify that the trial must begin within the six year period, but rather that the prosecution must be commenced, and further defines “commenced” as being when “a warrant or summons is issued, an indictment is found, or an information is filed.” The Dabney court had already determined that the warrant was sufficient, and that it validly commenced the action. The court further established its decision as concordant with the legislative intent by pointing to the amendment made subsequent to Dabney’s indictment: 2001 Act 16 of the Wisconsin State legislature amended subsections (1) and (2)(c) and created subsection (2d), expressly addressing the issue of DNA profiles. The court concluded that the statute demonstrates the legislature’s recognition that DNA profiles do sufficiently identify sexual-assault offenders and that the competing interest in sexual-assault prosecutions weigh in favor of allowing such prosecutions to commence after six years when the state has obtained the offender’s DNA profile but has been unable to match it to a known DNA profile within that period.

Therefore, the acceptance of the John Doe warrant does not toll the statute inevitably, but rather tolls it “under certain circumstances until a match is discovered.” The legislative intent to limit only the timing of the commencement of the prosecution was clear in the language of the statute of limitations even prior to the amendment. The amendment effectually narrowed the statutory requirements in the particular situation raised in Dabney to preempt future contentions on the issue.

Dabney’s third, and final, claim was that his constitutionally mandated due process rights were twice violated. First, “he was not given sufficient notice of the claim because the original complaint and warrant identified him only by his DNA.” However, as the court noted, a criminal “defendant is not entitled to specific notice that the state is issuing a complaint and seeking an arrest warrant.” The defendant is not actually involved in the issuing process, and is not notified of the pending criminal charge until the actual warrant is

162. WIS. STAT. § 939.74(1).
163. Id.
164. See id.
165. Dabney, 663 N.W.2d at 373.
166. Id.
167. Id. at 374.
168. Id.
When the actual warrant for Dabney was issued, "John Doe" had already been replaced with his real name. Therefore, it did not matter whether or not Dabney could identify his own DNA code, because it never appeared on the final warrant.

Second, Dabney argued that his Due Process rights were violated by the delay in prosecution. He contended that "the State intentionally delayed this case until it was able to obtain a positive DNA identification ... [and] that, as a result ... [he] has been prejudiced because 'memories fade' and 'witnesses become unavailable.'" The court's rejection of this argument rests upon State v. Wilson, which states that for a claim to be dismissed upon a violation of Due Process, a defendant must "prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense." This decision is substantially based upon a series of Supreme Court decisions, which establish that four factors should be considered when determining whether a defendant's Due Process right of a speedy trial has been violated: the length of the delay, the reason for the delay, the defendant's assertion of his right, and the resulting prejudice caused to the defendant. "To prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." Instead, one must show that the delay was either a malicious tactic employed by the prosecution in an attempt to hinder the defendant, or was the result of a reckless disregard for timeliness on the part of the prosecution.

The court held that Dabney failed to satisfy his burden by not sufficiently presenting a claim of actual prejudice, and by not establishing that the "delay in filing the complaint resulted from an improper prosecutorial motive or purpose." Instead of proving actual prejudice, Dabney relied upon the argument that since the statute of limitations had expired, prejudice was "irrebuttable presumed," but

169. See id.
170. See id.
171. Id.
172. 440 N.W.2d 534 (Wis. 1989).
173. Id. at 544.
175. Lovasco, 431 U.S. at 796.
176. Dabney, 663 N.W.2d at 374.
177. Id.
failed to provide any specific allegations of prejudice. He further failed to show with particularity any advantage gained by the prosecution through the delay, and was therefore unable to support an allegation of improper motive or purpose.

The aforementioned Supreme Court cases, Gouveia, Lovasco, Barker, Doggett, and Marion, caution that each of the four prongs of the Court's approach to addressing a delay in prosecution are neither a necessary nor a sufficient condition to the finding of deprivation of the right: "Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." Included in each of these Supreme Court cases is a reminder that because the right to a speedy trial is fundamental, the "process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." The primary concerns of the Speedy Trial Clause are identified as being the protection against "undue and oppressive incarceration" and the "anxiety and concern accompanying public accusation," and that the passage of time will cause the defendant to suffer prejudice to his ability to defend himself. Of these concerns, the last is recognized as being the most important because "the inability of a defendant adequately to prepare his case skews the fairness of the entire system," calling into question the propriety of the entire justice system.

Barker made it clear that "different weights should be assigned to different reasons" for delay. The Doggett court distinguished between negligence on the part of the prosecution and deliberate intent to hinder

178. Id. During trial, the substance of the prosecution's case was founded on the DNA sample left in the victim's mouth and the statement of the victim. Dabney presented no rebutting evidence, leading the court to the conclusion that his case was not adversely affected by the delay.

179. Id. Instead, Dabney relied upon a claim that the DNA profile could have been run earlier, resulting in an earlier identification. However, the facts indicated that the test was run against the national database before the final discovery, but returned no match at that time.

186. Id.
187. Marion, 404 U.S. at 320.
188. Doggett, 505 U.S. at 660.
190. Id. at 531.
the defense, assigning a lighter weight to the former during the court’s balancing, but made clear that either reason for delay “falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun.” The Court further reasoned that “[c]ondoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state’s fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority.” However, it is recognized that delay is inevitable, and more likely than not will cause some complications for the defense. What must be shown is that “the interval between accusation and trial has crossed the threshold dividing ordinary from ‘presumptively prejudicial’ delay.” If the accused makes this showing, “the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim.” A defendant cannot claim that his right to a speedy trial has been violated if the prosecution has acted with “customary promptness.”

What must then be considered in determining whether Dabney presents a constitutional violation are the circumstances of the prosecutorial delay. As was previously mentioned, Dabney alleged that the DNA profile on the sample collected from the victim could have been run earlier, therefore resulting in an earlier identification. However, when the profile was created, there was no known match to identify the perpetrator. When the profile was run against the national DNA databank on December 18, 2000, there was still no match found. However, on February 27, 2001, the DNA profile was again run against the databank, and Robert Dabney was identified as the perpetrator. This match was reconfirmed on March 7, 2001. The court found “no evidence that the State intentionally delayed the prosecution of [the] case in order to obtain a tactical advantage over Dabney.” The burden was on Dabney to establish the improper prosecutorial motive or purpose.

192. *Id.*
194. *See id.* at 533-34.
196. *Dabney*, 663 N.W.2d at 374.
197. *See id.* at 369.
198. *See id.*
199. *See id.*
200. *See id.*
201. *See id.* at 375.
However, his contention failed because he did not show that the prosecution acted with anything other than customary promptness when periodically checking the profile against the databank. The Dabney court adopted the Supreme Court factors to determine the inappropriateness of the delay, and acted in accordance with precedent. There is every reason to believe the Supreme Court would decide the issue in the same fashion, holding that DNA-based John Doe warrants are constitutional.

CONCLUSION

So why amend the statute of limitations to allow the utilization of the John Doe warrant? As discussed, there is no federal court holding on the issue; the Court of Appeals of Wisconsin is the highest court to yet address the issue. If the DNA-based John Doe warrant is going to be a reliable and feasible tool for the states, there needs to be greater assurance for the prosecution than the likelihood that it could hold up in court. Many state courts have not yet uttered the words “DNA-based John Doe warrant,” and the initial debate of the issue would become a long and unneeded process as it is argued in each state. The focus of each of these cases would be diverted from the central issue of each, the sexual assault that occurred, to the tangential issue of whether the identification of the perpetrator was enough to satisfy the particularity requirement, the jurisdictional issue, the statute of limitations, and the issue of the due process right to a speedy trial. An amendment or abolition of the statutes of limitation relevant to sexual assault cases would prevent the superfluous litigation that would likely result, and would lead to the swift justice society seeks.

As discussed, there will soon be at least thirty states, including New York, that have passed legislation removing or extending the statutes of limitation on sexual offenses in which DNA evidence is found at the crime scene. The fears raised by civil libertarians, who contend that use of the warrants abridges the defendant’s right to a fair trial, can best be addressed by statutorily determining the procedure that is to be followed when issuing a John Doe warrant. As evidenced by Wisconsin’s recently amended statute, the defendants’ interest in

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202. See Moran, supra note 19. A campaign in New York City, the John Doe Indictment Project, seeks to do DNA testing for hundreds of unsolved sex-crimes before the end of the 10-year statute of limitations.

maintaining a viable defense can be preserved while still allowing the prosecution to go forward with the case.

The harm caused to society by the horrors of sexual assault is indubitable. Without further amendment to current statutes of limitation, states’ efforts to effectuate justice will continue to be thwarted by the law’s failure to keep pace with technological advances. Since 2000, Manhattan prosecutors have had to close over 690 sexual assault cases, despite solid leads on, and occasional identification of, the perpetrators through DNA evidence, because of the expiration of the statutes of limitation.\textsuperscript{204} The evidence further showed that a portion of these crimes were committed by repeat offenders.\textsuperscript{205} However, the dangers to society caused by these lapses in justice may be avoided. The advent of DNA identification, its use in warrants, and the ingenuity of state legislatures such as Wisconsin’s have together antiquated the arguments supporting the perpetuation of statutes of limitation in rape cases where DNA evidence is present. The DNA-based John Doe warrant does not propose the truncation of a defendant’s rights where proper procedure is followed; rather, it promises the preservation of valid and substantial evidence that furthers the pursuit of justice. Society would best be served by the nationwide acceptance of a statutorily enacted John Doe warrant.

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\textsuperscript{204} See Preston, \textit{supra} note 70.
\textsuperscript{205} See id.

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