

Understanding the Use of John Doe Arrest Warrants in Cold Case Sexual Assaults *for Prosecutors*

Prosecuting Cold Case Sexual Assault: John Doe Complaints and Arrest Warrants

Criminal prosecutions, especially those for serious offenses such as sexual assault, are often time sensitive and resource intensive. Although prosecutors work closely with law enforcement to determine availability of evidence sufficient for charging and to diligently prepare cases, there still may be some cases that do not move forward for one reason or another and end up “cold.” A cold case is “any sexual assault case whose probative investigative leads have been exhausted.”¹ Although some cold case sexual assaults may have led to investigative dead ends, others may have involved unsubmitted sexual assault kits (SAKs) that were not submitted to laboratories until many months or years after the crimes occurred.² Finally, there may be cases that, for a myriad of reasons, did not go forward.

Even when investigations are delayed or are cold, law enforcement and prosecution can still pursue justice. One tool available for certain cases is the John Doe arrest warrant, which commences a prosecution by identifying the suspect by his or her unique genetic profile. This resource will provide an overview of John Doe arrest warrants and how they may be used in investigating and prosecuting cold case sexual assaults.

Responding to the Passage of Time

Statutes of limitations provide for a certain timeframe within which criminal charges must be filed. They require timely investigations to preserve evidence and resolve cases justly.³ “[S]tatute of limitations reflect[] a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict.”⁴ However, with the continued development of technology and DNA testing, tolling the statute of limitations allows for an opportunity to test evidence and pursue justice against unknown offenders.

With previously unsubmitted SAKs, an expiring statute of limitations is an urgent concern for testing priorities and triage policies. If charges are not filed within the applicable period, prosecution is precluded.⁵ Where the statute of limitations is nearing expiration, the John Doe arrest warrant may be crucial in tolling (i.e., stopping the running of) the

clock. Additionally, some states have provisions that extend a statute of limitations when DNA matches a known sample of a suspect.⁶

Following a sexual assault, law enforcement may collect evidence from crime scenes, victims,⁷ and other sources and submit it for testing at a crime laboratory. This evidence may contain a suspect’s DNA, also known as his or her⁸ unique genetic profile.⁹ Typically, after testing is complete, the DNA profile obtained from the evidence is uploaded into the local, state, and national DNA database, known as the Combined DNA Index System (CODIS), to see whether there is a “hit.”¹⁰

When a probative DNA profile is obtained but there is no CODIS hit, and there are no other leads establishing identity, the prosecutor can file a John Doe complaint to initiate prosecution and request the court issue an arrest warrant. Filing a John Doe complaint, information, or indictment and obtaining the arrest warrant will toll the statute of limitations

John Doe Arrest Warrant

There are two applications:

Offender Unknown

- ◆ Evidence tested identifies a genetic (DNA) profile.
- ◆ The DNA profile is uploaded to CODIS.
- ◆ No hit: Prosecutor files a John Doe complaint to request an arrest warrant.
- ◆ John Doe warrant tolls the statute of limitations for the crime, allowing the investigation to continue.

Offender Known

- ◆ John Doe complaint and arrest warrant show due diligence in pursuing the investigation.
- ◆ Filing the John Doe complaint and arrest warrant helps defeat claims of violation of constitutional rights when criminal defendants are identified years later.
- ◆ Prosecutors amend the complaint when the suspect is named, providing the suspect with constitutional notice and due process.
- ◆ Suspect is arraigned on amended information, which is now within the statute of limitations.

and allow investigators to continue to conduct proper due diligence to identify a possible perpetrator, as well as time for prosecutors to review evidence.¹¹

The John Doe warrant is also instrumental in establishing the due diligence of prosecution when an offender's DNA is known. Even in jurisdictions without a statute of limitations, or in jurisdictions that toll the running of the limitations period until an identified suspect has been named, a John Doe complaint and arrest warrant may help establish that law enforcement has exercised due diligence in pursuing the investigation to the extent it is able to do so. For example, claims of pre-accusatorial or pre-indictment delay may in some cases be brought even when a charge may still be within the statute of limitations.¹² Some criminal defendants who were not identified until years later have argued that their constitutional rights were violated, because the prosecution failed to act promptly in the investigation and charging of the case. While such claims of pre-accusatorial delay are rarely successful, filing a John Doe arrest warrant may help to establish the prosecution's diligence and good-faith efforts to prosecute the offender, thereby helping to defeat such claims.¹³

Preparing the John Doe Complaint and Warrant

A John Doe complaint filed to obtain an arrest warrant specifically identifies the defendant by his or her genetic profile.¹⁴ The defendant should be referred to in a criminal complaint as "John Doe, unknown [*male/female*] with matching DNA at [*specific genetic locations*]." CODIS requires that 20 core loci be identified for a profile to be entered into the database.¹⁵ These 20 loci should be included in the John Doe complaint. Prosecutors should work closely with crime laboratory personnel and law enforcement to confirm the accuracy of the documented genetic profile and record this carefully on the complaint (i.e., charging document) and warrant. The warrant also should contain verification of the methodology and protocol for DNA testing, genetic profile obtained, statistical probability of the profile appearing in the relevant population,¹⁶ the sex of the suspect, and, when possible, other descriptive information.¹⁷ Information sufficient for probable cause also should be provided in the warrant.¹⁸ Additionally, John Doe complaints should include any available and detailed physical description, attached photographs, or even addresses of a residence with a physical description.¹⁹

Prosecutors should amend the complaint when the name of the suspect associated with the genetic profile is determined. Although the statute of limitations was tolled with the filing of the information, providing the suspect with

requisite constitutional notice and due process is essential. The suspect then will be arraigned on the amended information, which is within the statute of limitations.²⁰

Responding to Defense Arguments

Prosecutors should anticipate defense arguments concerning the use of John Doe complaints and arrest warrants. Many constitutional issues have been previously litigated under the Fourth, Fifth, Fourteenth amendments, and corresponding state law, and have been found constitutionally acceptable by the courts. Courts across the United States, for example, have upheld use of such warrants as sufficiently particularized as required by the law: "[T]he law in most states requires identification of a suspect to contain a description by which someone may identify the person with reasonable certainty."²¹ Because the arrest warrant containing a defendant's DNA profile is considered to meet the Fourth Amendment requirement that a warrant contain a specific description of the defendant, courts have been issuing them since the 1990s.²² Furthermore, John Doe arrest warrants provide persuasive evidence for sufficient notification when a DNA profile is listed, but not a name.²³

Although a John Doe complaint tolls the running of the statute of limitations, a claim of pre-accusatorial or pre-indictment delay still may be brought. This due process argument addresses the lapse of time and adverse impact on the defendant's ability to prepare a defense. A speedy trial argument also may be made pursuant to the Sixth Amendment to the Constitution and applicable state constitutional provisions. The core issue is whether there was an unjustified delay in prosecution from charging to arrest. The timeliness of a John Doe complaint and warrant, as well as diligent execution of the warrant, is an important factor in overcoming this argument. For example, issuing a warrant,

A Note on Pre-Accusatorial Delay

Even in jurisdictions without a statute of limitations, or in jurisdictions that toll the running of the limitations period until an identified suspect has been named, a John Doe arrest warrant may help establish that law enforcement has exercised due diligence in pursuing the investigation to the extent it is able to do so. Some criminal defendants who were not identified until years later have argued that their constitutional rights were violated, because the prosecution failed to act promptly in the investigation and charging of the case. While such claims of pre-accusatorial delay are rarely successful, filing a John Doe arrest warrant may help to establish the prosecution's diligence and good-faith efforts to prosecute the offender, thereby helping to defeat such claims.²⁵

but not locating the defendant until over a year later, did not violate the defendant's constitutional rights.²⁴ Even in jurisdictions without a governing statute of limitations, a John Doe warrant is a means of establishing diligence upon discovery of an offender profile, proactively countering a potential claim of pre-accusatorial or pre-indictment delay.

Other defense arguments may include whether DNA was initially legally obtained from the defendant,²⁶ public policy considerations for timely resolution of claims, and specific adverse impact on the defense.²⁷

Conclusion

In any jurisdiction with a statute of limitations, the John Doe arrest warrant may be employed effectively when the genetic profile is known, but there is no named individual associated with the profile, there is no CODIS database hit, and the statute of limitations is nearing expiration. John Doe arrest warrants allow the criminal justice system to hold offenders accountable for their crimes, promoting justice and safety for victims as well as the community. Carefully evaluating the timeliness of each case within the applicable statute of limitations, by engaging in appropriate case analysis and prioritizing any case nearing an expiration period, is vital, especially with high volumes of cases ensuing from testing previously unsubmitted SAKs. In jurisdictions without a governing statute of limitations, a John Doe arrest warrant is also a means of establishing diligence upon discovery of an offender profile, proactively countering a potential claim of pre-accusatorial delay.²⁸

References:

1. National Institute of Justice. (n.d.). *What Is a Cold Case?* Retrieved from <https://nij.gov/journals/260/pages/what-is-cold-case.aspx>.
2. Sexual Assault Kit Initiative. (2017). Retrieved from www.sakitta.org.
3. Jurisdictions across the country vary in their charging requirements. Some states require charging by indictment, for example, which may follow the issuance of a criminal complaint or may be returned by a grand jury without a preliminary complaint. For additional information, see Ulmer, F. B. (2001). Using DNA to obtain "John Doe" arrest warrants and indictments. *Washington & Lee Law Review*, 58, 1585–1624.
4. Guthrie, C. M. (2007, April). Killing time: The application of John Doe indictments to keep cases warm. *National Clearinghouse for Science, Technology and the Law*. Retrieved from <http://www.ncstl.org/news/GuthrieApril07>.
5. Joyful Heart Foundation & AEQUITAS. (2017). *Statute of Limitations for Sexual Assault Offenses*. Available upon request from AEQUITAS at info@aequitasresource.org.
6. Ibid.
7. A suspect's DNA evidence is often collected from a victim's body by a sexual assault nurse examiner and placed in a SAK. Typically, when a sexual assault is reported, a law enforcement officer will pick up the SAK at the hospital and transport it to the laboratory to maintain the SAK's chain of custody. A chain of custody ensures proper handling of evidence when transporting a SAK from one location to another, so that the contents can remain in their original, untouched state prior to testing.
8. "His" and "her" are used in this publication, because genetic profiles are sex specific.
9. A CODIS "hit" can be made by a DNA profile from evidence in an unsolved case matching the DNA profile from a convicted offender or an arrestee. A "hit" also can be made between evidence in an unsolved case and another unsolved case or to a previously solved case; see Lacroix, C. *What Does a CODIS Hit Mean?* (2013). Posted entry, Virginia Department of Forensic Science. Retrieved Oct. 3, 2017, from http://www.dfs.virginia.gov/question_answer/what-does-a-codis-hit-mean/. Each human being has a unique genetic profile, so no matter where his or her DNA is found, it will match. See Jeanguenat, A. (2017). *Sexual Assault Kit Initiative: Understanding DNA Testing and Reporting: Unsubmitted Sexual Assault Kits*. RTI International. Retrieved from <https://sakitta.org/resources/docs/SAKI-Understanding-DNA-Testing-and-Reporting.pdf>.
10. "The Combined DNA Index System, or CODIS, blends forensic science and computer technology into a tool for linking violent crimes. It enables federal, state, and local forensic laboratories to exchange and compare DNA profiles electronically, thereby linking serial violent crimes to each other and to known offenders. Using the National DNA Index System of CODIS, the National Missing Persons DNA Database also helps identify missing and unidentified individuals." Federal Bureau of Investigation. (n.d.). *Combined DNA Index System (CODIS)*. Retrieved Aug. 8, 2017, from <https://www.fbi.gov/services/laboratory/biometric-analysis/codis>. See Jeanguenat, A. (2017). *Sexual Assault Kit Initiative: Understanding DNA Testing and Reporting: Unsubmitted Sexual Assault Kits*. RTI International. Retrieved from <https://sakitta.org/resources/docs/SAKI-Understanding-DNA-Testing-and-Reporting.pdf>.
11. For a sample John Doe complaint and arrest warrant, please contact AEQUITAS at info@aequitasresource.org or at (202) 558-0040.
12. See *State v. Jones*, 148 Ohio St.3d 167 (2016).
13. Pre-accusatorial delay is a due process claim brought to address the time lapse between the commission of the crime and the filing of the complaint/indictment. See also, *Ibid*.
14. "His" and "her" are used in this publication because genetic profiles are sex specific.
15. Federal Bureau of Investigation. (n.d.). *Frequently Asked Questions on CODIS and NDIS*. Retrieved Sept. 27, 2017, from <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet>; Hares, D. R. (2015, July 17). Selection and implementation of expanded, CODIS core loci in the United States. *Forensic Science International: Genetics*, 33–34. Epub March 1, 2015. doi: 10.1016/j.fsigen.2015.03.006
16. *State v. Belt*, 179 P.3d 443, 447, 450 (Kan. 2008).
17. See *Commonwealth v. Dixon*, 458 Mass. 446 (2010).
18. "A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime." Probable cause. (2014). In *Black's Law Dictionary* (10th ed.).
19. This information may be used to obtain an arrest warrant on its own but should also be included whenever possible to supplement the genetic profile. See Bieber, M. A. (2002). Meeting the statute or beating it: Using "John Doe" indictments based on DNA to meet statute of limitations. *University of Pennsylvania Law Review*, 150(3), 1079–1098.
20. *State v. Burdick*, 395 S.W.3d 120 (Tenn. 2012).
21. See *State v. Dabney*, 663 N.W.2d 366 (Wis. Ct. App., 2003); *State v. Danley*, 853 N.E.2d 1224 (Ohio Ct. C.P., 2006); *People v. Martinez*, 855 N.Y.S.2d 522 (N.Y. App. Div., 2008); Ulmer, see note 4; U.S. Const. Amend. IV (requiring that warrants particularly describe the person who is going to be arrested). Courts have held that the genetic profile satisfies the particularity or reasonable certainty requirement of identification necessary to notice and due process. The prosecutor should amend the complaint when the name of the suspect associated with the genetic profile is determined. Although the statute of limitations was tolled with the filing of the information, providing the suspect with requisite constitutional notice and due process is essential. See *State v. Burdick*, 395 S.W.3d 120 (Tenn. 2012).
22. U.S. Const. Amend. IV. See Ulmer, note 4; Gahn, N. (n.d.). *An Update on John Doe DNA Profile Arrest Warrants*. Milwaukee County District Attorney's Office. Retrieved from http://www.denverda.org/dna_documents/gahn2.pdf.
23. *People v. Martinez*, 855 N.Y.S.2d 522 (N.Y. App. Div., 2008).

24. Pre-accusatorial delay is a due process claim brought to address the lapse in time from the crime to filing a complaint or an indictment. See also note 13.
25. *State v. Danley*, 853 N.E.2d 1224 (Ohio Ct. C.P., 2006).
26. See Ala. Code § 36-18-25, Conn. Gen. Stat. Ann. § 54-102g; FLA. STAT. ANN. § 943. See also Mallios, C. (2013). *Supreme Court Upholds DNA Collection of Arrestees*, 19 Strategies in Brief. Available at www.aequitasresource.org/library.cfm.
27. Please contact the Sexual Assault Kit Initiative to request assistance countering defenses at sakitta@rti.org or call toll-free 1-800-957-6436.
28. *Ibid.*
29. Amy Jeanguenat, MFS, has spent her career working in the private forensic industry supporting efforts world-wide to prevent and eliminate DNA backlogs. Mrs. Jeanguenat helped manage the successful completion of sexual assault kit outsourcing projects from Houston, TX, and Detroit, MI. Currently Mrs. Jeanguenat works as the principal consultant at Mindgen, LLC.

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