

# TOLLING TIME: HOW JOHN DOE DNA INDICTMENTS ARE SKIRTING STATUTES OF LIMITATION AND CRIPPLING THE CRIMINAL JUSTICE SYSTEM

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## INTRODUCTION

In summer 2018, U.S. Attorney for the District of Columbia Jessie K. Liu announced that her office would for the first time be using DNA to charge a man in two assaults, even though the authorities did not know his name.<sup>1</sup> Known as a “John Doe” DNA indictment, the indictment identifies the suspect by his genetic makeup, formally beginning the prosecution and allowing the prosecutor to skirt statutes of limitation. Prosecutors in the District and in at least ten other states have used John Doe indictments to effectively toll statutes of limitation,<sup>2</sup> allowing the police to continue their search for the person connected to the indicted profile. As defense lawyers question the constitutionality of these warrants and indictments, prosecutorial attorney organizations and the Justice Department are encouraging their filing.<sup>3</sup>

This note will evaluate the current landscape surrounding the JohnDoe DNA indictments before arguing, first, that such indictments abandon the purposes of statutes of limitation, and second, that John Doe DNA indictments open the door for John Doe fingerprinting indictments, which would ultimately subvert a criminal justice system based on the principle that people are innocent until proven guilty. Rather than using John Doe DNA indictments to take away the rights of defendants on a case-by-case basis, all states should abolish statutes of limitations on felony sex crimes.

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<sup>1</sup> Peter Hermann & Michael Brice-Saddler, *The Hotel Rapist’s Name is Still a Mystery, but ‘John Doe’ has Been Indicted, Based on his DNA Profile*, WASHINGTON POST (June 19, 2018) [https://www.washingtonpost.com/local/public-safety/the-hotel-rapists-name-is-still-a-mystery-but-john-doe-has-been-indicted-based-on-his-dna-profile/2018/06/19/83f5c73c-73bb-11e8-805c-4b67019fcfe4\\_story.html?noredirect=on&utm\\_term=.879c9fe7fd09](https://www.washingtonpost.com/local/public-safety/the-hotel-rapists-name-is-still-a-mystery-but-john-doe-has-been-indicted-based-on-his-dna-profile/2018/06/19/83f5c73c-73bb-11e8-805c-4b67019fcfe4_story.html?noredirect=on&utm_term=.879c9fe7fd09).

<sup>2</sup> See *State v. Dabney*, 264 Wis. 2d 843 (Wis. Ct. App. 2003); *State v. Gully*, 2005 WL 2106556 (Ohio Ct. App. 2005); *State v. Martinez*, 52 A.D.3d 68 (N.Y. App. Div. 2008); *State v. Belt*, 285 Kan. 949 (Kan. 2008); *People v. Robinson*, 47 Cal.4th 1104 (Cal. 2010); *Commonwealth v. Dixon*, 458 Mass. 446 (Mass. 2010); *State v. Burdick*, 395 S.W.3d 120 (Tenn. 2012); *State v. Younge*, 321 P.3d 1127 (Utah 2013); *State v. Carlson*, 845 N.W.2d 827 (Minn. Ct. App. 2014); *State v. Neese*, 236 Ariz. 84 (Ariz. Ct. App. 2016).

<sup>3</sup> NIJ, USING DNA TO SOLVE COLD CASES 4,22 (July 2002).

## I. TODAY'S JOHN DOE INDICTMENT LANDSCAPE

Defense attorneys have repeatedly questioned the constitutionality of John Doe DNA indictments. These challenges have focused on the Fourth Amendment's particularity requirement and the Sixth Amendment's speedy trial requirement.<sup>4</sup> This phenomenon of using John Doe indictments began in 2000 when Milwaukee County Assistant District Attorney Norm Gahn filed a warrant with only the suspect's DNA profile to toll the statute of limitations.<sup>5</sup> Since then, at least ten states have taken up the issue of John Doe DNA warrants and indictments.<sup>6</sup>

While most courts have used the same logic, *People v. Robinson* best articulates the rationale of the courts for upholding the constitutionality of John Doe DNA indictments. In *Robinson*, the defendant was charged with a rape that occurred in 1994. DNA was found on the victim.<sup>7</sup> Four days before the six-year statute of limitations would have expired, a felony complaint was filed against "John Doe, unknown male," describing him by 13-loci DNA.<sup>8</sup> The Court found that while the Fourth Amendment's particularity requirement "must clearly state what is sought,"<sup>9</sup> the warrant "need only be reasonably specific"<sup>10</sup> and the "specificity required varies depending on the circumstances of the case and the type."<sup>11</sup> A warrant is considered an accusation against a person, not just a name. Therefore, the court reasoned that when the name is unknown, a person may be identified with the best description available.<sup>12</sup> The Court concluded that DNA is "arguably the most discrete, exclusive means of personal identification possible" and describes a person "with far greater precision than a physical

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<sup>4</sup> See *Dabney*, 264 Wis. 2d at 843; *Gulley*, 2005 WL 2106556; *Martinez*, 52 A.D.3d at 68; *Belt*, 285 Kan. at 949; *Robinson*, 47 Cal.4th at 1104; *Dixon*, 458 Mass. at 446; *Burdick*, 395 S.W.3d at 120; *Younge*, 321 P.3d at 1127; *Carlson*, 845 N.W.2d at 827; *Neese*, 236 Ariz. at 84.

<sup>5</sup> Sabrina Tavernise, *Police, Tracing 'John Doe' DNA, Name Suspect in Old Sex Crime*, N.Y. TIMES (Oct. 28, 2004) <https://www.nytimes.com/2004/10/28/nyregion/front%20page/police-tracing-john-doe-dna-name-suspect-in-old-sex.html>.

<sup>6</sup> See *Dabney*, 264 Wis. 2d at 843; *Gulley*, 2005 WL 2106556; *Martinez*, 52 A.D.3d at 68; *Belt*, 285 Kan. at 949; *Robinson*, 47 Cal.4th at 1104; *Dixon*, 458 Mass. at 446; *Burdick*, 395 S.W.3d at 120; *Younge*, 321 P.3d at 1127; *Carlson*, 845 N.W.2d at 827; *Neese*, 236 Ariz. at 84.

<sup>7</sup> *Robinson*, 47 Cal.4th at 1114.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1132 (quoting *U.S. v. Towne*, 997 F.2d 537 (9th Cir. 1993)).

<sup>10</sup> *Id.* (quoting *U.S. v. Hayes*, 794 F.2d 1348, 1354 (9th Cir. 1986)).

<sup>11</sup> *Id.* (quoting *U.S. v. Rude*, 88 F.3d 1538, 1551 (9th Cir. 1996)).

<sup>12</sup> *Id.* at 1133.

description or name.”<sup>13</sup> For these reasons, the Court held that the John Doe DNA indictment did not violate the federal or state constitution.<sup>14</sup>

Nearly every state court that has examined this issue,<sup>15</sup> has held the indictment to be constitutional, with most courts choosing to focus on Fourth Amendment.<sup>16</sup> In 2016, the John Doe DNA Indictment was expanded to a non-sex crime, namely burglary, case in Arizona, with the Court still finding the indictment to be constitutional for the same reasons as John Doe DNA indictments in sex crime cases.<sup>17</sup>

## II. STATUTES OF LIMITATION

Statutes of limitation are statutory time limits for filing charges, based on the date when the offense occurred.<sup>18</sup> Such limitations are created to protect individuals from having to defend themselves against charges when the basic facts become obscured by the passage of time and minimize the danger of official punishment because of acts in the far distant past.<sup>19</sup> Prosecutorial delay can result in the loss of physical evidence, the unavailability of witnesses, and the impairment of the future defendant and his witnesses to accurately and fully remember the events in question.<sup>20</sup> Application of statutes of limitations is “the primary guarantee against bringing overly stale criminal charges.”<sup>21</sup> These time restraints can also have the secondary effect of encouraging law enforcement officials to promptly investigate suspected criminal activity.<sup>22</sup> More serious crimes tend to have longer limitations periods.<sup>23</sup> Murder, for example, does not have any statute of limitations in many

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<sup>13</sup> *Id.* at 1134.

<sup>14</sup> *Id.*

<sup>15</sup> *See Belt*, 285 Kan. at 960 (holding that while an arrest warrant’s or a supporting affidavit’s inclusion of a unique DNA profile can qualify as a description by which a defendant can be identified with reasonable certainty, the mere listing of DNA loci in the warrant or in a support affidavit cannot).

<sup>16</sup> *See id.*; *see also Dabney*, 264 Wis. 2d at 843; *Gulley*, 2005 WL 2106556; *Martinez*, 52 A.D.3d at 68; *Robinson*, 47 Cal.4th at 1104; *Dixon*, 458 Mass. at 446; *Burdick*, 395 S.W.3d at 120; *Younge*, 321 P.3d at 1127; *Carlson*, 845 N.W.2d at 827; *Neese*, 236 Ariz. at 84.

<sup>17</sup> *See Neese*, 236 Ariz. at 86-87 (affirming the defendant’s conviction).

<sup>18</sup> Black’s Law Dictionary (10th ed. 2014).

<sup>19</sup> *Id.*

<sup>20</sup> *See United States v. Marion*, 404 U.S. 307, 332 n.4 (1971).

<sup>21</sup> *Id.* at 322 (quoting *United States v. Ewell* 386 U.S. 116, 122 (1966)).

<sup>22</sup> Black’s Law Dictionary (10th ed. 2014).

<sup>23</sup> *What Is The Statute of Limitation for A Sex Crime?* ABC NEWS (Sept. 4, 2018) <http://www.abc-7.com/story/39021931/what-is-the-statute-of-limitation-for-a-sex-crime>.

states. As it currently stands, forty-two states have statutes of limitations for felony sex crimes.<sup>24</sup>

John Doe DNA indictments toss the rationales for having a statute of limitations in the waste basket. In most cases, the indictment is filed just days before the statute of limitations expires.<sup>25</sup> The timing of John Doe DNA indictments supports the argument that use of the indictments should be forbidden. In a sex crime case, a defendant may want to call a witness to testify about the circumstances surrounding the alleged assault or provide an alibi. Years after the incident, the accused stand a high likelihood of not being able to locate these witnesses. Even if the potential witnesses are located, they may not remember the events and details clearly or at all.

As the Supreme Court has noted since the nineteenth century, statutes of limitations “are vital to the welfare of society . . . They promote repose by giving security and stability to human affairs.”<sup>26</sup> The idea behind this is that suspects should not have to fear for the rest of their lives they will be accused or even prosecuted. While some proponents of John Doe DNA indictments argue that this is only a problem if the identity of the suspect is known,<sup>27</sup> such an argument fails to account for the wrongly accused. The purpose of having a sufficiently particular description of the accused in a warrant is to give notice to the accused of the charges against him.<sup>28</sup> The average citizen does not know his or her genetic code and, therefore, cannot feasibly be put on notice with such an indictment. As argued above, DNA, while strong evidence, does not unequivocally prove guilt. In a society where defendants are presumed innocent until proven guilty, courts of law should not be relying on the presumption that whoever left DNA at the scene of a crime is guilty.

The strongest argument for why these types of indictments do not violate statutes of limitation is that the DNA, unlike other types of evidence, most likely will not be lost or degraded over time. While it is true that once a DNA sample has been tested and profiled it can be entered into a system and preserved until it matches against a sample taken from

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<sup>24</sup> RAINN, *State by State Guide on Statutes of Limitations* (Last visited Oct. 9, 2018) <https://www.rainn.org/state-state-guide-statutes-limitations> (noting that Kentucky, Maryland, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming have no statute of limitations for any felony sex crimes).

<sup>25</sup> See *Dabney*, 264 Wis. 2d at 843; *Gulley*, 2005 WL 2106556; *Martinez*, 52 A.D.3d at; *Belt*, 285 Kan. at 949; *Robinson*, 47 Cal.4th at 1104; *Dixon*, 458 Mass. at 446; *Burdick*, 395 S.W.3d at 120; *Younge*, 321 P.3d at 1127; *Carlson*, 845 N.W.2d at 827; *Neese*, 236 Ariz. at 84.

<sup>26</sup> *Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

<sup>27</sup> 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, 1090 (2002).

<sup>28</sup> See *United States v. Gaytan*, 74 F.3d 545, 551 (5th Cir. 1996); see also *United States v. De Stefano*, 476 F.2d 324, 328 (7th Cir. 1973).

a suspect in the future, a similar process can be followed for fingerprinting. As Part III will discuss, fingerprints are not used as the basis of John Doe indictments.

### III. FORGOTTEN FINGERPRINTS?

When issuing an indictment and the subsequent arrest warrant, a court must find that enough probable cause exists to believe the subject of the warrant committed the instant crime.<sup>29</sup> State courts across the country have found, in limited circumstances, that John Doe DNA indictments are sufficient to satisfy the Fourth Amendment's particularity requirements. Science and logic point to the notion that John Doe fingerprint indictments would be at least as reliable – if not more – than John Doe DNA indictments. Unlike fingerprint evidence, which is consistently collected and documented from state to state, DNA evidence is only valuable if it is properly collected.<sup>30</sup> There is no uniformity between labs from state to state with respect to collection, storage, and interpretation of DNA.<sup>31</sup> A match between DNA found in one state and a criminal apprehended in another does not necessarily mean the police have the same person.<sup>32</sup> It might just mean the states' methods differ. Furthermore, in many states, court have found that fingerprints alone are sufficient to establish probable cause.<sup>33</sup> On the other hand, courts are still battling over whether DNA alone can establish probable cause.

Just as DNA at the scene of a crime does not mean that the person who the DNA belongs to committed the crime, nor does a fingerprint. Some proponents of John Doe DNA indictments argue that DNA is different in sex crimes because the DNA is often semen, thereby implicating the nature of the crime. Two problems exist with such an argument. First, the DNA found and used in John Doe DNA indictments is not always semen; and second, prosecutors have already started using John Doe DNA indictments for more than sex crimes.<sup>34</sup> With all of this in mind, prosecutors could confidently indict suspects on lone fingerprint evidence.

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<sup>29</sup> See Fed. R. Crim. P. 9(a).

<sup>30</sup> Dalia Lithwick, *Saving DNA for a Rainy Day*, SLATE (Aug. 7, 2003) <https://slate.com/news-and-politics/2003/08/new-york-indicts-bad-dna.html>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See *State v. Maya*, 493 A.2d 1139, 1145 (N.H. 1985); *People v. Thrower*, 670 P.2d 1251, 1253 (Colo. Ct. App. 1983); *People v. Summers*, 426 N.E.2d 937, 940 (Ill. App. Ct. 1981).

<sup>34</sup> See *Neese*, 236 Ariz. at 239 (stating that John Doe was charged with seven counts of burglary in the second degree, class 3 felonies; three counts of theft, class 5 felonies; one count of burglary in the first degree, a class 3 felony; three counts of theft, class 3 felonies; and one count of theft, a class 2 felony).

Despite the likelihood that such an indictment would succeed, prosecutors have failed to do so.

The increased use of John Doe DNA indictments begs the question: how long can prosecutors only use DNA for these anonymous indictments when much more criminal activity involves fingerprints and many scientists acknowledge fingerprints may be more reliable for identification than DNA? Such a development by prosecutors, if it were to occur, would essentially annihilate statutes of limitations for any crime that took place and involved DNA or fingerprint evidence. The concept of “innocent until proven guilty” would be put on the back burner in favor higher conviction rates.

### CONCLUSION

The implications from John Doe indictments could ultimately lead to an altering of the criminal justice system in America. The United States criminal justice system has always been premised on the idea of innocent before proven guilty. The use of John Doe DNA indictments subverts defendants’ rights by working around legislatively created statutes of limitations. If the use of John Doe DNA indictments continues to pervade into more states and more areas of criminal activity, the question of why fingerprints are not allowed to be similarly used in indictments will arise.

While the use of John Doe DNA indictments to prosecute rapists has a noble goal in mind, the entire U.S. criminal justice system should not be reimaged over the issue when a simpler solution exists. State legislatures should expand current law to eliminate the statute of limitations in rape cases where DNA evidence is recovered.