

1-1-2013

Waiting for John Doe: The Practical and Constitutional Implications of DNA Indictments

Daniel Gaudet

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

Recommended Citation

18 Suffolk J. Trial & App. Advoc. 106 (2013)

This Notes is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.

WAITING FOR JOHN DOE: THE PRACTICAL AND CONSTITUTIONAL IMPLICATIONS OF DNA INDICTMENTS

I. INTRODUCTION

Over the course of the past two decades, DNA evidence has become a powerful tool for both prosecutors and defense attorneys in criminal trials.¹ Because it is generally accepted as accurate, this evidence is used in a myriad of ways in various legal proceedings.² Notably, in recent years, prosecutors in several states frequently utilized the practice of obtaining a DNA sample from an unknown suspect and issuing a so-called “John Doe” indictment based on the profile developed from the sample.³ However, the proliferation of this new prosecutorial device has not come

¹ See *Andrews v. State*, 533 So. 2d 841, 843 (Fla. Dist. Ct. App. 1988) (noting it was first appellate court to address admissibility of DNA evidence), overruled by *Hadden v. State*, 690 So. 2d 573, 577 (Fla. 1997); see also George Bundy Smith & Janet A. Gordon, *The Admission of DNA Evidence in State and Federal Courts*, 65 *FORDHAM L. REV.* 2465, 2465 (1997) (commenting that value of DNA evidence is useful to both sides of criminal proceeding). Because DNA evidence can operate as a virtual certainty as to whether a defendant was present at the scene of a crime, both sides can utilize it as an effective tool. See Smith & Gordon, *supra*, at 2465.

² See, e.g., *Green v. Berge*, 354 F.3d 675, 676 (7th Cir. 2004) (noting all fifty states maintain DNA collection banks with samples from inmates); Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 *FORDHAM L. REV.* 1453, 1473 (2007) (stating post-conviction DNA testing has exonerated wrongfully accused convicts); Christopher L. Blakesley, *Scientific Testing and Proof of Paternity: Some Controversy and Key Issues For Family Law Counsel*, 57 *LA. L. REV.* 379, 380 (1997) (stating federal government requires states provide genetic testing in contested paternity cases); see also Joseph L. Peterson & Anna S. Leggett, *The Evolution of Forensic Science: Progress Amid the Pitfalls*, 36 *STETSON L. REV.* 621, 654 (2007) (asserting reliability of DNA testing has made it “gold standard” of forensic evidence). But see Kristen Bolden, *Note, DNA Fabrication, A Wake Up Call: The Need to Reevaluate the Admissibility and Reliability of DNA Evidence*, 27 *GA. ST. U. L. REV.* 409, 410 (2011) (arguing that DNA evidence is not absolutely trustworthy).

³ See *Commonwealth v. Dixon*, 938 N.E.2d 878, 882, 884-85 (Mass. 2010) (describing process for issuing DNA indictment); cases cited, *infra* note 88 (listing cases where DNA indictments utilized); see also Micah Sucherman, *Note, People v. Robinson: Developments and Problems in the Use of “John Doe” DNA Arrest Warrants*, 99 *CALIF. L. REV.* 885, 897-901 (2011) (examining approach taken by four states toward “John Doe” indictments). The first high court to look at a challenge to a “John Doe” DNA indictment was the Kansas Supreme Court. Sucherman, *supra*, at 900. Other states, including Wisconsin, Ohio, and New York, have also upheld the use of DNA indictments. *Id.* at 897-99.

without concerns.⁴

The main criticisms typically aimed at John Doe DNA indictments focus on the perceived deficiencies of DNA evidence, which can be exacerbated by the gap in time between the collection of a sample and the location of a match.⁵ Some have argued that by indicting a DNA sample, prosecutors are able to toll the statute of limitations of the alleged crime until attaching a name to the indictment, allowing for an endless period during which an identity can be later found.⁶ Questions thus arise as to whether the use of John Doe DNA indictments violates the statutory and constitutional rights of criminal defendants who are eventually linked to the originating crime.⁷ Despite these criticisms, courts have found overwhelmingly in favor of the constitutionality of these indictments.⁸

This Note examines the problems that DNA indictments raise for criminal defendants as well as the potential safeguards against prosecutorial abuse in issuing nameless indictments.⁹ Part II discusses the factual and legal background of DNA evidence, including its historical development, technical underpinnings, and weaknesses.¹⁰ Part III traces the history and

⁴ See Andrea Roth, *Safety in Numbers? Deciding When DNA Alone is Enough to Convict*, 85 N.Y.U. L. REV. 1130, 1145-46 (2010) ("Some have voiced concern that DNA alone carries too great a risk of laboratory error, coincidental matches, or other injustice to be permissible.").

⁵ See *id.*; Boaz Sangero & Mordechai Halpert, *Why a Conviction Should Not Be Based on a Single Piece of Evidence: A Proposal for Reform*, 48 JURIMETRICS J. 43, 45 (2007) (citing laboratory errors as potential cause of wrongful convictions); Andrew C. Bernasconi, *Comment, Beyond Fingerprinting: Indicting DNA Threatens Criminal Defendants' Constitutional and Statutory Rights*, 50 AM. U. L. REV. 979, 983-84 (2001) (arguing inaccuracy of DNA evidence can lead to "misguided prosecutions"). Bernasconi argues further that the gap in time between an indictment and an actual trial can violate a defendant's right to a speedy trial. Bernasconi, *supra*, at 984.

⁶ See Frank B. Ulmer, *Note, Using DNA Profiles to Obtain "John Doe" Arrest Warrants and Indictments*, 58 WASH. & LEE L. REV. 1585, 1599-1600 (2001) (issuing arrest warrant or filing indictment tolls statute of limitations). Problems may arise when criminal proceedings begin years after an alleged crime occurs. *Id.* at 1613. Ulmer notes that as time passes, evidence becomes less reliable, which then calls into question the defendant's rights. *Id.* at 1613-14.

⁷ See Bernasconi, *supra* 5, at 990 (questioning "validity and legitimacy" of DNA indictments when considering historical use of statutes of limitations). One of the primary purposes of having a statute of limitations for most crimes is to protect against the risk of an unfair trial brought on by evidence that is no longer reliable. *Id.* at 995. Bernasconi argues that "John Doe" indictments are directly contrary to this purpose. *Id.* at 999. Another concern is the potential conflict these indictments have with the Sixth Amendment's Speedy Trial Clause. See *id.* at 1024.

⁸ See Sucherman, *supra* 3, at 901 ("[C]ourts appear very willing to accept 'John Doe' DNA arrest warrants as sufficiently particular to satisfy the demands of the statute of limitations and the Fourth Amendment . . . courts do not seem particularly concerned with 'speedy trial' issues that may arise from the use of 'John Doe' DNA arrest warrants."); cases cited *infra* note 88 and accompanying text (examining cases that affirmed use of such warrants).

⁹ See *infra* Part V (detailing specific problems and criticisms of indictments and suggesting possible solutions).

¹⁰ See *infra* Part II (recounting specifics surrounding use of DNA evidence).

purpose behind statutes of limitations, the Fourth Amendment's particularity requirement, and the Sixth Amendment's "Speedy Trial" clause.¹¹ Part IV details the history of John Doe indictments prior to the use of DNA technology through the present.¹² Part V concludes by examining the current problems with issuing John Doe indictments, suggesting measures to ensure that defendants are not burdened by the use of these indictments, and anticipating future developments of the law.¹³

II. DNA EVIDENCE

A. Admissibility

Like all forms of scientific evidence, DNA evidence is subject to certain admissibility standards in all federal and state jurisdictions.¹⁴

¹¹ See *infra* Part III (examining rationale behind principles that arguably conflict with "John Doe" indictments).

¹² See *infra* Part IV (looking at case law and statutes relevant to indictments).

¹³ See *infra* Part V (reviewing state of law and suggesting alternatives).

¹⁴ See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 583-98 (1993) (noting Frye test superseded by adoption of Federal Rules of Evidence); *Frye v. United States*, 293 F. 1013, 1013 (D.C. Cir. 1923) (introducing first test for admissibility of scientific-based evidence). In *Frye*, the D.C. Court of Appeals established that the test for admissibility of scientific evidence was based on whether the principle upon which the evidence was developed was generally accepted by the scientific community. See *Frye*, 293 F. at 1014 (stating test's standards). This test was used by courts throughout the country until it was supplanted by Rule 702 of the Federal Rules of Evidence in the *Daubert* decision. See *Daubert*, 509 U.S. at 588 ("Nothing in the text of this Rule establishes 'general acceptance' as an absolute prerequisite to admissibility. Nor [is there] any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a 'general acceptance' standard."). Rule 702 states:

A witness who is qualified as an expert . . . may testify in the form of an opinion or otherwise if: (a) the expert's . . . knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

FED R. EVID. 702. Typically, the introduction of DNA evidence requires accompanying expert testimony to familiarize the jury with the scientific procedures it entails. See Ryan Patrick O'Malley, Comment, Criminal Law—Inconclusive DNA Test Results Admitted as Relevant Evidence Despite Absence of Random Match Probability Analysis—*Commonwealth v. Mattei*, 892 N.E.2d 826 (Mass. App. Ct. 2008), 14 SUFFOLK J. TRIAL & APP. ADVOC. 127, 138 n.48 (2009). While the majority of states now follow the *Daubert* test, a minority still accepts test established in *Frye*. See Kavita Pillai, Comment, Another "Competitive Enterprise": A Balanced Private-Public Solution to North Carolina's Forensic Science Problem, 90 N.C. L. REV. 253, 284 n.186 (2011) (noting that "*Frye* remains the test in more than a dozen states"). Thus, DNA evidence is subject to scrutiny under whichever approach the relevant jurisdiction follows. See, e.g., *Allen v. State*, 62 So. 3d 1199, 1201 (Fla. Dist. Ct. App. 2011) (subjecting DNA evidence to *Frye* test); *Commonwealth v. Lanigan*, 641 N.E.2d 1342, 1349 (Mass. 1994) (adopting modified

Today, courts in all fifty states accept that DNA evidence meets the thresholds for admissibility established in both the Daubert and Frye decisions.¹⁵ Not only is such evidence generally accepted by the scientific community in accordance with Frye, but it is also conforms to the Daubert decision's emphasis on Rule 702 of the Federal Rules of Evidence.¹⁶

B. Collection and Testing

DNA evidence can be obtained from samples including human skin, hair, blood, semen, and other bodily fluids and tissues.¹⁷ Aside from being obtainable from any cell in the human body, DNA evidence is such a useful device because it is unique to each individual.¹⁸ Once a sample has been acquired, several different methods of analysis may be used to develop a profile of the suspect.¹⁹ Initially, the most common form of DNA testing was Restriction Fragment Length Polymorphism ("RFLP") analysis.²⁰ As compared with other forms of DNA testing, RFLP analysis requires a larger sized genetic sample from which a human profile can be developed and then compared with that of a known defendant or with those

version of Daubert and using it to analyze DNA evidence); *Taylor v. State*, 889 P.2d 319, 328 (Okla. Crim. App. 1995) (accepting Daubert approach and applying it to admissibility of DNA evidence).

¹⁵ See Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1656 (2008) ("[D]NA evidence is now admissible at trial in all states.").

¹⁶ See *Daubert*, 509 U.S. at 588-89 (creating test that conforms with Federal Rules of Evidence); *Frye*, 293 F. at 1013 (establishing first test for admissibility of scientific evidence); see also *supra* note 14 and accompanying text (detailing Frye and Daubert standards).

¹⁷ See Ulmer, *supra* 6, at 1591 (enumerating various sources of human DNA). Ulmer explains that after having obtained a DNA sample from one of these sources, a genetic profile of an individual can be developed. *Id.*

¹⁸ See DNA Matching, FORENSIC SCI., http://library.thinkquest.org/04oct/00206/text_pti_dna_matching.htm (last visited Nov. 12, 2012) (analyzing power of DNA evidence).

¹⁹ See *United States v. Hicks*, 103 F.3d 837, 844-45 (9th Cir. 1996) (explaining Polymerase Chain Reaction ("PCR") method of DNA testing), overruled by *United States v. Grace*, 526 F.3d 499, 503 (9th Cir. 2008); *Lemour v. State*, 802 So. 2d 402, 405 (Fla. Dist. Ct. App. 2001) (detailing Short Tandem Repeat variety of PCR testing); *Commonwealth v. Curmin*, 565 N.E.2d 440, 446-48 (Mass. 1991) (describing Restriction Fragment Length Polymorphism ("RFLP") DNA analysis); see also Smith & Gordon, *supra* note 1, at 2471 (examining steps in PCR testing); Riley, *infra* note 20 and accompanying text (examining steps in each type of DNA testing).

²⁰ See *State v. Futch*, 860 P.2d 264, 271 (Or. Ct. App. 1993) ("The RFLP testing process is the most common method used for DNA matching."); Donald E. Riley, *DNA Testing: An Introduction for Non-Scientists An Illustrated Explanation*, SCI. TESTIMONY AN ONLINE JOURNAL (Apr. 6, 2005), <http://www.scientific.org/tutorials/articles/riley/riley.html> (commenting that RFLP analysis has all but been replaced by PCR analysis).

collected in a databank.²¹ This process consists of seven steps that culminate in the creation of a set of genetic bands that can be used for comparison purposes with a known suspect or a grouping of samples to ascertain a statistical match.²² This type of analysis is believed to be less susceptible to contamination when compared to alternative methods.²³ However, despite this advantage, RFLP testing is rarely used and has been largely replaced by a faster and more sensitive process called Polymerase Chain Reaction (“PCR”) analysis.²⁴

PCR analysis was first developed in the early 1990s and eventually became the preferred method of DNA examination.²⁵ Unlike RFLP testing, the PCR method is not used to create a statistical match between two DNA samples, but rather to exclude individuals as potential matches via a three-step process.²⁶ The major advantage that PCR testing has over RFLP testing is that PCR can be done with a very small genetic sample, which in

²¹ See Riley, *supra* 20. For RFLP testing to be a viable option, the sample must not only be larger than that which would be usable with other methods but it must also be adequately preserved, rendering older samples useless with this procedure. *Id.* The Massachusetts Supreme Judicial Court thoroughly described the testing as a seven-step process. *Curnin*, 565 N.E.2d at 446. First, the biological sample must be chemically extracted from the surface or material it was left on so the DNA can be separated. *Id.* Second, the DNA sample is cut at specific points and creates what are called restriction fragments. *Id.* Third, the remaining restriction fragments are then separated according to length within a gel. *Id.* at 446-47. Fourth, the fragments are transferred to a nylon membrane where they are then each split in half. *Id.* at 447. Fifth, restriction fragments that contain certain types of alleles are separated from the rest using a probe with a corresponding allele attached to it via a process called hybridization. *Id.* Sixth, a pattern of bands is created by the energy on the probes attached to the restriction fragments. *Id.* The position of these bands tends to be different from person to person. *Id.* Finally, the print of the bands is compared with that of the suspect or with a databank to determine the accuracy of the possible match. *Id.* The frequency at which the band appears within the general population is extremely relevant in this comparison stage. *Id.* at 447-48. The less likely the band appears it appears in the general population, the greater the likelihood of a match and vice-versa. *Id.* at 448.

²² See *Curnin*, 565 N.E.2d at 446-48 (describing seven-step RFLP testing process); Riley, *supra* 21 and accompanying text (describing RFLP testing and sample size).

²³ See *Pruitt v. Brown*, No. 08-CV-01495, 2011 WL 3555829, at *3 (E.D.N.Y. Aug. 9, 2011) (recounting testimony that PCR testing may be more easily contaminated than RFLP testing).

²⁴ See Riley, *supra* 20 (stating reasons why PCR has largely overtaken RFLP). The combination of speed at which PCR testing can be completed and the results it produces makes it the preferred analysis method. *Id.*

²⁵ See D. Scott Porch, IV, Comment, Evidence—State v. Begley: When the Tennessee Supreme Court Meets PCR-Method DNA Analysis, It’s Love at First Sight, 28 U. MEM. L. REV. 1239, 1242-43 (1998) (noting time of test’s development and subsequent popularity). Part of the appeal of PCR testing is that it is seen as a quicker and cheaper alternative to RFLP testing. *Id.* at 1243.

²⁶ See *United States v. Hicks*, 103 F.3d 837, 845 (9th Cir. 1996) (commenting on nature of three-step procedure), overruled by *United States v. Grace*, 526 F.3d 499, 503 (9th Cir. 2008). Much like RFLP testing, the first step in PCR testing is to extract the DNA sample from wherever it was left. *Id.* Secondly, in a process referred to as amplification, scores of copies of the DNA fragment are created. *Id.* Lastly, the remaining product is compared with other samples. *Id.*

turn can come from older and potentially degraded sources that would not be suitable for RFLP analysis.²⁷ As noted, however, the major drawback of PCR testing is that it is prone to contamination and can in turn produce incorrect results.²⁸

The most commonly used method of DNA analysis today is a variation of PCR testing referred to as Polymerase Chain Reaction Short Tandem Repeat ("PCR-STR") testing.²⁹ Much like ordinary PCR testing, the PCR-STR method amplifies a certain portion of a DNA sample and uses that amplification for comparison purposes.³⁰ The major difference is that PCR-STR analysis focuses primarily on certain DNA strands called short tandem repeats ("STR").³¹ The results produced by PCR-STR tests are generally considered to be the most accurate, which in turn has made it the primary method currently used by technicians throughout the United States.³² However, in spite of its popularity, PCR-STR testing has not been immune from criticism.³³ The primary concern, similar to other forms of

²⁷ See Porch, *supra* 25, at 1243 (noting that only small sample is required for PCR testing).

²⁸ See Smith & Gordon, *supra* 1, at 2471 (finding contamination in PCR testing process can lead to amplification of wrong DNA). Additionally, Smith and Gordon note other drawbacks of PCR testing specifically related to the type of alleles examined in a PCR test. *Id.* at 2471-72. Such a problem can lead to further difficulties distinguishing the sample from the general population. *Id.*

²⁹ See Emilee Davenport, Note, The Admissibility of DNA Evidence in Vermont Courts After Pfenning, 29 VT. L. REV. 1009, 1017 (2005) (recognizing PCR-STR analysis is "predominate" method used by American labs). Because PCR-STR tests can produce extremely likely match results, it is typically viewed as the most accurate method of DNA analysis. *Id.*

³⁰ See Commonwealth v. Curnin, 565 N.E.2d 440, 446-48 (Mass. 1991) (describing RFLP analysis); Davenport, *supra* note 29, at 1016-17 (describing similarities between two models of analysis); Riley, *supra* 21 and accompanying text (detailing RFLP analysis process); see also State v. Traylor, 656 N.W.2d 885, 889 (Minn. 2003) (elaborating on PCR-STR test process). The testing process can be broken down into five parts. Traylor, 656 N.W.2d at 889. Like the other methods previously discussed, the DNA must first be extracted and separated from its source. See Hicks, 103 F.3d at 844-45; Curnin, 565 N.E.2d at 446-48; Traylor, 656 N.W.2d at 889 (noting first step of testing process); Davenport, *supra* 21 and accompanying text (detailing RFLP and PCR testing procedures). Second, technicians determine how much isolated DNA is available. Traylor, 656 N.W.2d at 889. Third, the strands of DNA are copied during the amplification period. *Id.* Fourth, the copied strands are separated based on size. *Id.* Finally, the sizes of the STR fragments are determined and can be used for comparison purposes. *Id.*

³¹ See Davenport, *supra* 29, at 1016 (finding STRs are targeted because of their varying length amongst human population). Because short tandem repeats are a different length in each individual, analyzing large sample sizes "allows for identification." Traylor, 656 N.W.2d at 889.

³² See Davenport, *supra* 29, at 1017 (commenting on reliability of and praise for PCR-STR method).

³³ See Riley, *supra* 20 (describing how PCR testing generally is subject to cross-contamination). Riley asserts that "[g]ood PCR technique is no guarantee that contamination didn't influence the results." *Id.* Because STRs lack immune systems, they may be particularly susceptible to contamination. *Id.* Furthermore, if steps are not taken to detect contamination, it could very easily go unnoticed. *Id.*

testing, focuses on the great potential for contamination that can occur during the testing process.³⁴

C. DNA Evidence Criticism

The use of DNA evidence in court proceedings has been closely scrutinized for a variety of reasons.³⁵ A frequent critique has been the potential for crime lab errors that lead to erroneous results.³⁶ During the past decade, there have been a number of incidents throughout the United States in which DNA testing was compromised and inaccurate results were produced.³⁷ If the crime lab assigned to analyze a DNA sample commits an error, whether it is intentional or not, the potential arises for serious complications in the legal proceedings.³⁸ False positive results have the potential to lead to wrongful convictions.³⁹ The significant number of

³⁴ See *id.* (elaborating on contamination threat during testing).

³⁵ See generally Kimberley Cogdell Boies, *Misuse of DNA Evidence Is Not Always a "Harmless Error": DNA Evidence, Prosecutorial Misconduct, and Wrongful Conviction*, 17 *TEX. WESLEYAN L. REV.* 403, 411-20 (2011) (listing various problems associated with DNA evidence). Boies suggests a litany of concerns that exist and complications that can arise with the introduction of DNA evidence. *Id.* These issues range from those that are purely scientific in nature to those that are associated with courts and jurors. *Id.* Specifically, she points to inadequate amounts of DNA, false positive results, intentional crime lab fabrications, and juror confusion as issues of primary concern. *Id.*

³⁶ See William C. Thompson, *Tarnish on the 'Gold Standard': Understanding Recent Problems in Forensic DNA Testing*, *CHAMPION*, Jan./Feb. 2006, at 10-11 (discussing problem of botched lab work being used in criminal proceedings).

³⁷ See *id.* at 10-12 (enumerating various examples of mistaken crime lab work). Several high profile incidents of mishandled DNA testing emerged during the early 2000s. *Id.* at 10. For example, in Houston, Texas in 2003, the Houston Police Department shut down a local crime lab that had produced dozens of test results that other labs were unable to confirm. *Id.* Most disturbingly, two men were wrongfully incriminated of crimes based on these faulty results. *Id.* Thompson notes several other incidents that occurred throughout the country in places such as Virginia, Seattle, and North Carolina in which labs failed to conduct accurate tests. *Id.* Further, Thompson argues that these incidents are not indicative of any new problems with DNA testing that have only arisen over the past decade, but rather that they always existed and are only now being recognized. *Id.* at 11.

³⁸ See *id.* (finding numerous incidents of wrongful convictions and incriminations based on false DNA analysis).

³⁹ See *id.* at 10 (noting several incidents of use of fallacious DNA evidence in criminal proceedings). The 1984 Virginia case of Earl Washington, Jr., a mentally handicapped man who was falsely convicted of murder and sentenced to death, is particularly noteworthy. *Id.*; see also *Washington v. Commonwealth*, 323 S.E.2d 577, 589 (Va. 1984) (detailing grounds for Washington's appeal). Washington's initial conviction was upheld due to incorrect DNA analysis. *Washington*, 323 S.E.2d at 589 (affirming conviction and refusing to commute death sentence); Thompson, *supra* note 36, at 10-12. After learning of the false DNA results, Governor James Gilmore issued an absolute pardon for Washington's murder conviction, and Washington was released from prison on February 21, 2001. See *Earl Washington*, *THE INNOCENCE PROJECT*, http://www.innocenceproject.org/Content/Earl_Washington.php (last visited Dec. 1,

incidents in which wrongful convictions have been secured based on faulty lab work calls into question whether DNA evidence should be so readily relied upon.⁴⁰

Some errors in DNA testing may result more from the sample itself than from human error.⁴¹ As discussed, PCR testing, which is the preferred method, does not require a large sample size of DNA.⁴² While many view this point as a major advantage of using this test, one of the drawbacks that it carries is the fact that water and other substances used during the amplification process are vulnerable to contamination.⁴³ Without proper oversight of the testing procedure, the risk exists that a contaminated DNA sample is being analyzed.⁴⁴

A third problem with DNA evidence arises from the lay-people who comprise juries.⁴⁵ Research shows that jurors often fail to properly interpret probability statistics that commonly accompany introduction of DNA evidence and are easily swayed by how these numbers are offered.⁴⁶ Consequently, jurors can very easily misinterpret any statistical data

2012) (detailing Washington's case and exoneration).

⁴⁰ See Thompson, *supra* note 36, at 10-12 (questioning supposed infallibility of DNA evidence). Throughout his article, Thompson refers to DNA evidence as "the gold standard" because of how many interpret it. *Id.* at 11. However, he poses the question as to why it should be viewed this way if in fact there is such overwhelming evidence that it has numerous deficiencies. *Id.*; see also Bolden, *supra* note 2, at 424-25 (calling for reevaluation of DNA's reliability).

⁴¹ See Boies, *supra* 35, at 412 (referencing contamination problems with small DNA samples). Boies specifically addresses issues that may arise with PCR testing due to the small size of the required sample. *Id.*

⁴² See Porch, *supra* note 25, at 1243 (describing need for only small DNA sample with PCR method).

⁴³ See Boies, *supra* note 35, at 411-12 (detailing potential sources of contamination). This point is not to say that such contamination is completely unavoidable. *Id.* at 412. If the proper steps are taken, such contamination concerns can be avoided. *Id.* However, as Boies points out, labs follow different oversight standards and do not all follow the same procedures, hence the danger exists for inconsistency. *Id.*

⁴⁴ See *id.* at 411-12 (discussing need for caution when conducting PCR analysis due to contamination risk).

⁴⁵ See *id.* at 416-20 (describing problems that can arise when presenting DNA evidence to jurors). Boies notes the so-called "CSI effect" and juror confusion as two primary concerns. *Id.*

⁴⁶ See Laurie Meyers, The Problem with DNA, MONITOR ON PSYCHOL., June 2007, at 52, available at <http://www.apa.org/monitor/jun07/problem.aspx> (discussing indications that people in general are apt to misinterpret statistics). According to Meyers, studies have shown that statistical evidence concerning DNA is often misinterpreted. *Id.* She gives an example where jurors were more impressed when told that the probability of a match was 0.1 in 100 as opposed to one in 1000, despite the fact that they are equal. *Id.* She further elaborates that jurors often assume that an individual must be the only potential match when they hear probabilities such as one in ten billion, because they assume it covers everyone without realizing that it is just a statistical probability and not a definite result. *Id.*

concerning the likelihood of a DNA match.⁴⁷ Researchers have also identified a similar problem with jurors, dubbed the “CSI Effect.”⁴⁸ Coined after the popular television crime drama, *Crime Scene Investigation*, the so-called effect describes the emphasis jurors tend to place on DNA in what they perceive as concrete, infallible evidence.⁴⁹ This effect is in large part due to the program’s unrealistic and uninformative portrayal of DNA analysis.⁵⁰ Additionally, jurors may at times expect to be presented with DNA evidence and give less credibility to a case in which it is not utilized.⁵¹ As a safeguard against these concerns, some courts have taken it upon themselves to educate jurors on how to properly interpret the presence or lack of DNA evidence.⁵²

III. CONFLICTING CONCEPTS

A. Statutes of Limitations

The federal government and almost all fifty states have statutes of limitations pertaining to criminal offenses.⁵³ Primarily an invention of American law, criminal statutes of limitations have long played an

⁴⁷ See Meyers, *supra* note 46, at 52 and accompanying text (noting problems juries may have interpreting statistical information).

⁴⁸ See Boies, *supra* note 35, at 416-17 (describing basis for “CSI Effect”). The television drama *Crime Scene Investigation* often portrays the use of DNA analysis. *Id.* As a result, many jurors have come to expect DNA evidence to be introduced at trial, and some studies suggest that jurors place an undue level of reliance on such analysis. *Id.* at 417.

⁴⁹ See *id.* at 416 (noting influence of effect). Boies notes that one particular study showed jurors “found DNA evidence to be 95% accurate and 94% persuasive.” *Id.* On the contrary, she notes that other studies have shown that jurors do not place any overemphasis on DNA. *Id.* However, this danger still exists and courts must remain vigilant to prevent juror bias. *Id.*

⁵⁰ See *id.* at 417 (commenting that *Crime Scene Investigation* does not give jurors better understanding of DNA).

⁵¹ See *id.* at 416-17 (noting problem of jurors assuming DNA evidence is routinely introduced).

⁵² See *Kelly v. State*, 6 A.3d 396, 411 (Md. Ct. Spec. App. 2010) (instructing jurors how scientific information should be interpreted). In *Kelly*, the presiding judge instructed the jurors during voir dire to identify themselves if they were unable to assess the defendant without scientific data. *Id.*; see also *United States v. Gentles*, 619 F.3d 75, 82 (1st Cir. 2010) (holding mention of “CSI Effect” not prejudicial enough to warrant mistrial); *Commonwealth v. Seng*, 924 N.E.2d 285, 295-96 (Mass. 2010) (finding judge appropriate in cautioning jury against drawing negative inference from lack of forensic testing).

⁵³ Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 WM. & MARY L. REV. 199, 249-50 (1995) (noting prevalence of statutes of limitations in American legal system). However, Adlestein does mention that because statutes of limitations are legislative creations, each state approaches them differently causing them to vary in length on a state-by-state basis. *Id.* at 250 n.223 (providing examples of differences among states).

important role in the justice system.⁵⁴ Specifically, statutes of limitations aim to ensure that individuals do not have to defend themselves against facts and accusations that may have occurred so long ago that they are now difficult to contest.⁵⁵ Though capital offenses, namely murder, typically do not have a statute of limitations, most other crimes employ a set time limit to ensure that the individual defendant is protected against overly prolonged prosecution.⁵⁶ Additionally, courts have often emphasized the need for law enforcement to conduct swift and effective investigations of crimes as an important rationale behind criminal statutes of limitations.⁵⁷

Numerous other reasons have been proposed as to why statutes of limitations are important and necessary components of criminal justice proceedings.⁵⁸ Whether these reasons are to protect the rights of the accused, to appease the public, or to serve as a means of more effectively pursuing and prosecuting offenders, there is little doubt that criminal

⁵⁴ See *id.* at 249-55 (discussing origins of statutes of limitations). Unlike much of American law, statutes of limitations did not originate in English law. *Id.* at 254-55. Instead, their origins in the United States can be traced to the First Congress. *Id.* at 252.

⁵⁵ See *Toussie v. United States*, 397 U.S. 112, 114-15 (1970) ("The purpose of a statute of limitation is to limit exposure to criminal prosecution to a certain fixed period of time 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 and to minimize the danger of official punishment because of acts in the far-distant past."); see also *United States v. Scharton*, 285 U.S. 518, 521-22 (1932) (stating that criminal statutes of limitations should be "liberally interpreted in favor of repose"). In *Scharton*, the Court insisted that statutory crimes should not be extended to include offenses not within their bounds. *Id.* at 522.

⁵⁶ See, e.g., ME. REV. STAT. tit. 17-A, § 8 (2011) (excusing murder and various sex crimes from statute of limitations); MASS. GEN. LAWS ch. 277, § 63 (2012) (noting murder and many violent crimes do not carry statute of limitations); MISS. CODE ANN. § 99-1-5 (West 2010) (excluding numerous felonies from statute of limitations). Courts have cited the intolerability of allowing a murderer to escape justice due to the mere passage of time as the main purpose for not having a statute of limitations for such offenses. *United States v. Gallaher*, 624 F.3d 934, 942 (9th Cir. 2010) (citing *United States v. Quinones*, 196 F. Supp. 2d 416, 418 (S.D.N.Y. 2002)). For most crimes, however, the goal remains to protect individuals from defending against accusations from long in the past. See cases cited *supra* note 55 (quoting Supreme Court's rationale for criminal statutes of limitations).

⁵⁷ See *Toussie*, 397 U.S. at 114-15 (suggesting statutes of limitations encourage law enforcement to speedily conduct investigations); *Adlestein*, *supra* note 53, at 262 (mentioning effect of evidence preclusion encourages swift investigations by law enforcement).

⁵⁸ See *Adlestein*, *supra* note 53, at 264-65 (outlining justifications for time bar on certain offenses). During the adoption period of the Model Penal Code, the American Law Institute considered five main reasons that justify statutes of limitations. *Id.* First, and most importantly, there exists a need to prosecute a case based on fresh evidence. *Id.* at 265. Second, there is a belief that as time passes, the need to punish lessens. *Id.* Third, society is likely to be inclined to feel more sympathy for a defendant brought up on charges that occurred long in the past. *Id.* Fourth, the less time there is to wait for prosecution, the less chance there is of blackmail on behalf of one who knows of the offense. *Id.* Lastly, such statutes encourage faster action of justice and thus create a more secure and harmonious society. *Id.*

statutes of limitations have long received a great deal of support from American lawmakers and court officers.⁵⁹ Nonetheless, criminal statutes of limitations are not a constitutionally protected right.⁶⁰

Despite the longstanding support for criminal statutes of limitations, there are those who view them as outdated and unnecessary as a result of several legal developments.⁶¹ These views reflect the current attitudes on criminal punishment that are focused primarily on retribution as opposed to rehabilitation, which some argue is embodied by legal mechanisms such as John Doe DNA indictments.⁶² This shift in opinion has been accompanied by a willingness to extend or abolish criminal statutes of limitations, effectively eroding a deep-rooted component of the justice system.⁶³

⁵⁹ See *id.* (listing arguments in favor of criminal statutes of limitations).

⁶⁰ Adlestein, *supra* note 53, at 250 (“No jurisdiction has held that criminal statutes of limitations are mandatory; they are solely a matter of legislative choice.”).

⁶¹ See Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 135-36 (2008) (presenting argument that technological advances render many evidentiary concerns moot). Citing an article by Paul H. Robinson and Michael T. Cahill, Powell points out that many criticize criminal statutes of limitations because prosecutors now have the resources available to eliminate many of the past concerns of the reliability of stale evidence. *Id.* at 136. Powell, on the other hand, believes that many have shifted their support away from criminal statutes of limitations because of changing opinions on how best to deal with crime. *Id.* Attitudes have recently moved towards a “get-tough-on-crime” approach, whereas thirty to forty years ago there was an emphasis on the rehabilitative aspects of the criminal justice system. *Id.*; see also *Robinson v. California*, 370 U.S. 660, 667 (1962) (recognizing drug addiction as illness for which incarceration is cruel and unusual punishment); *Williams v. New York*, 337 U.S. 241, 248 (1949) (asserting “reformation and rehabilitation” as primary goals of criminal law as opposed to retribution). While the view expressed in *Williams* was the predominant one throughout the mid-twentieth century, it was entirely supplanted by those seeking retributive goals through the criminal justice system. See Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 9-11 (2003) (noting paradigmatic shift in rationale for criminal punishment).

⁶² See Alschuler, *supra* note 61, at 9-11 and accompanying text (discussing modern attitudes toward crime); Powell, *supra* note 61, at 136 (acknowledging argument that innovations such as John Doe indictments reflect new technologies and criminal philosophies). Powell disputes the argument that exceptions to statutes of limitations can be explained solely by the technological advances that have resulted in DNA indictments. See Powell, *supra* note 61, at 136.

⁶³ See James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 HOUS. L. REV. 1205, 1223-26 (2004) (commenting that several states have sought to reform criminal statutes of limitations). DiFonzo argues that technological advances will allow states to continue creating exceptions to statutes of limitations. *Id.* at 1220-21. For example, Utah greatly expanded the statute of limitations period for a number of crimes, and former New York Governor George Pataki advocated for a bill that would have completely eliminated the statute of limitations on various violent crimes, including first-degree rape, manslaughter, and assault. *Id.* at 1225-26.

B. The Fourth Amendment Particularity Requirement

Another important legal aspect when considering "John Doe" DNA indictments is the Fourth Amendment's particularity requirement.⁶⁴ The complete history of the Fourth Amendment is a long and complicated one that has continued to evolve since its inception in the late 1700's.⁶⁵ For the purposes of discussing John Doe indictments, it is best to focus on what has been dubbed the "particularity requirement."⁶⁶ This clause reads, "[N]o warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."⁶⁷ The issue of what will constitute a particular description, especially with regard to warrants, has been debated and contested for over a century.⁶⁸

The purpose behind the particularity requirement is to ensure that searches and seizures supported by a warrant based on probable cause will be restricted to the authorization of those places and people that are

⁶⁴ See 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." (emphasis added)).

⁶⁵ See generally Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 933-1036 (2010) (tracing development of Fourth Amendment and its different interpretations). Throughout his extensive piece, Davies examines how the Fourth Amendment experienced a constant course of change since its inception, evolving into a doctrine concerned primarily with criminal arrests. *Id.* at 941, 1037.

⁶⁶ See *People v. Robinson*, 224 P.3d 55, 60, 80 (Cal. 2010) (analyzing whether unknown suspect's DNA profile fulfills particularity requirement). As one of the most recent decisions in the area of DNA indictments, one of the main focuses in *Robinson* was determining whether or not the particularity requirement was met solely by including a DNA profile. *Id.* at 60-61. Accordingly, the issue is central to understanding the arguments for and against such indictments. See *id.* at 73-75.

⁶⁷ U.S. CONST. amend. IV (emphasis added)..

⁶⁸ See *West v. Cabell*, 153 U.S. 78, 85 (1894) (holding warrant must name or sufficiently describe individual in question); see also Bernasconi, *supra* note 5, at 1024-26 (noting potential constitutional infringement from use of DNA indictments); Hunter, *infra* note 78, at 624 and accompanying text (discussing how failure to affix name does not fail to meet particularity requirement); Ulmer, *supra* note 6, at 1601-02 (finding DNA profiles satisfy particularity test). In *West v. Cabell*, the Supreme Court famously held that an arrest warrant intended for one man, but incorrectly naming him and failing to sufficiently describe him, failed to meet the requirements set forth by the Fourth Amendment. 153 U.S. at 85. The plaintiff in *Cabell* was arrested under a warrant bearing the name James West. *Id.* The plaintiff's name was actually Vandy M. West, and he had never gone by the first name "James." *Id.* The defendant argued that the plaintiff was the intended target of the warrant, but the Court ultimately held that notwithstanding the issuing authority's intent to place the plaintiff on the warrant, it was invalid for failure to properly name or sufficiently describe him. *Id.*

permissible to search.⁶⁹ As a whole, the Fourth Amendment was designed to protect against general searches and unrestrained seizures.⁷⁰ By ensuring that a suspect is adequately described, the Amendment's goals are satisfied.⁷¹

C. *The Sixth Amendment Right to a Speedy Trial*

It is also necessary to examine the Sixth Amendment and its so-called "Speedy Trial" Clause when discussing prolonged, un-named indictments.⁷² The first portion of the Sixth Amendment guarantees a criminal defendant the right to a "speedy" trial.⁷³ In *Barker v. Wingo*,⁷⁴ the Supreme Court held that to determine whether the rights of a criminal defendant have been violated, the conduct of both the prosecution and defense should be weighed against each other.⁷⁵ The Court also identified four key factors to be considered when balancing the behavior of both parties: "[l]ength of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."⁷⁶

⁶⁹ See *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (detailing purpose of "Warrant Clause" in Fourth Amendment). This portion of the Fourth Amendment acts as a check on "wide-ranging exploratory searches" that the Framers of the Constitution specifically sought to avoid. *Id.* Only those individuals who are specifically sought after by a warrant should be subject to its intrusions. *Id.* at 84-85.

⁷⁰ See *Stanley v. Georgia*, 394 U.S. 557, 569 (1969) (Stewart, J., concurring) (stating original purpose of Fourth Amendment). Justice Stewart noted that early American colonialists were routinely subject to personal invasions by agents of the British crown as a key reason for the inclusion of the Fourth Amendment in the Bill of Rights. *Id.*

⁷¹ See *Garrison*, 480 U.S. at 84 (discussing purpose of particularity requirement).

⁷² U.S. CONST. amend. VI ("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" (emphasis added)). Some critics of John Doe indictments argue that by allowing a warrant to exist indefinitely until a name is affixed to it, the Speedy Trial Clause is violated. See *Bernasconi*, *supra* note 5, at 1024-26. The presumably lengthy delay between a John Doe indictment and an arrest would, some contend, conflict with the Sixth Amendment's protections for defendants who face extraordinary delays before they are tried. *Id.* at 1024-25.

⁷³ U.S. CONST. amend. VI.

⁷⁴ 407 U.S. 514 (1972).

⁷⁵ *Id.* at 530 (adopting new test for evaluating potential Sixth Amendment violations). Prior to *Barker*, courts determined that a defendant who failed to demand a speedy trial subsequently waived that right. *Id.* at 527-28. The Court noted, however, that a defendant still has some obligation to assert her right to a speedy trial. *Id.* at 528.

⁷⁶ *Id.* at 530 (outlining factors of new Sixth Amendment balancing test). The Court cited the length of the delay as the factor that would set off an initial inquiry. *Id.* The issue of a delay is highly fact-dependent; if the prosecution delays the trial to hinder the defense, it will weigh heavily against them, whereas the absence of a key witness would not. *Id.* at 530-31. As to the defendant's responsibility to assert his right, the Court stated that a defendant's failure to raise a delay defense would make it difficult to later prove that he was denied any constitutional rights.

The Sixth Amendment is designed to ensure that criminal defendants avoid prolonged pre-trial detention, extended public humiliation resulting from being accused of a crime, and being forced to defend themselves either with or against deteriorated evidence.⁷⁷ Arguably, each of these goals is impacted by the use of DNA indictments.⁷⁸ However, no court has invalidated the use of these indictments on Sixth Amendment grounds alone.⁷⁹

IV. JOHN DOE INDICTMENTS

John Doe warrant indictments existed long before the advent of DNA testing technology.⁸⁰ Initially, questions existed as to whether a description of a suspect without an accompanying name would suffice.⁸¹ Courts have since made it clear that so long as the best possible description

Id. at 531-32. Lastly, prejudice to the defendant is measured relative to three main interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." Id. at 532.

⁷⁷ See *United States v. Ewell*, 383 U.S. 116, 120 (1966) (stating these three reasons as grounds for right to speedy trial); Bernasconi, *supra* note 5, at 1018 (listing primary purposes behind Sixth Amendment). Bernasconi notes that while there are other rationales behind the Sixth Amendment, these are the three that are most commonly addressed. Bernasconi, *supra* note 5, at 1018. One other less cited rationale is society's interest in seeing that a defendant is quickly brought to trial to prevent him from committing an additional crime in the interim period. Id. at 1018 n.252.

⁷⁸ See Bernasconi, *supra* note 5, at 1024-26 (discussing potential constitutional infringements from DNA indictments). If a DNA profile sufficiently describes an individual the right to a speedy trial should attach when the indictment is filed, despite the fact that the defendant's liberty is not restrained and the public is unaware of the charge. Id. at 1025-26; *see also* *United States v. Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eye-witness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."). But see Seth T. Hunter, Note, Do DNA Descriptions Provide Sufficient Information to Prevent the Statute of Limitations From Running?, 33 AM. J. TRIAL ADVOC. 599, 624 (2010) (arguing no violation of constitutional rights). Hunter posits that there is no Sixth Amendment violation due to the use of a John Doe DNA indictment no matter how long the delay. Hunter, *supra*, at 624. Because memories relating to violent and sexual assault crimes are unlikely to fade in the minds of witnesses and victims, and the police purportedly have a legitimate purpose in delaying the trial while searching for the true suspect, Hunter argues that there is no constitutional infringement. Id. at 624-26.

⁷⁹ See generally Sucherman, *supra* note 3, at 897-912 (recounting outcome of challenges to DNA indictments in several states). Courts in Wisconsin, Ohio, New York, Kansas, and California have all examined and affirmed Sixth Amendment challenges to John Doe DNA indictments. Id.; *see also* *Commonwealth v. Dixon*, 938 N.E.2d 878, 880 (Mass. 2010) (holding in favor of DNA indictments).

⁸⁰ See *Commonwealth v. Crotty*, 92 Mass. 403, 404-05 (1865) (holding warrant may be issued without affixing subject's true name). The Crotty court held that a warrant was valid if the "best" possible description of a suspect was provided, despite the name being inaccurate. Id.

⁸¹ *See id.* (discussing need for sufficient suspect description).

of a suspect is provided—whether describing his residence, place of business, or some other sufficient means of identification—the warrant is valid.⁸²

The requirement that an indictment or warrant must sufficiently describe an individual remains in effect today.⁸³ However, simply indicting a “John Doe” without any description of the accused and later seeking to amend the warrant with the suspect’s name does not pass constitutional muster.⁸⁴ In recent years, courts have begun to accept the idea that a genetic profile of an individual suspect is a satisfactory description.⁸⁵

In *State v. Dabney*,⁸⁶ Wisconsin’s appellate court affirmed the use of DNA indictments and became the first state in the country to rule on the issue.⁸⁷ This decision was followed by those in several other states, including California, Kansas, Massachusetts, New York, and Ohio.⁸⁸ To

⁸² See cases cited *infra* notes 83-84 (detailing sufficient means of description other than suspect’s name); see also *Crotty*, 92 Mass. at 405 (same).

⁸³ See *Dixon*, 938 N.E.2d at 884 (Mass. 2010) (following prior decisions allowing for descriptive content short of true name). In *Dixon*, Massachusetts became the most recent state to uphold the constitutionality of DNA indictments. *Id.* at 880-81.

⁸⁴ *Connor v. Commonwealth*, 296 N.E.2d 172, 175 (Mass. 1973) (“It is an inescapable conclusion that the indictment must contain words of description which have particular reference to the person whom the Commonwealth seeks to convict. No matter how extensively or specifically the defendant was described in grand jury proceedings, the constitutional requirement can be met only by a sufficient description in the indictment itself.”). The key element of the warrant is that it must not be general. See *Commonwealth v. Laventure*, 894 A.2d 109, 118-119 (Pa. 2006) (invalidating warrant for vagueness). The only two things that must be particularly described in a warrant are the place to be searched and the individual or things to be seized. *United States v. Grubbs*, 547 U.S. 90, 97 (2006).

⁸⁵ See *Ulmer*, *supra* note 6, at 1602 (noting many jurisdictions employing DNA indictments have held them to be sufficiently descriptive). *Ulmer* notes that warrants and indictments are treated in virtually the same manner when dealing with DNA descriptions. *Id.* at 1601-02.

⁸⁶ 663 N.W.2d 366 (Wis. Ct. App. 2003).

⁸⁷ *Id.* at 369-74 (describing circumstances of case). The court in *Dabney* found that the particular physical characteristics of the suspect would be useful to enhance “the completeness of the complaint and warrant.” *Id.* at 372. However, the court found the DNA profile descriptive enough to satisfy the particularity requirement, and the exclusion of physical characteristics did not invalidate the warrant. *Id.*; see also *Sucherman*, *supra* note 3, at 897 (noting *Dabney* considered first appeal of John Doe DNA arrest warrant).

⁸⁸ See, e.g., *People v. Robinson*, 224 P.3d 55, 80 (Cal. 2010) (finding statute of limitations was met with use of DNA indictment); *State v. Belt*, 179 P.3d 443, 450-51 (Kan. 2008) (agreeing with concept of DNA indictments but reversing conviction due to insufficiency of warrant); *Dixon*, 938 N.E.2d at 880-81 (Mass. 2010) (affirming DNA warrant based conviction); *People v. Martinez*, 855 N.Y.S.2d 522, 527-28 (N.Y. App. Div. 2008) (affirming conviction based on arrest made with John Doe DNA warrant); *State v. Danley*, 138 Ohio Misc. 2d 1, 7 (Ct. Com. Pl. 2006) (denying motion to dismiss DNA indictment based on Sixth Amendment argument). The second court to examine this issue was Ohio’s Court of Common Pleas in *State v. Danley*, 138 Ohio Misc. 2d at 5 (examining only prior decision on issue). The court’s decision closely analyzed whether a John Doe DNA indictment violated the Sixth Amendment and concluded that it did not. *Id.* at 7-8. In *People v. Martinez*, the New York Supreme Court’s Appellate Division held

date, each of these courts has ruled in favor of the constitutionality of DNA indictments for varying reasons.⁸⁹

Some courts have been reticent to declare that a genetic profile alone, without any other descriptive content, satisfies the Fourth Amendment notice requirement.⁹⁰ While still affirming the overall constitutionality of the use of DNA as part of the description process, these courts have hinted that some accompanying identification of the suspect, potentially in the form of a physical description, may be necessary.⁹¹ This particular issue has not been explicitly addressed in any state, and courts have not found the use of DNA indictments to be an impediment to a defendant's constitutional right to notice.⁹²

V. ANALYSIS

The principal criticism of John Doe DNA indictments is the combination of the flaws of DNA evidence and the potential for long periods between the commission of a crime, the filing of an indictment based on a genetic profile, and a subsequent affixation of the defendant's name to the indictment.⁹³ As noted, the preferred method of DNA analysis

that the defendant's constitutional right to notice was satisfied when his indictment was unsealed, and there is no requirement that he be referred to by name for the notice requirement to be met. 855 N.Y.S.2d at 525. The Supreme Court of Kansas held in *State v. Belt* that while the concept of DNA indictments is constitutionally valid, the execution was improper in this specific case because the warrant failed to describe the defendant with any particularity. 179 P.3d at 450-51. In *People v. Robinson*, the California Supreme Court held that the Fourth Amendment particularity requirement is satisfied by listing a DNA profile partly because it prevents seizing something not identified in the warrant. 224 P.3d at 80. Finally, in the most recent example of a state affirming the use of DNA indictments, the Massachusetts Supreme Judicial Court acknowledged in *Commonwealth v. Dixon* that there are problems that defendants face when subjected to these indictments, but these issues do not invalidate their use. 938 N.E.2d at 888.

⁸⁹ See cases cited *supra* note 88 and accompanying text (describing cases holding DNA arrest warrants and indictments constitutionally valid).

⁹⁰ See *Dixon*, 938 N.E.2d at 884 n.16 (declining to answer whether genetic profile alone suffices for constitutional purposes); *Dabney*, 663 N.W.2d at 372 (acknowledging merits of argument that more description may be useful). The Wisconsin Court of Appeals in *Dabney* agreed with the defendant that without any description beyond a DNA profile, a suspect might not be on notice that the profile is his. 663 N.W.2d at 372. Some further description may be necessary in cases where there is no additional description. *Id.* Similarly, the Massachusetts Supreme Judicial Court in *Dixon* followed the approach set forth in *Dabney* and declined to even address the issue. 938 N.E.2d at 884 n.16.

⁹¹ See cases cited *supra* notes 88, 90 and accompanying text (noting possibilities of further descriptions suggested by *Dabney* and *Dixon* courts).

⁹² See *Sucherman*, *supra* note 3, at 901 (recognizing notice has not acted as barrier to DNA warrants); see also *Martinez*, 855 N.Y.S.2d at 526 (finding right to notice not impeded).

⁹³ See *Bernasconi*, *supra* note 5, at 983-84 (explaining risks of inaccurate DNA evidence); *Roth*, *supra* note 4, at 1145-46 and accompanying text (voicing concerns about DNA

is PCR-STR testing.⁹⁴ Despite being the method that most researchers use, PCR-STR is the most susceptible to contamination and inaccurate results.⁹⁵ This problem is compounded when considered alongside other issues that can occur during long gaps between crimes and trials, such as the loss of critical evidence and the fading of witness's memories.⁹⁶ Considering the recently documented incidents of botched DNA lab work, and that juries tend to place a strong emphasis on the results of such work as presented at trial, defendants face a difficult task in producing convincing rebuttal evidence after a long period of time has passed.⁹⁷

Aside from the practical implications of the use of John Doe DNA indictments, there are specific constitutional concerns that deserve attention.⁹⁸ The issue of whether indicting a DNA sample conflicts with the Fourth Amendment's particularity requirement has been addressed by several courts, including the highest courts in Wisconsin and Massachusetts.⁹⁹ However, while no court has overturned a conviction acquired as a result a DNA indictment, none have specifically addressed whether a DNA sample alone could sufficiently describe a suspect.¹⁰⁰

indictments); Sangero & Halpert, *supra* note 5, at 45 and accompanying text (citing laboratory errors leading to wrongful convictions); Ulmer, *supra* note 6, at 1613-14 and accompanying text (discussing criticisms of John Doe DNA warrants and indictments).

⁹⁴ See *United States v. Hicks*, 103 F.3d 837, 845 (9th Cir. 1996) (commenting on nature of RFLP and PCR procedures), overruled by *United States v. Grace*, 526 F.3d 499, 503 (9th Cir. 2008); *Commonwealth v. Currin*, 565 N.E.2d 440, 446-447 (Mass. 1991) (detailing RFLP procedure); *State v. Traylor*, 656 N.W.2d 885, 889 (Minn. 2003) (describing PCR procedure); *Davenport*, *supra* note 29, at 1016-17 (describing two types of DNA analysis); *Porch*, *supra* note 25, at 1242-43 (contrasting PCR and RFLP testing methods and popularity); *Riley*, *supra* note 20 and accompanying text (describing evolution of PCR testing and reasons for popularity in scientific community); *Smith & Gordon*, *supra* note 1, at 2471 (noting drawbacks of PCR testing).

⁹⁵ See *Smith & Gordon*, *supra* note 1, at 2471-72 (elaborating on problems associated with PCR-STR testing).

⁹⁶ See *Ulmer*, *supra* note 6, at 1614-15 (listing ways evidence may be compromised during time prior to trial). *Ulmer* contends that the older the crime, the greater the chance that an important piece of evidence has been lost, destroyed, or compromised in some other way. *Id.* at 1613-14. Furthermore, *Ulmer* argues that with the passage of time it becomes increasingly difficult for a defendant to conduct his own DNA testing to rebut earlier test results gathered by the prosecution. *Id.* at 1617-19.

⁹⁷ See *Boies*, *supra* note 35, at 416-17 (describing DNA lab errors and juror bias toward DNA); *Thompson*, *supra* note 36, at 10-12 (same).

⁹⁸ See *People v. Robinson*, 224 P.3d 55, 60-61, 80 (Cal. 2010) (analyzing whether Fourth Amendment particularity requirement met by DNA indictments); *Bernasconi*, *supra* note 5, at 1024-26 (discussing potential constitutional infringements from DNA indictments). *But see Hunter*, *supra* note 78, at 624 (arguing DNA indictments do not violate constitutional rights).

⁹⁹ See cases cited *supra* notes 86-88 and accompanying text (recounting different court rulings on John Doe DNA indictments).

¹⁰⁰ See cases cited *supra* note 90 and accompanying text (noting decisions in Wisconsin and Massachusetts declined to address issue).

Similarly, no court has found such an indictment invalid on the grounds that it violated a defendant's fundamental right to a speedy trial under the Sixth Amendment.¹⁰¹ Likewise, no decision has held that the delay between indicting a defendant's DNA sample and later attaching his name to the indictment constitutes an unreasonable delay that subjects him to prolonged detention, public humiliation, or a trial involving decayed evidence.¹⁰² Some commentators have taken a hard-line approach and insist that these indictments present no constitutional violation, as they are most often used in prosecutions of violent or sexual assault crimes—events witnesses are unlikely to forget.¹⁰³ Furthermore, some courts have chosen to pass on the Sixth Amendment issue altogether.¹⁰⁴

One of the essential rationales behind the Sixth Amendment's Speedy Trial Clause is to counter the possibility that a criminal defendant could be forced to either contend against or rely upon deteriorated evidence.¹⁰⁵ DNA indictments conflict with this notion because they can potentially delay a trial for many years, thereby placing the defendant in the unenviable position of producing evidence that has not been affected by the passage of time.¹⁰⁶ Nonetheless, courts have not found this argument compelling enough to deem DNA indictments unconstitutional.¹⁰⁷

A clash also exists between John Doe DNA indictments and

¹⁰¹ See *Commonwealth v. Dixon*, 938 N.E.2d 878, 880 (Mass. 2010) (holding in favor of DNA indictments); Sucherman, *supra* note 3, at 897-912 (recounting court decisions examining Sixth Amendment challenges to DNA indictments).

¹⁰² See *United States v. Ewell*, 383 U.S. 116, 120 (1966) (stating rationales behind Sixth Amendment right to speedy trial); cases cited *supra* note 88 and accompanying text (affirming DNA indictments); Bernasconi, *supra* note 5, at 1016-17, 1018 & n.252 (noting purpose of Sixth Amendment).

¹⁰³ See Hunter, *supra* note 78, at 623-24 (contending no conflict between Sixth Amendment and John Doe DNA indictments). Ignoring the fact that other critical evidence may be compromised, Hunter insists there is no constitutional problem, and instead focuses on the apparent infallibility of memories associated with a rape that may have happened years earlier. *Id.* at 624. In turn, he erroneously asserts that there is no adverse effect on the defendant's case because witnesses will likely still be reliable. *Id.* Furthermore, this argument disregards the fact that eyewitness testimony has a history of being unreliable. See *United States v. Wade*, 388 U.S. 218, 228 (1967) (noting eyewitness testimony is imperfect).

¹⁰⁴ See *People v. Robinson*, 224 P.3d 55, 79 (Cal. 2010) (suggesting there is no constitutional prohibition against indictments); *Commonwealth v. Dixon*, 938 N.E.2d 878, 889 (Mass. 2010) (suggesting legislature should determine whether existing safeguards in place for defendants are adequate).

¹⁰⁵ See *Ewell*, 383 U.S. at 120 (discussing basis for Speedy Trial Clause); Bernasconi, *supra* note 5, at 1018 & n.252 (explaining rationale underlying Sixth Amendment right).

¹⁰⁶ See Ulmer, *supra* note 6 and accompanying text (describing John Doe indictment mechanism and noting potential time gap between indictment and trial).

¹⁰⁷ See cases cited *supra* note 104 and accompanying text (detailing two courts that failed to find constitutional infractions).

statutes of limitations.¹⁰⁸ Critics argue that DNA indictments circumvent statutes of limitations and ignore their intended purpose of swiftly prosecuting offenders while simultaneously maintaining a fair justice system.¹⁰⁹ Conversely, proponents contend that the goals of statutes of limitations are not displaced when a John Doe indictment is issued because DNA evidence is preserved and will not differ in results, as its structure will not change within the defendant.¹¹⁰ Whereas opponents of these indictments may argue that they violate fundamental rights set forth by the Fourth and Sixth Amendments, no such argument exists with regard to statutes of limitations, because they are purely the result of legislation.¹¹¹ The question thus becomes whether John Doe DNA indictments delegitimize statutes of limitations and render them obsolete.¹¹²

DNA indictments run completely contrary to the notion that criminal statutes of limitations exist in part to afford defendants a fair opportunity to defend themselves.¹¹³ This purported fair opportunity dissipates once significant time has passed, and it becomes increasingly difficult for defendants to produce their own exculpatory evidence, especially when confronted with DNA evidence.¹¹⁴ During the Model Penal Code's adoption period, the American Law Institute cited the need to prosecute cases based on fresh evidence as the most important reason for having statutes of limitations.¹¹⁵ This reason, however, has been

¹⁰⁸ See Powell, *supra* note 61, at 127 (noting John Doe indictments exist as exception to federal statutes of limitations). So long as a DNA profile is indicted within the original statute of limitations, that period is tolled indefinitely until a name can be affixed to the indictment. *Id.* at 127-28.

¹⁰⁹ See *id.* at 128 (contending John Doe indictments ignore principals upon which statutes of limitations are based). Powell cites fairness to the defendant as a central goal of criminal statutes of limitations that is ignored by the allowance of DNA indictments. *Id.* at 133-34. Defendants are increasingly less likely to be able to adequately defend themselves when long periods of time are allowed to pass between an alleged incident and trial. *Id.*

¹¹⁰ See Hunter, *supra* note 78, at 606 (arguing no prejudice to criminal defendants because DNA evidence does not change). But see Boies, *supra* note 35, at 411-20 (suggesting problems with DNA evidence and questioning its infallibility); Meyers, *supra* note 46, at 52 (same); Porch, *supra* note 25, at 1243 (same); Riley, *supra* note 20 (same); Thompson, *supra* note 36, at 10-12 (same).

¹¹¹ See Adlestein, *supra* note 53, at 249, 250 & n.223 (noting statutes of limitations are legislatively enacted).

¹¹² See *supra* note 61 and accompanying text (discussing criticisms of statutes of limitations given new technologies). One commentator posits that many now view "the criminal statute of limitations as a relic of a bygone era" as a result of newfound abilities to preserve evidence. See Powell, *supra* note 61, at 135.

¹¹³ See *id.* at 127 (arguing adequate defense becomes more difficult with lapse in time).

¹¹⁴ See Boies, *supra* note 35, at 416 (detailing problems of jury interpretation of DNA); Ulmer, *supra* note 6, at 1613-14 (discussing problems of evidence decay);

¹¹⁵ See Adlestein, *supra* note 53, at 264-65 (recounting "fresh evidence" as foremost

neutralized to a great extent by DNA indictments.¹¹⁶

Assuming courts continue to uphold the validity of John Doe indictments, the first step in remedying concerns relating to them is to ensure that DNA testing is closely monitored and properly performed.¹¹⁷ It is crucial that DNA evidence, the centerpiece of these indictments, is accurate because a defendant who must answer to accusations levied years after they may have first been brought is placed at a tremendous disadvantage.¹¹⁸ Additionally, the trend of judicial instruction to juries on how to properly interpret and handle DNA evidence will need to continue.¹¹⁹ Juror misunderstanding of DNA evidence exacerbates its other flaws, thereby necessitating the need for clarity and proper instruction.¹²⁰

Much of the burden of ensuring that DNA evidence is properly tested and later admitted falls on defense attorneys.¹²¹ As is abundantly clear, criminal defendants are placed at the greatest disadvantage by DNA indictments.¹²² Ideally, defense lawyers, being the representatives of those most afflicted, will recognize the problems these indictments create and push for reforms in both the testing labs and the courts.¹²³

One solution for achieving greater compliance with the Fourth Amendment's particularity requirement may be to require that more than

importance for statutes of limitations).

¹¹⁶ See Bernasconi, *supra* note 5, at 990, 995, 999, 1024 (contending DNA indictments reduce need to prosecute based on fresh evidence).

¹¹⁷ See Thompson, *supra* note 36, at 12 (urging criminal defense attorneys to advocate for testing reform). Thompson points out that the labs in which some of the worst testing mishaps took place received little scrutiny and oversight from outside sources. *Id.* As a way of ensuring that the evidence is accurately analyzed, defense lawyers need to urge that these labs are closely supervised and the results are closely scrutinized in accordance with the Sixth Amendment. *Id.* at 12-13.

¹¹⁸ See *id.* (asserting need for accurate testing to preserve defendants' constitutional rights).

¹¹⁹ See cases cited *supra* note 52 and accompanying text (listing cases in which judges specifically addressed how to handle DNA evidence); see also Boies, *supra* note 35, at 416 (stating defense attorneys shoulder responsibility of ensuring jurors understand DNA evidence).

¹²⁰ See Boies, *supra* note 35, at 417 ("The adversarial nature of court proceedings enhances the problems when seemingly harmless inferential leaps are made This suppression of uncertainty could lead to serious errors by the jury.").

¹²¹ See Thompson, *supra* note 36, at 12-13 (encouraging defense lawyers to take active role in oversight efforts).

¹²² See Ulmer, *supra* note 6, at 1613-14 (noting problems defendants encounter when charged by DNA indictments).

¹²³ See Thompson, *supra* note 36, at 14-15 (arguing defense attorneys are best equipped to confront DNA issues). Defense lawyers often discover irregularities when reviewing cases. See *id.* at 14. As a result, they are in the best position to argue for reforms. See *id.* Thompson points to successful efforts in Virginia to establish oversight commissions for forensic laboratories as a model for future improvements. *Id.*

just a DNA sample be listed on the indictment itself.¹²⁴ The fact that some courts have hinted at the possibility that a genetic profile alone would not pass constitutional muster for descriptive notice purposes indicates that some measure of restraint is possible in the future.¹²⁵ However, as no court has definitively answered this question, it remains purely within the realm of conjecture whether any court will adopt such an approach in the future.¹²⁶

It is unlikely that John Doe DNA indictments will be sweepingly overturned on the grounds of Sixth Amendment violations, but rather a reversal is more likely on a fact driven, case-by-case evaluation.¹²⁷ A defendant would likely need to prove that the prosecution intentionally delayed the trial by waiting to affix a genetic profile to hinder the defendant's case.¹²⁸ Absent fraudulent prosecutorial intentions, the reason for the delay in trial would be legitimate because no name could be attached to the DNA sample at the time of collection.¹²⁹ Furthermore, the defendant would have to show actual prejudice on behalf of the prosecution, and courts have been reluctant to recognize similar arguments to date.¹³⁰

The argument for DNA indictment invalidation based on noncompliance with statutes of limitations will also fail, as these statutes are a product of legislative creation.¹³¹ If anything, John Doe DNA indictments and other technologically enhanced evidentiary devices could eventually phase out criminal statutes of limitations for many crimes.¹³² This end result would be a major upheaval in criminal justice, and would

¹²⁴ See cases cited *supra* note 90 and accompanying text (noting no court has completely addressed particularity issue). The courts in Dabney and Dixon both discussed the possibility that more than just a genetic profile may be needed to develop an adequate description. See *id.*

¹²⁵ See *id.* (examining Dabney and Dixon approaches to concern). The Dabney court indicated that notice might require more than just a description of a defendant's genetic profile. *State v. Dabney*, 663 N.W.2d 366, 372 (Wis. Ct. App. 2003). In Dixon, the Massachusetts Supreme Judicial Court followed the same approach. *Commonwealth v. Dixon*, 938 N.E.2d 878, 884 n.16 (Mass. 2010).

¹²⁶ See cases cited *supra* note 90 (noting courts that have examined issue).

¹²⁷ See *Barker v. Wingo*, 407 U.S. 514, 527-28, 530-32 (1972) (noting fact specific nature of Sixth Amendment violation challenges).

¹²⁸ See *id.* at 530-32 (detailing manner in which Sixth Amendment challenge may be brought).

¹²⁹ See *id.* (listing reason for delay as factor in determining whether violation took place).

¹³⁰ See Sucherman, *supra* note 3, at 897-912 (noting juror prejudice and outcomes of different DNA indictment cases).

¹³¹ See Adlestein, *supra* note 53, at 249, 250 & n.223 and accompanying text (explaining statutes of limitations are designed by legislatures).

¹³² See *supra* note 61 and accompanying text (detailing arguments that new technology renders statutes of limitations moot).

reverse years of practice and precedent.¹³³

VI. CONCLUSION

There is no denying that John Doe DNA indictments are an extremely powerful tool for prosecutors. They also give victims of violent and sexual assault crimes the opportunity to see that their attackers are brought to justice. However, the problems they create for criminal defendants cannot be ignored. DNA indictments severely hinder the ability of criminal defendants to defend themselves. With the typical jury placing such enormous weight on DNA evidence, defendants face an extremely difficult battle in cases where these indictments are utilized years after an alleged incident occurred. It is especially troubling that these indictments create such a prejudice in the face of conflicting constitutional dogma and long held statutory precedent. Given society's ongoing desire to harshly punish criminal offenders and the court system's repeated approval of this practice, the use of DNA indictments is only likely to increase in the coming years. With an increased use, however, comes an increased need for regulation and caution. DNA testing needs to be closely monitored, and juries need to know how to properly handle DNA evidence. To ensure that the rights of their clients are properly protected, defense attorneys must advocate for these steps to be taken. Without the necessary safeguards in place, criminal defendants' rights will likely be diminished even further. If a fair justice system is to be maintained, it is imperative that these rights be preserved.

Daniel Gaudet

¹³³ See Adlestein, *supra* note 53, at 249-55 (discussing history of criminal statutes of limitations).